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AGENDA 2001

This year promises to be one of major change for lawyers, their profession and their clients. The three major changes on the horizon are well signalled:

- the abolition of the office of QC;
- the ending of appeals to the Privy Council; and
- the Legal Professions Bill.

The first may be regarded as one of those things that does not matter too much. In fact those who energise themselves to abolish this long-standing tradition may be regarded as being as fatuous as those who get hot under the collar about defending it. The worrying aspect is not so much the abolition of the office of QC itself as the missionary zeal for disrupting traditions and severing connection with the past that it displays.

What this debate has succeeded in doing is diverting energy and attention from more important issues. The Corporate Lawyers Association, for example, has just conducted a survey of its members on the QC issue. What we would really like to know is the attitude of its members to the Privy Council issue, but whether CLANZ has the energy and money to repeat the exercise must remain to be seen.

Again, with the Privy Council the worry is not just the move itself but the arguments put forward to justify it. These amount to a denial of the fundamentals of a legal system. If the claims that Judges need to be more conscious of social conditions in New Zealand are to be taken seriously, then Judges need to be stripped of their security of tenure and high salaries and made to expose themselves to periodic reselection. In fact we should abolish Courts altogether and replace them with street committees at local level, as proponents of restorative justice advocate, and committees of Parliament at national level.

The whole point of a legal system is to ensure that individuals are protected by a body of rules from the vagaries of public opinion, whether it be the opinion of the whole or local population or just of the chattering classes.

However it is clear that we have a government and an Attorney-General who do not believe in any autonomous concept of law, but simply in law as an instrument of the dictatorship of the majority, until that is some of their own priorities are threatened by majority opinion at which point they call in aid an international convention.

It is also quite improper for proponents of abolition of appeals to London to make fawning comments about the competence of the Court of Appeal. Improper, because the only way to respond is to attack the record of the Court of Appeal and in particular the Divisional Courts, which it is difficult to get lawyers publicly to do and one would be at risk of being accused of breaching convention, making personal attacks on Judges and so forth.

There is also a severe dichotomy between recent governments' views on the Privy Council and their enthusiasm for signing up to international conventions and individual rights of complaint. In principle it is difficult to square the arguments about national sovereignty with respect to the Privy Council which will defer to New Zealand legislation and even, more recently, to obiter comments in New Zealand Courts, with rights of complaint to international bodies which will happily tell New Zealand that it must change legislation, and indeed have done so.

At a more practical level, it is astonishing to see that the government counts sending a Judge to London periodically to sit on Privy Council appeals, including New Zealand appeals, as a cost and not as a benefit. If that is so, why did we allow a High Court Judge to sit on an international committee who was not allowed to take part when New Zealand was being considered? Any argument that a Judge will gain valuable experience by sitting on such a committee must apply many times over to sitting on the Board in London.

As for the legal profession, the Bill that Mr Goff is to produce can only be described as a damp squib. It is no improvement on the Bill that a gutless National government proposed in an election year when it wanted to avoid a fight with a powerful vested interest. In particular the proposal that the New Zealand Law Society remain the monopoly regulator means that the worst aspects of the current system will continue while a few more minor problems are ironed out.

The Law Society defends its monopoly on the ground that it has a role in defending the rule of law. Despite frequent challenges, those who make this comment have yet to provide an example of this happening or even to explain what they mean by the rule of law. It is doubtful that most members of the hierarchy of the Law Society even understand where the major threat to the rule of law comes from. We are certainly not going to see the Law Society standing up to this government while this Bill is hanging over its head.

The need is also urgent for the members of the large firms and the niche commercial firms to free themselves from the dead hand of a monopoly dominated by general practitioners, criminal and family lawyers and litigators. These commercial firms have to compete in an international market and cannot do so effectively when shackled by an organisation within which they are outvoted by people who have little understanding of their work. The fact that the hierarchy of the Law Society expresses itself in favour of abolishing appeals to the Privy Council demonstrates the point.

So 2001 is going to bring plenty of change; perhaps half a step forward and a great leap backwards. ❑

THE BLUE ENSIGN

Hamish Ross, Bell Gully, Auckland

explains why and how we came to have a new national flag (see inside front cover)

In August 2000 a new flag was authorised for restricted use in New Zealand and overseas. The flag is the New Zealand Blue Ensign.

Early in the nineteenth century, as yachting became popular amongst the affluent classes of Britain, the taking of a cruise to France became common. French port authorities however refused to distinguish between merchant vessels and pleasure vessels: pleasure vessels were levied port duties and taxes as if they were merchant vessels.

The solution was to flag the pleasure vessels as vessels of the British government and thereby immune from levies and taxes. This was achieved by the Admiralty granting warrants to yacht clubs permitting their members to fly from their vessels one of the three Ensigns of the Royal Navy, sometimes defaced with the badge of the club. Out of this early form of tax avoidance, and a desire on the part of the Admiralty to foster the development of yacht clubs, grew the tradition of the granting by the British Admiralty to eminent yacht clubs in Britain and the Commonwealth, of a warrant to permit members to fly one of the three British Ensigns. A warrant was commonly conferred when a yacht club was granted by the Crown the right to use the word "Royal" in its name, although not exclusively so.

Until 1864 the Royal Navy was divided into three divisions, known as the red, white and blue. Hence the description "an Admiral of the Blue" (or Red or White). Each division flew an Ensign of the respective colour. In 1864 the Royal Navy abandoned this system and elected to keep the White Ensign for itself, (a curious decision given the Red was more senior) the Red Ensign was made available for the merchant fleet, and the Blue Ensign for use by the Civil Service. Hence, the New Zealand Flag is blue rather than red or white, as the New Zealand Flag was created at the direction of the Colonial Office. Had the Royal Navy chosen to keep the Blue Ensign, the New Zealand Flag may well have ended up as a red or even white flag.

With some early brief exceptions, the only yacht club with the right of its members to wear the White Ensign is the Royal Yacht Squadron, although uniquely the Flag Officers of the Royal New Zealand Yacht Squadron have a royal warrant to wear the New Zealand White Ensign. Currently, 31 yacht clubs in Britain and the Commonwealth have the right to use the Blue Ensign, 56 to use the British Blue Ensign defaced by a badge of the club, and three clubs a defaced Red Ensign.

In 1902, the British Admiralty issued a warrant granting members of the RNZYS the right to fly a British Blue Ensign on their vessels. A similar right had been conferred on the Port Nicholson Yacht Club of Wellington, which in 1921 became the Royal Port Nicholson Yacht Club. In 1938 the Royal Akarana Yacht Club of Auckland received a warrant for a Blue Ensign defaced with the Club's badge of a naval crown above a Polynesian voyaging canoe. The principal term of the respective warrants required members' vessels to be registered as British ships. This became impossible in New Zealand when the Shipping and Seamen Act 1952 established an independent ship registration system in New Zealand, however all three yacht clubs continued to use the British Blue Ensign. The constitutional aspect of the British Admiralty issuing warrants authorising New Zealanders to fly British Blue Ensigns on their vessels was never considered.

The right, to the extent that any still existed, was finally lost when the Ships Registration Act 1992 came into force which provided in s 58 that all vessels in New Zealand, (other than New Zealand Government ships which must fly the New Zealand Flag), were required to fly the New Zealand Flag or the Marine Ensign of New Zealand (New Zealand Red Ensign) other than vessels of the armed forces. This clearly and unequivocally made the flying of the British Blue Ensign in New Zealand unlawful.

After some lobbying, it was agreed that the tradition should continue and Parliament passed the Ships Registration Amendment Act 1999 inserting s 58A which permits New Zealand vessels to fly an alternative flag authorised by the Sovereign or the Governor-General. Subsequently, discussion and correspondence were entered into as to the appropriate form of a flag to replace the British Blue Ensign. Ultimately, the form of the flag was settled in the form depicted, based on a similar flag worn by vessels in the late nineteenth century of the Auckland Sailing Club, the precursor of the RNZYS. The new flag is officially the New Zealand Blue Ensign, and its use by RNZYS and Royal Akarana Yacht Club is authorised by Royal Licence from the Queen.

Both Clubs have promulgated their own rules regulating the use of the New Zealand Blue Ensign by their members which are consistent with the traditional rules for the use of the British Blue Ensign, traditional flag etiquette, and New Zealand legal requirements. Royal Port Nicholson Yacht Club, for reasons best known to itself, elected not to receive a Royal Licence for the new New Zealand Blue Ensign, however the option for it in the future remains open.

As an official flag of New Zealand, the New Zealand Blue Ensign is the national flag for those members authorised by either the Royal Akarana Yacht Club or the Royal New Zealand Yacht Squadron to fly on their vessels both in New Zealand and overseas. ❑

UNDEREMPLOYMENT AND CHILD SUPPORT

Stewart Benson, McElroys, Auckland

considers a useful review by an Australian Court

"Underemployment" in the context of child support occurs when a liable parent earns less than he or she is capable of earning from employment. The Full Court of the Family Court of Australia in *DJM v JLM* [1998] FLC 92-816 has made significant observations on underemployment as a ground for departure from child support assessments on the basis of "earning capacity" but the case does not appear to have been considered by New Zealand Courts or texts.

Under the Child Support Act 1991 liable parents are assessed for child support each year according to a formula based on an income, living allowance and a child support percentage. Section 105(1) of the Act allows departures from the formula assessment if:

(a) there is a ground for departure (s 105(1)(a));

(b) departure is just and equitable between the child, custodian and liable parent (s 105(1)(b)); and

(c) departure is otherwise proper (s 105(1)(c)).

Under s 105(2) there are ten grounds for departure. The New Zealand equivalent to the ground considered in *DJM* is s 105(2)(c)(i) which includes "earning capacity":

> (c) that, by virtue of special circumstances, application in relation to the child of the provisions of this Act relating to the formula assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent because of:
>
> (i) the income, earning capacity, property, and financial resources of either parent of the child ....

THE DECISION IN *DJM*

The liable parent husband was employed as a management consultant during the parties' marriage from 1980 to 1994. In late 1996, the husband was earning about A$200,000 per year but reduced his consultancy activities and took employment as an academic to earn income of A$80,000 to A$100,000 per year. This income made no practical difference to his assessment which was based on the maximum formula income (reduced from A$93,500 to A$75,500 by the time of the appeal) and the appeal primarily concerned matrimonial property and spousal maintenance. However, the Court devoted 50 paragraphs to a review of Australian and American cases on underemployment as a basis for departure from child support assessments. The cases referred to in *DJM* (Australian unless stated otherwise) are best considered by dividing them into those where underemployment was found, those where underemployment was not found and a particular analysis of underemployment approved by the Court.

Underemployment proved

- the liable parent gave up employment for an unjustified reason – in *Rowe* (Fogarty J, 12 December 1994) the liable parent was made redundant, took up employment as a carpet tile salesperson (at an income of A$40,000 per year) but left to start a business with his partner (A$15,000 per year); in *Bregar v Swanson* (1997) Co 278 (CA Co) an attorney earning US$50,000 pa started a financially unsuccessful cattle ranch because "he had wanted to raise cattle since childhood"; and in *Virginia v Ewing* 470 SE 2d 608 (CA Va) a pharmacist earning US$79,000 worked part-time for US$45,000 while studying at medical school but later left employment entirely to carry on his studies;
- employment was terminated voluntarily – in *Rojas* 1995 Fla 1169 (CA Fl) the liable parent terminated employment voluntarily without any physical or mental incapacity or other circumstance over which he had no control; and in *McCord* (1995), 910 P 2d 85 (CA Co) a construction worker ceased employment after winning a lottery payable annually: the Court added the lottery payment to his former income;
- the liable parent failed to make reasonable efforts to obtain employment – *Scott* (1994) FLC 92-457.

Underemployment rejected

- genuine unemployment, ie an unemployed person with no particular qualifications or skills for employment in times of high unemployment – see *Scott*;
- a career change – in *Scott v Stauder* (Kay J, 20 November 1996) a lawyer left a salaried position as a prosecutor for potentially lucrative private practice; in *Wastle v Wooster* (Kay J, 23 July 1996) a professional golfer with potentially high earnings could have earned a reasonable income as a golf teacher; and in *Nelson* 1996 ND 1 (SC ND) the liable parent gave up modestly paid work (US$17,000 pa) for an ultimately unsuccessful business;
- study intended to improve earning capacity with temporary reduction of income – Several US cases cited.

Analysis approved by *DJM*

DJM (at para 17.37) singled out for approval the analysis of earning capacity in *Padilla* 45 Cal Rptr 2d 255 (CA California) which in turn quoted from *Regnery* (1989) 214 Cal App 3d 1367, 263 Cal Rptr 243 (CA California):

> "Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful

attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire ... When the ability to work or the opportunity to work is lacking, earning capacity is absent. When the payor is unwilling to pay and the other two factors are present, the Court may apply the earnings capacity standard to deter the shirking of one's family obligations." We find *Regnery* compelling. A parent's motivation for reducing available income is irrelevant when the ability and opportunity to adequately and reasonably provide for the child are present.

NEW ZEALAND

There is little New Zealand case authority. In *Fong* [1993] NZFLR 574 the Judge ordered the liable parent to pay a lump sum child support where he had received a large redundancy payment but in order to avoid child support had not found employment. The leading text, Butterworth's *Family Law Service* (at para 5.240) suggested that potential earning capacity was "clearly relevant":

> However, potential earning capacity will not affect the result if it is unreasonable to expect the parent or child to take action necessary to enable the income to be earned. For instance, a custodial parent who has qualifications for a job will not be forced to work if this is incompatible with the responsibilities attached to looking after the child.

The relevant footnote referred to cases involving the earning capacity of the *custodial parent* (*Gyselman* (1991) 15 Fam LR 219, an Australian case) not the liable parent (as in *DJM*) and preceding the Child Support Act 1991 (*A v Social Security Commission* (1984) 3 NZFLR 154).

Application of *DJM* to New Zealand

DJM and the cases it considered are not binding on New Zealand Courts but should be of considerable persuasive value given similar legislation and near absence of New Zealand authority. Without attempting to exhaustively reconcile any divergence of opinion where it existed in the cases cited (eg see *DJM* at para 17.28), it is suggested that the following principles as to underemployment can be extracted:

- the facts of each case are important but usually relevant will be the liable parent's skills, qualifications, experience, age, health, opportunities for employment, efforts to gain employment, present and potential income and the reasons for present employment or unemployment (eg *Scott*, *Padilla* 45 Cal Rptr 2d 255);
- earning capacity consists of the ability to work, willingness to work and opportunity to work; there is no underemployment if there is no ability or opportunity to work; but there is underemployment if there is ability and opportunity but not willingness to work (*Padilla*);
- a liable parent is underemployed if former employment was terminated for an unjustified reason (*Rowe*), an inadequate alternative (*Bregar, Ewing*), voluntarily (*Rojas, McCord*), reasonable efforts have not been made to obtain employment (*Scott*) or a reasonable time to improve earning capacity has elapsed (eg a period of retraining; in *Wastle* the Court suggested that a liable parent had two years to make good as a professional golfer or take up alternative employment);
- however, a liable parent is not underemployed if there has been a genuine attempt to improve earning capacity within the foreseeable future with a temporary reduction of income, eg by a career change (eg *Scott v Stauder*; and, in some cases, even if the business is unsuccessful as in *Nelson*) or a reasonable time to retrain or complete study (*Seanor*, *Sabatka*, *Ciostek*, *Kelly*);
- a liable parent in highly paid employment may have more difficulty in justifying a decision to change career (*Bregar*) unless the new venture has definite prospects of success (*Scott v Stauder*) or there are other good reasons; but a liable parent in modestly or low paid employment may have less difficulty in justifying a decision to change career (*Nelson*) or study.

DJM expressed a preference for the analysis in *Padilla*. However, there should be no need to prefer any one test. Decisions in cases on change of career and study may be assisted by cases on similar facts; the principles in such cases may be relevant in different circumstances; or the analysis in *Padilla* may be more useful. It is undesirable to apply one test to all possible facts when the test is a means to answering the ultimate question whether the child support assessment is unjust and inequitable because of the liable parent's earning capacity (s 105(2)(c)(i)).

New businesses

The most difficult cases are likely to concern liable parents who start new businesses. Cases involving businesses can be difficult without the complication of "earning capacity" given the unpredictability of income from business and opportunities presented by business structures to reduce or divert income, eg by paying a salary to a relative who is a silent shareholder or by retaining profits within a company (eg *Collie v Marx* District Court, Henderson, FP 288/93, Judge Aubin, 10 September 1997). An application for departure at the outset of a new business may be granted if the business was never viable (eg if seriously undercapitalised or entered into with a total absence of planning) or predicted such poor returns for such a long period of time that it amounted to failure to use earning capacity regardless of the reasons for commencement. At a later stage in the life of a business, earning capacity and underemployment should not be assessed in hindsight. There may be a temptation where a business has not in fact resulted in higher or comparable income (a temptation which would not exist if income has improved) to say that the liable parent was underemployed and did not use earning capacity but the true issue is whether the liable parent made a genuine attempt to enhance earning capacity within a reasonable time rather than attempting to reduce or evade child support. As stated in *Ciostek* at 691:

> the parent responsible for the support of the children may, where necessary, forego employment and pursue further education that will enhance his earning capacity and thereby ultimately benefit the children. A parent may not, however, unilaterally forego employment in an attempt to evade support responsibilities.

However, a liable parent is not entitled to continue indefinitely in an unsuccessful business if he or she has unutilised earning capacity in an alternative occupation. At some point an application for departure would succeed if it was clear that the business would not generate a reasonable income compared to the liable parent's earning capacity.

CONCLUSION

The *DJM* case ought to be of great use for its analysis of a wealth of case law on underemployment. It is a valuable contribution to departures on the basis of earning capacity under s 105(2)(c)(i) of the Child Support Act 1991. ❑

TAX UPDATE

Jan James and Nicholas Bland, Simpson Grierson, Auckland

discuss triangular taxation of Trans-Tasman investments

The New Zealand and Australian governments have recently restated their commitment to examining and resolving the issue of "triangular taxation" in the case of trans-Tasman investments – last raised in 1996, in terms almost identical to recent announcements. The issue is, stated simply, that New Zealand shareholders in Australian companies deriving New Zealand sourced income do not receive credit for New Zealand tax already paid on that income. Similarly, Australian shareholders in New Zealand companies deriving Australian sourced income do not receive credit for Australian tax already paid on that income. The income is, in effect, taxed twice by the same jurisdiction.

Obviously these issues are not limited to trans-Tasman investment – they arise in respect of many cross-border investments. In the context of CER, however, there is added impetus to resolve them, thereby increasing economic integration between New Zealand and Australia.

For simplicity we focus on the impact on New Zealand investors in Australian companies, and on New Zealand companies with Australian shareholders – the issues are, however, similar if the nationalities are reversed.

DOUBLE TAXATION RELIEF

Both New Zealand and Australia adopted imputation regimes in the late 1980s. Imputation reduced the double taxation of distributed company earnings – once at the company level, and again at the shareholder level.

A New Zealand company is permitted to attach imputation credits (referred to as franking credits in Australia), to dividends paid to New Zealand shareholders. The company obtains these credits when it pays New Zealand income tax, and can attach credits worth up to 33 per cent of the combined dividend and credit.

Shareholder are assessed, at their own marginal rates, on the amount of the dividend received plus the amount of the imputation credit attached. The tax liability of the shareholder is reduced by the amount of the imputation credit. If maximum imputation credits are attached, then profits of a company are taxed only once, at the marginal tax rate of the shareholder to whom they are distributed.

The imputation regime reduces the tax cost of domestic equity investment by lessening the double taxation of company profits. Prior to the introduction of the regime, double taxation of company profits discouraged the distribution of dividends and could result in capital being locked into unproductive companies, ripe for take-over and asset stripping. It encouraged companies to borrow, rather than to issue shares, leading to unhealthy debt/equity ratios. By reducing double taxation of company profits, the regime increases the mobility of capital, removes an artificial incentive for corporate take-overs and mitigates an inequity.

LIMITATIONS OF IMPUTATION

The scope of the imputation regime is, however, limited in the following ways:

- only New Zealand resident companies can derive and attach imputation credits to offset against a shareholder's New Zealand tax liability. The rationale for this is found in the international tax regime which taxes offshore interests held by New Zealand residents. Allowing non-resident companies to distribute imputation credits could encourage New Zealand companies with offshore interests and a mixture of foreign and New Zealand shareholders to re-locate overseas in tax havens, thereby reducing the effect of the international tax regime, while still ensuring that profits from New Zealand operations could be distributed with imputation credits. To buttress the international regime and create a disincentive for companies to migrate offshore (where the right to tax world-wide income could be lost), the ability to distribute imputation credits to New Zealand shareholders was limited to New Zealand resident companies;
- imputation credits accrue to a company only to the extent of New Zealand tax paid, not foreign tax paid. This limitation has an obvious revenue saving rationale, in that it does not allow New Zealand shareholders to reduce New Zealand income tax on the basis that foreign tax has been paid;
- neither New Zealand nor Australia recognises imputation credits arising from tax paid by a distributing company in the other country. The rationale here is similar to that of the second limitation.

The imputation regime and the international tax regime were intended to be mutually consistent and reinforce one another. The ideal situation was determined to be one of "capital export neutrality", where foreign and domestic sourced income is taxed in the same way so that residents are indifferent to tax considerations when determining whether to invest offshore or locally. For the reasons given above, however, the pursuit of this ideal was deemed necessarily subject to the above limitations.

IMPACT OF THE LIMITATIONS

As a result of these limitations, a New Zealand resident who holds shares in an Australian company which derives and pays tax on New Zealand sourced income does not receive any credits for this New Zealand tax. Distributions of the income as dividends will be subject to New Zealand tax without reduction via imputation. This is because as an Australian resident, the distributing company cannot attach New Zealand imputation credits to its dividends. In addition no franking credits will arise as the tax paid by the company is New Zealand tax, and even if franking credits were attached no reduction in New Zealand income tax is available via Australian franking credits.

Similarly, a New Zealand company with Australian shareholders which derives and pays tax on Australian sourced income is unable to distribute any credits to its Australian shareholders to reduce the Australian tax payable by the shareholders upon distribution of that income. This is because no New Zealand imputation credits arise from the payment of Australian income tax, and even if such credits did arise, they would not be recognised in Australia. In addition, as a New Zealand resident, the distributing company cannot attach Australian franking credits to its dividends.

In both cases therefore, the profits of the company are taxed twice by the same jurisdiction – once in the hands of the company upon derivation, and again in the hands of the shareholder upon distribution.

The effect of this triangular taxation on New Zealand shareholders in Australian companies is to raise the effective New Zealand tax rate on those profits to nearly 60 per cent. In addition, where such companies also have Australian shareholders, the company has an incentive to maximise Australian tax, as this will give rise to franking credits which will be of benefit to those shareholders. This Australian tax maximisation will often be at the expense of the New Zealand tax base – for example by borrowing to fund New Zealand operations, thereby incurring interest to offset New Zealand income.

In the case of New Zealand resident companies with Australian operations, the effect of triangular taxation is a significant impediment to capital raising in Australia – Australian investors would have a disincentive to invest in returns which are subject to double Australian tax.

POSSIBLE SOLUTIONS

Three possible ways of minimising the impost of trans-Tasman triangular taxation are as follows:

- mutual recognition by Australia and New Zealand of each other's credits;
- apportionment of both types of credit between Australian and New Zealand shareholders; or
- streaming of imputation credits through to New Zealand shareholders and franking credits through to Australian shareholders.

Mutual recognition involves New Zealand and Australia recognising each other's imputation credits. A New Zealand shareholder in an Australian company could receive a credit in New Zealand for tax paid in Australia by the company, and a New Zealand company accrue New Zealand imputation credits for tax paid in Australia.

This would not only allow New Zealand resident shareholders in an Australian company to receive imputation credits in respect of New Zealand sourced and taxed income derived by that company, it would also allow them to receive credits for Australian tax paid by the company on Australian sourced income.

While this would remove any investment disincentives between the two countries, it could also pose a significant threat to the New Zealand tax base, as it goes further than simply eliminating triangular taxation. This option would not only remove New Zealand double taxation of New Zealand distributed profits, it could also reduce the New Zealand tax impost on income to the extent of Australian tax paid. In addition, given that aspects of the Australian and New Zealand regimes differ significantly from each other, there is potential for this option to result in major complexities and unexpected "side effects", without much broader and deeper harmonisation of New Zealand and Australian tax systems.

Apportionment would involve a calculation whereby the type and magnitude of credit obtained and able to be distributed by a company (ie New Zealand imputation versus Australian franking credits) would be a function of both the proportion of New Zealand to Australian income tax paid by the company, and the proportion of New Zealand to Australian shareholders. It involves in part apportioning existing available credits between shareholders in the two jurisdictions.

This method may reduce one type of credit in favour of another – for example an Australian company may obtain some imputation credits for distribution to New Zealand shareholders, but at the expense of previously available Australian franking credits able to be distributed to its Australian shareholders, and vice versa in the case of a New Zealand company. This would appear to be a significant disincentive to adopt such an option.

The third option, streaming of credits, minimises both the tax base threat and potential side effects of the first option, and the disadvantaging of local shareholders in the second option. Under the credit streaming proposal, imputation credits are obtained in the jurisdiction in which tax is paid, and are allowed to "flow through" trans-Tasman companies, along with the income on which that tax has been imposed, to shareholders resident in that jurisdiction.

Streaming would enable an Australian company with New Zealand shareholders to obtain New Zealand imputation credits for tax paid in New Zealand, and to distribute those credits to New Zealand resident shareholders. The New Zealand shareholders would not be able to utilise Australian franking credits, as the proposal does not go as far as adopting mutual recognition of credits – thus the threat to the tax based is minimised. In addition, there is no reduction under this method of Australian franking credits in respect of Australian tax paid able to be distributed to Australian shareholders, so those shareholders are not disadvantaged.

This option in effect removes the first limitation on the imputation regime referred to above – that of the inability of non-New Zealand resident companies to derive and attach New Zealand imputation credits to New Zealand resident shareholders. As was also discussed above, the rationale for this limitation is that it discourages New Zealand companies from migrating to tax haven jurisdictions, by imposing as a cost of migration the loss of the ability to impute credits to New Zealand shareholders. However, given that Australia is obviously not a tax haven jurisdiction, and that significant existing concessions under the international tax regime are already available in respect of Australian investments, this rationale is not persuasive in the context of trans-Tasman structures.

CONCLUSION

It would appear that the option of streaming credits is the one most likely to appeal to both jurisdictions. There are, however, many considerations that require further examination – not least the issue of compliance and practicalities such as the availability of information on income sources and shareholder residency. It is to be hoped that these considerations will not relegate the issue once again to the too hard basket. ❑

WORLD TRADE BULLETIN

Gavin McFarlane, of Dechert, London

reviews the lamb case and other goings-on

US LAMB CASE

On 7 December 2000, a panel of the WTO dispute resolution forum found in favour of complaints lodged by the governments of New Zealand and Australia that quotas and tariffs imposed by Washington on imported lamb from those two countries were in breach of the GATT agreements administered by the WTO. These measures are said to have no foundation in the terms of the agricultural agreement which was finalised in 1994 at Marrakech, where the Uruguay Round of GATT was agreed. The members of the panel concluded that these impositions were protectionist in nature, and constituted illegal barriers to trade. Although this decision has been widely applauded by representatives of both industry and government in the two appellant states, the rejoicing is not being overdone. The US are pressing on with an appeal. Should the decision of the WTO appellate body also go against Washington, it will be the Bush not the Clinton administration which will be on the receiving end. Then the big question for the Australian and New Zealand Governments will be whether they will be prepared to press ahead with trade sanctions on goods which they import from the United States, and risk an all out trade war with Washington.

NEW US TRADE REPRESENTATIVE

As the new American President takes up the chains of office, there is much speculation about the stance the new administration will take on international trade. While the president elect was choosing his new team of advisers and officials, there were fears that the increasingly important post of US Trade Representative would be downgraded from cabinet status to a non-cabinet rank. Fortunately, this has not proved to be the case. As the new President put the final touches to his team, it was announced that the new Trade Representative would be Robert Zoellick, and that he would enjoy cabinet rank. That said, there will be close attention paid to early signs of the way in which the new man at the card table intends to play his hands. He certainly has good credentials in international affairs, having been heavily involved a decade ago in the steps which led up to the unification of Germany. He served in the administration of George Bush senior as an economic under secretary; as such he was at the heart of the negotiations which led to the setting up of the North American Free Trade Agreement between the United States, Mexico and Canada.

BLOWING UP A STORM?

The arrival of Mr Zoellick is one thing, but the direction that international trade affairs will now take is quite another matter. The last five or six years has been punctuated by an almost constant barrage of headline grabbing disputes between the EU and the US over international trade. The long running saga about the importation of bananas into the EU is still not finally resolved. The ban on the importation of beef treated with growth promoting hormones is a further outstanding issue. Tensions are starting to surface again in the aircraft industry, with mutual recriminations flying back and forth across the Atlantic over accusations and counter accusations of illegal subsidies. The Europeans complain about the American Boeing Corporation, and the Americans point the finger at Airbus Industrie. But all these affairs are dwarfed by the monumental battle over Foreign Sales Corporations – the FSCs – which the dispute resolution system of the World Trade Organisation has declared to be an illegal system of subsidisation through tax breaks for the exportation of goods and services through offshore companies in tax havens. At the back of several of these decisions lie sanctions of one kind and another, and in the case of bananas and beef these are already in operation in the form of penal duties on selected goods imported into the country entitled to impose sanctions. But the issue of FSCs is so large that the amount of sanctions which potentially can be authorised by the WTO dwarfs all the other sanctions put together.

The point is that all these disturbances have erupted during the Clinton years of office, during which first Micky Cantor, and subsequently Charlene Barshevky held the position of US trade representative. Several commentators have suggested that when compared with the attitudes which the Bush administration is likely to adopt on international trade, the Clinton era will appear to have been benign. But it should be noted that in the large majority of the existing trade disputes, matters have not been resolved, the decisions of the WTO have not been accepted, and in consequence sanctions are already in operation, or steps are being taken to set them in motion. The sums involved in the FSC matter are so astronomic that if they were not acceptable to the Clinton administration, they are likely to make the Bush administration go (and the word is employed metaphorically) ballistic. All the signs are that Mr Bush and his advisers consider the Clinton cabinet to have been soft on trade matters, and even within the US domestic scene, to have given too much ground to the environmental and labour union lobbies. There are wide expectations that the United States will now be pushing for ever wider free trade; there will be particularly strong efforts to remove barriers to financial services and intellectual property. As this comes at a time when third world states have begun to form themselves into a cohesive lobby prepared to resist the domination of the developed countries as the latter drive towards unrestricted access for their goods and services to the markets of the under developed world, there seems to be an era of considerable friction ahead. It should not be forgotten that within a couple of years, Mike Moore will end his term of office as Director-General of the WTO, to be succeeded by Dr Supachai Panakpadi of Thailand. The latter is the choice of the third world WTO members, and he can be expected to fight their corner. More to the point, any new trade round which takes place is likely to be running when he is in control of the administrative side of the WTO. At this stage it is a fair bet that the Bush administration will be less likely to back down on international trade matters than was the outgoing Democrat administration; expect the lobby for withdrawal from the WTO which is always present in the United States to become very much more vocal as a background to these disputes which seem inevitably to increase in bitterness. The difficulty for President Bush could be that if he adopts too fierce a stance on trade, it may be hard for him to withstand these calls to withdraw; it may be that his economic advisers will be telling him that this is the last thing that he should wish for, in view of the increased chances it would bring of introducing a world slump.

> ***it is a fair bet that the Bush administration will be less likely to back down on international trade matters than was the outgoing Democrat administration***

ENDANGERED SPECIES

A recent decision of the English Court of Appeal shows the dangers for those involved in international trade in not following the rules governing the movement of goods and services. Although they are now many in number, highly complex, and contained in what to the layman may appear a vast number of sources, failure to comply with these rules can bring the gravest consequences. In *R v Sissen*, 8 December 2000, the appellant bred parrots at home in North Yorkshire and had acquired an international reputation for doing so. The 1973 Convention on the International Trade in Endangered Species (CITES) has been in force throughout the EU since 1984. Two of the species listed in the Convention are the Blue Headed Macaw and Lear's Macaw. In the one case, importation is restricted, and in the other it is prohibited. Sissen had been convicted by a jury of being knowingly concerned in the fraudulent evasion of a restriction on the importation of goods under s 170(2)(b) Customs and Excise Management Act 1979, for which he had been sentenced to a total of 30 months' imprisonment. It was accepted that in no case was the point of entry into the EU the United Kingdom; in all probability the birds had been imported into Austria. It was argued on behalf of Sissen on appeal that the relevant articles of the EU legislation did not have direct effect in the United Kingdom; even if they did have direct effect, they applied only at the point of introduction into the EU which was probably Austria. Failure to present an import permit at an entry point into the EU within a member state other than the UK could not constitute an offence under English law. The Court of Appeal commented that it was indisputable that art 189 of the Treaty made regulations of the EU Council directly applicable within member states. The essence of a regulation was that it became part of national law without the requirement for further legislation. The use of CEMA and the treatment of the council regulations as enactments containing restrictions or prohibitions within that Act was entirely appropriate for a regulation under art 189. In support of the territoriality submission, counsel for Sissen referred to *Air India v Wiggins* [1980] 2 All ER 593. The Crown argued that the offence under s 170 CEMA was a continuing offence, and the evasion of the of the prohibition or restriction was not limited to the moment of importation itself, but extended to a continuing series of events both before and after that moment. The evasion continued until the goods ceased to be prohibited or restricted, or possibly until they were exported. The Court of Appeal was adamant that *Wiggins* did not hold that a statute could not provide for an offence of evading a restriction which bit abroad. It did not deal with the context under consideration in Sissen's case of the EU as a single market for import controls. As a matter of statutory construction, CEMA clearly incorporated as restrictions the EU Council regulations which restricted entry of certain goods into the EU as a whole, and without differentiation between member states. CEMA could not be interpreted as applying only to acts of evasions and prohibitions which took place in the United Kingdom. On its true construction it was an offence in English law for a person to be knowingly concerned in the fraudulent evasion of the restriction on importation of these macaws into the EU, whatever the country of entry into the EU might have been. The appeal was accordingly dismissed.

PARALLEL TRADING

One of the most vexed questions in international trade is that of the parallel traders' activities. This is the practice under which producers of goods, generally at the luxury end of the market, seek to maintain different levels of prices for their products according to a scale of what they believe more prosperous consumers will be prepared to pay in different areas of the world; they thus set up a hostage to fortune, for they create opportunities for arbitrage. This allows enterprising retailers there to undercut the higher retail price which the manufacturer hopes to maintain throughout that area. This has set up a number of frictions. The EU and domestic politicians have been rather ambivalent so far, and conflicting signals have been sent out. On the one hand there has been much talk about protecting the interests of the consumer, but against that decisions of the European Court on trademarks have tended to protect the interests of the manufacturer of the brand who is trying to insist on his goods being sold at a higher retail price. The issue may soon come to a head. The Levi Strauss corporation has recently begun legal proceedings in an attempt to prevent the British supermarket chain Tesco from selling Levi jeans which Tesco has bought outside the European Union on the world market, and then offers to its customers at prices below those which the manufacturer wishes to maintain. Among the arguments which Levi is advancing are that Tesco does not employ specially trained staff who can advise customers on the purchase of Levi jeans. This does rather open the door to the defence of exposing retail staff in approved outlets who appear to fall short of the standards which Levi claims to require from vendors of its products. The objection that designer clothes should not be sold in the same outlets as food and household goods may not get far, for this would appear to exclude Harrods. ❑

INNOCENT PARTNERS *v* DEFAULTING PARTNERS

P R H Webb, Emeritus Professor, University of Auckland

asks when innocent partners can claim compensation from defaulting partners

One of the prime rules in partnership law is that in s 27(a) of the Partnership Act 1908, that, in the absence of agreement to the contrary, each partner is entitled to an equal share of the firm's profits and is obliged to bear an equal share of the firm's losses. It is a corollary of this rule that, if one partner is obliged to pay more than his or her share of a debt of the firm or properly incurs a personal liability in carrying out the firm's business, he or she is normally entitled to an appropriate contribution from the other partner or partners: s 27(b)(i). There is an exception to partners' usual rights to contribution which is not well known. This note explores this exception.

In *M'llreath v Margetson* (1785) 4 Doug KB 278, two persons, A and B, acted as prize agents. A made a payment of money in good faith to persons who had fraudulently and falsely represented themselves to be sailors. A was subsequently called upon to make a second payment to the persons who were rightfully entitled to the money. The question arose whether B was bound to contribute to this sum. Lord Mansfield CJ regarded A as having been "guilty of negligence" and held that, as between him and B, B was not liable to contribute. The Court considered to be "of great consequence to the public" the rule that, if one of two partners incurs a liability in negligence to a third party, all the partners are liable to the third party, but, as between the partners themselves, only the defaulting one bears the loss. It is noteworthy that, at this early stage, the Court appreciated that it was necessary to distinguish between, on the one hand, the duty owed by a partner (and his or her firm) to an outsider and, on the other hand, the duties owed by each partner to his or her fellow partner or partners. To similar effect is *Re Webb* (1818) 8 Taunt 443.

On the other side of the line is another early case, *Cragg v Ford* (1842) 1 Y & C Ch Cas 280. Upon the dissolution of G's and H's partnership it was agreed that H should undertake the winding up of the business. In the course of this, H sold some of the firm's assets injudiciously. As a result, a loss was incurred. The question arose whether H was solely chargeable with this loss. It was held that he was not chargeable with the loss, the reason being that G still possessed his general rights as a partner and so would have full power to step into prevent the sale. H was seen to have acted in good faith and with due discretion. It would seem to be fair to say that H's injudiciousness fell short of negligence.

Another approach is to be seen in *Bury v Allen* (1845) 1 Colly 589, which makes clear that one partner may have a demand against the other for compensation in the nature of unliquidated damages. Knight Bruce, V-C said (at 604):

> it is, I apprehend, plain, that one of two partners may have a demand against the other for compensation, substantially in the nature of unliquidated damages, enforceable in equity, and in equity only. Suppose the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interests, in breach of his duty to the partnership: whether at law compellable, or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect.

A particularly striking case is *Thomas v Atherton* (1878) 10 ChD 185 (CA). J, the managing partner in a colliery business, worked the mine beyond the colliery boundaries. He never, indeed, made any inquiries at all as to the boundaries. The adjoining owner notified J that he was trespassing. Despite this, J recklessly continued his workings, never consulting his partners. It seems that J bona fide believed that the adjoining owner did not have title to the relevant disputed area. J had, to say the least, displayed what might nowadays be described as a want of reasonable care in this respect. An action brought by the adjoining owner against J for trespass was referred to arbitration and the arbitrator found that a trespass had indeed been committed and assessed the damages at £6,000. The other partners having declined to contribute, J now sought a declaration that the £6,000 was a partnership debt and that the other partners were bound to contribute rateably to it. James LJ described (at p 199) his negligence in continuing the working the relevant area after notification from the adjoining owner – and without discussion with the other partners – as "culpable". Accordingly J was held solely liable for the damages.

A claim for damages by one partner against another figured in the post-Partnership Act case of *Gallagher v Schulz* (1988) 2 NZBLC 103. S, a man with particular skills as a commercial property valuer, had encouraged G, an unskilled person, to leave to him the organisation of their joint project to develop some flats on land belonging to G. The project eventually proved to be financially disastrous. G suffered considerable mental distress and worry because of S's breach of contract. Williamson J considered that S owed a fiduciary duty to G and that he had broken it. He awarded G $4,000 damages. In his view, a partner who deliberately or carelessly failed to use a reasonable degree of care in the circumstances, might well be in breach of fiduciary duty. S was obliged to show the skill and care which would be expected from a prudent valuer and experienced property developer. Williamson J enumerated the principal failures of S, eg failure to ensure timely completion of the flats; failure to keep and maintain adequate records, and failure to keep separate and meticulous records as to work done on the flats and on non-partnership projects.

The most recent case is *Ross Harper & Murphy v Banks* [2000] SLT 699. The pursuers were a firm of Scottish solicitors. They were seeking damages from the defender, a former partner. A building society client of the firm had instructed the defender to act in a loan transaction for which security was to be granted over certain land in Scotland. The defender failed to spot an onerous condition affecting this land. The security proved not to be adequate. The society was unable to recover its loan in full and sued the firm and its partners, the defender included, for its losses. This action was based on breaches of implied terms in the contract between the society and the firm in relation to the due examination of, and reporting on, the title – which B had said was in order, good and marketable. A similar ground of action was laid in tort – that the defender had failed to exhibit the standard of care and skill to be expected of a reasonably competent solicitor experienced in conveyancing and loan transactions, vicarious liability being imputed to the firm for such failures. This action was evidently settled by a payment to the society. The present action was to recover £20,000 as representing the excess on professional indemnity insurance, the balance of the settlement sum having been met by the insurers.

It is important to appreciate that the case was not one of the firm and the "innocent" partners suing the defender for a contribution towards loss sustained in circumstances where the partners were under a common obligation to a third party and one of them had discharged that obligation. The action was one for damages in which the firm sought to recover the whole loss, (except, of course, in so far as already met by insurance), by reason of liability being incurred to the society. The pursuers were not relying on remedies flowing from any common obligation owed to the society. They were relying on terms which, they claimed, were to be implied in the partnership contract and on duties of care which, they also claimed, were owed to them by the defender at common law, viz, to exhibit reasonable care in the performance of work for clients of the firm so as not to expose the firm to claims for professional negligence ....

Lord Hamilton made an extensive review of Scottish and English case law and texts on both partnership and agency: see paras 16-32. At para 30, he said:

> I am of opinion that under Scots law a partner may in certain circumstances be liable in damages to his firm (and secondarily to his co-partners) for loss sustained by reason of liability incurred to a third party and that these circumstances are not restricted to those where the offending partner has been responsible for fraudulent or illegal activity; the duty extends, in my view, to a duty of care. The existence, in the absence of provision to the contrary, of such a duty is not, in my opinion, inconsistent with the terms of the Partnership Act nor of any established rule of common law.

Lord Hamilton then turned to the more difficult and uncertain question whether breach of that duty would occur by "mere" or "ordinary" negligence or only where something more, such as "gross negligence" or "recklessness" or the like, occasions the loss. His view was as follows (ibid):

> In the absence of clear and binding authority I favour a standard which requires the exercise of reasonable care in all the relevant circumstances. Those circumstances will include recognition that the relationship is one of partnership (which may import some mutual tolerance of error), the nature of the particular business conducted by that partnership (including any risks or hazards attendant on it) and any practices adopted by that partnership in the conduct of that business. The adjective "gross", as used in some of the authorities, appears to me to be essentially a word of emphasis rather than one indicative of a category distinction. In respect of liabilities incurred by the firm to a third party, it is, however, important to notice that breach of duty of reasonable care to the third party will not of itself import a breach by the "delinquent" partner of his obligation to the firm. The legal relationships are different. A firm may incur liability to a third party without breach of any duty of care but as a result, say, of a breach of a term unrelated to negligence contained in the contract with that third party, such breach having been occasioned by the conduct of one of its partners; in appropriate circumstances such conduct might amount to failure by the partner to take reasonable care for the interests of the firm, so giving rise to liability in the partner to it. Likewise a firm may incur liability to a third party by reason of a breach of an obligation or a duty of reasonable care owed to him but, although such liability had been occasioned by the conduct of a partner such conduct might not in the circumstances amount to a breach of his obligation to the firm. It is important to avoid conflating the two. The duties are not, in my view, co-extensive.

Counsel for the defender submitted that it would be destructive of any relationship of partnership, which depended on high standards of trust and good faith, if claims between partners were to be admitted other than in exceptional circumstances. Hence, it was argued, the implied duty of care must be accorded a very narrow scope. The existence of such obligations was held (para 31) not to be inconsistent with an obligation on the partners to exercise reasonable care in all the circumstances to avoid damaging the financial interests of each other. It was noted that a skilled employee in general owed a contractual duty of reasonable care to his or her employer in the performance of his or her employment: see *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555; [1957] 1 All ER125 (HL).

It would appear (para 15) that no partnership deed was placed before the Court in this case, and that it proceeded as if there had been no deed. One must, therefore, assume that there was no express waiver of the firm's right to require the defender to bear the ultimate loss alone, or, as in the case itself, to bear the excess on the professional indemnity insurance. No waiver could be inferred from the firm's practice in the past, nor was there any ad hoc waiver.

No doubt many interesting conundra will arise in this context in the future. Suppose Y, a partner in an accountancy firm, without any prior discussion, commits the firm to the purchase of 30 very expensive computers when ten less costly ones would have been quite sufficient for the firm's purposes. Assuming that the firm pays for the 30 computers, can the other partners now claim that Y must bear the whole cost alone? Or can Y claim that all the partners must contribute the price, the purchase being merely injudicious rather than grossly extravagant and culpably foolish? Or Z, a partner in a law firm which publicly purports to practice only in commercial law, were carelessly to give incorrect legal advice to a client on some matter of family law and that the firm consequently has to pay damages to the client. Can the other partners claim that Z has gone outside the ambit of the firm's practice and claim damages from him? Or is this a case where they have to accept that there has to be some "mutual tolerance of error"? ❑

PIRACY IN SE ASIA

Scott Davidson, University of Canterbury, now at University of Hull

finds an old scourge raising new challenges

PIRACY – THE CHALLENGE

Despite its romantic connotations, piracy is the oldest of international crimes in the suppression of which all states are duty bound to cooperate. The original and enduring hostility of international society towards pirates arose from the disruptive effects which piracy had, and continues to have, on sea-borne trade. Today, however, there is an increased awareness of the high human cost of piracy with seafarers being killed, beaten, held hostage, abandoned at sea or otherwise traumatised.

During the drafting of the Law of the Sea Convention 1982 (hereafter "UNCLOS") many delegations considered piracy to be, if not obsolete, then at least obsolescent and not in need of revision. In recent years this view has proved to have been too sanguine. One of the "dividends" arising from the end of the Cold War has been an upsurge in piratical activity in the waters of Southeast Asia. The reduction of tension between East and West has led to a diminution in warship presence in the region and has encouraged pirates to proliferate and become bolder. Although piracy has been reported off the coasts of Africa and South America, its major concentration is in Southeast Asian waters, particularly those of Indonesia. Of the seventy-seven incidents of piracy reported to the International Maritime Organisation (IMO) in July 2000 twenty-seven took place in Indonesian waters. The majority of the remainder took place in other Southeast Asian areas such as Bangladesh, the Strait of Malacca, Malaysia, Myanmar, the Philippines, Vietnam, and Thailand. (IMO, MSC/Circ972, 31 July 2000.)

While the level of reported incidents may appear high, the 1998 United Nations *Oceans and the Law of the Sea* report (UN Doc. A/53/456, para 147) stated that the International Maritime Bureau of the International Chamber of Commerce (IMB) and the International Transport Workers Federation estimated that official reports of piracy accounted for only fifty per cent of the attacks because ship owners and operators were unwilling to have their ships laid-up losing up to $10,000 a day while reports of piracy were investigated. Furthermore, insurers are becoming increasingly loath to insure against losses occasioned by piracy.

Lost time and money may, however, be a small price to pay to combat piracy, bearing in mind that over sixty seamen have lost their lives in pirate attacks since 1997 and some ship owners have lost entire vessels and their cargoes. These latter become the so-called "phantom ships" which disappear and then re-appear with new names and new registration papers under new ownership. There is also the danger that a pirate attack may go badly wrong leaving a ship out of control in a confined area such as the Strait of Malacca or among the islands of the Indonesian archipelago. The environmental and navigational consequences of a disaster in such major shipping routes are all too easy to imagine. So far, however, pirates have contented themselves primarily with robbing crews and stealing cargoes. The favoured method employed by modern pirates in the open sea is to use small, fast craft to enable them to board larger vessels. The pirates are usually well-armed and equipped with sophisticated communication devices. There has been some suggestion, although unproven, that in parts of Indonesia members of the military have taken an active part in attacks on shipping.

INTERNATIONAL LAW AND PIRACY

Piracy is defined by art 101 UNCLOS as consisting of any of the following acts:

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.

This provision, which is identical to its predecessor, art 15 of the High Seas Convention 1958, requires some elaboration. First, there is the question of whether piracy can be committed in a state's exclusive economic zone. Article 58(2) UNCLOS seems to suggest it can by reserving the applicability of arts 88 to 115 UNCLOS to the EEZ. Second, what is meant by "in a place outside the jurisdiction of any state". At first glance this would suggest territory which is res nullius or which belongs to no state. There are few areas of the world where this would apply, but it does raise the question of whether piracy can be committed on territory, such as the Spratly Islands in the South China Sea, whose territorial sovereign is in doubt, at least from an objective legal stance. Third, the acts of violence, detention or depredation must be committed for private ends, suggesting that acts undertaken for political, non-private ends do not constitute piracy. Fourth, the acts must be done by the crew or passengers of a private ship. Acts done by the crew of a warship or other public ship, unless they have mutinied, will not be piracy. Finally, the prohibited acts must be carried out by the crew or passengers of a private ship against another ship or aircraft. This means that there must be at least two vessels involved in order for piracy to occur: the pirate and the victim.

The restrictive nature of the legal definition of piracy has given rise to a number of practical problems. The first is that most acts of "piracy" occur not on the high seas but in ports, internal waters, territorial sea, archipelagic waters or straits used for international navigation; that is, in maritime areas which are subject to the sovereignty and jurisdiction of the coastal state. The primary responsibility for taking action against offences having a piratical character thus lies with the coastal state. Unfortunately, many states do not have the resources to combat piracy effectively, although such states sometimes do not seem to be aware that the best place to combat crimes at sea is on land through proper port control and coastline surveillance. A further problem which the definition of piracy gives rise to is that the prohibited acts must be committed for private ends. This means that acts having a public nature, such as hijacking a vessel and holding hostages to make a political statement, is not piracy under international law. Furthermore, the two vessel requirement means that "passengers" who hijack a ship or a crew which mutinies are not pirates per se unless they then use or intend to use the hijacked vessel to commit the acts prohibited by art 101. It was to meet these defects in the definition of piracy that following the hijacking of the *Achille Lauro* by Palestinian terrorists in 1985 that the IMO sponsored the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 (SUA) and its Protocol dealing with unlawful acts against fixed platforms on the continental shelf. Article 3 SUA requires states parties to make offences, inter alia, of acts of violence committed by persons to seize a ship, destroy its cargo or endanger its safe navigation. The states parties are also required to take jurisdiction over persons who commit these offences not only if they are their nationals, but also if they kill or injure their nationals. This is known as passive personality jurisdiction. States may also take jurisdiction on the basis that the vessel in question is one which flies its flag. The UN has observed that implementation of SUA provides a "more useful vehicle for prosecution than the nineteenth century pirate statutes", (UN Doc. A/53/456, para 152), but to date the level of ratification has been low. Thirty three states are party to SUA, but few of these are in the Southeast Asian region.

International enforcement and cooperation

Piracy is an international crime attracting universal jurisdiction. This means that any state which apprehends pirates may try and punish them regardless of where or against whom they committed the offence. If the piracy in question were "true" piracy, that is, if the individuals' actions fell within the scope of art 101 UNCLOS, then the warships or public vessels of any state may apprehend the pirates and that state may try and punish them under their domestic law. If, however, a pirate vessel flees to a maritime zone over which a third state has exclusive or near exclusive jurisdiction – that is territorial sea, internal waters or archipelagic waters – then, in the absence of any invitation by the coastal state to continue the pursuit, it is only that state which may arrest the vessel. Particular problems of jurisdiction arise where the act in question is "piracy" in a colloquial or domestic law sense rather than in a strict international law sense. As noted above, a great many acts which are classified as piracy by the IMO and IMB take place in states' coastal waters and not on the high seas and can therefore be classified as ordinary criminal offences. Indeed, the IMB itself defines piracy as:

> ... an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act.

Although there are problems with the definition of piracy and the jurisdictional bases for action, the interaction of domestic law, UNCLOS and SUA provide a sufficiency of substantive law to enable states to take the appropriate action against those who engage in piratical-type acts, whether this be "true" piracy or robbery or other criminal offences in a state's national waters. The main problem besetting states in Southeast Asia is the practical aspect of enforcement. Given the geographical proximity and archipelagic nature of regional states, it is comparatively easy for pirates both to hide and to flee to neighbouring jurisdictions. Pirates operating in Indonesian waters, for example, might be able to flee to either Filipino or Malaysian waters without much difficulty. A pursuing Indonesian vessel would not be able to enter the waters of their neighbouring states without express authority. A further problem encountered by regional states is the relative paucity of maritime surveillance vessels or aircraft. There are, for instance, over two thousand widely dispersed islands in Indonesia which are difficult to police. In order to overcome these difficulties therefore, it is imperative that regional states cooperate fully in order to suppress piracy. Such cooperation is now becoming evident and a number of multilateral and bilateral international and regional initiatives are emerging.

The Maritime Safety Committee of the IMO has been at the forefront of developments in this field. Its *Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships* (MSC/Circ622/Rev1, 16 June 1999) not only establishes a number of desirable jurisdictional and other practical measures which coastal and port states can take to combat piracy, but also suggests that flag states should develop Action Plans detailing the actions which should be taken in the event of a report of a pirate attack. In the Southeast Asian region work has already begun on such an Action Plan. Between 28-30 March 2000 an international conference in Tokyo involving fifteen regional states, the IMO and a number of shipowners and their associations issued the *Tokyo Declaration* and a Model Action Plan which closely followed the IMO *Recommendations*. Of particular significance is the IMO's *Draft Regional Agreement on Cooperation in Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships*. This *Draft Agreement*, which appears to be based on similar agreements to combat drug smuggling, gives proforma authorisation to the law enforcement authorities of signatory states to pursue and board offending vessels, even if these vessels are in the territorial sea of another state party. In addition to these multilateral initiatives, a number of regional states have engaged in bilateral measures. Vietnam and Cambodia, for example, have conducted joint anti-drug smuggling and anti-piracy patrols in each other's national waters.

The considerable role of the IMB in helping to combat piracy also deserves mention. The Bureau, which is financed by contributions from ship owners and insurance companies, operates a twenty-four hour piracy reporting centre in Kuala Lumpur which both receives and broadcasts warnings of piratical activity. Weekly reports can be viewed on the Web at www.iccwbo.org/ccs/imb_piracy. The IMB also offers advice on technological developments to safeguard against piracy. A new device known as SHIPLOC, for example, is an inexpensive way for shipping companies to monitor the precise locations of their vessels. Unauthorised or uncommunicated course deviations can thus provide additional timely warning of piratical activity in particular areas. ❑

CONDITIONS SUBSEQUENT?

Janet November, Research Counsel, Wellington District Court

asks whether they are making a comeback?

In *Waitata Holdings v Mansfield* (Wild J, HC Nelson M 300, 9 August 2000) Mr Mansfield signed a contract to purchase land in August 1997. He was advised at the time that he would be required to enter into an agreement covering maintenance of the right of way providing road access to the block. Hence cl 16 had been added to the REINZ/NZLS standard form contract and provided (inter alia):

> 16.0 This agreement is subject to and conditional upon
>
> (a) The Purchaser entering into an agreement with the Vendor on terms satisfactory to all parties for the ongoing maintenance of the right of way by 10 September 1997.

The District Court Judge found that at all times the purchaser was ready, willing and able (indeed anxious) to conclude a maintenance agreement. In January 1998 a director of the vendor company suggested a scheme whereby each registered proprietor of the subdivision would contribute in proportion to their lot size. However, in March the vendor purported to terminate the contract on the basis that the sale was conditional upon the parties concluding a maintenance agreement, and this had not been achieved. The purchaser rejected this proposition, and in May commenced proceedings for specific performance. In November 1998 the vendor's solicitor finally produced a proposed "maintenance agreement" which mostly amounted to restrictions on the purchaser's use of the right of way.

THE DISTRICT COURT

The main issue in the District Court, as in the High Court, was what was the effect of special condition 16.0(a). Judge Watson held that on the facts the parties intended to be legally bound by the contract. Secondly he held that there was a concluded binding contract. Counsel for Waitata Holdings had submitted that as the parties had yet to agree as to the terms of maintenance of the right of way the contract was not concluded. Counsel argued that *Willetts v Ryan* [1968] NZLR 863 and *Barrett v IBC International Ltd* [1995] 3 NZLR 170 applied. These cases involved the purported exercise of options where the Court of Appeal held that a material term had been reserved for further negotiation. Judge Watson distinguished *Willetts* and *Barrett*, first on the ground that the factual situation was quite different. He noted that it is a question of fact in each case when a contract becomes binding: following *Hunt v Wilson* [1978] 2 NZLR 261 (CA). Whereas in *Willetts* and *Barrett* one party had refused to acknowledge the purported acceptance of the options, in this case both parties accepted that there was a concluded contract before the vendor had purported to terminate it. Secondly the Judge found that cl 16.0(a) was not a "material term" of the agreement.

As to the effect of cl 16.0(a) the Judge found it was a condition subsequent "voidable by both or either parties when the impossibility to complete or deliver [is] something for which neither party [is] responsible": *Scott v Rania* [1966] NZLR 527 at 532. His Honour said the agreement must be regarded as a conditional contract from which neither party has the right to withdraw, and under which there are certain obligations still outstanding which each party must address prior to settlement, referring to *Hunt v Wilson*.

The Judge then rejected counsel's contention that the cl 16(a) was void for uncertainty because it failed to specify a date and because the phrase "satisfactory to all parties" was uncertain. His Honour referred to the principle that where a Court is satisfied that the real intention of the parties was to enter into a binding agreement the Court should endeavour to give effect to that intention: *Cameron v Warboys* [1951] 1 NZLR 789 at 795 and *Attorney-General v Barker Bros* [1976] 2 NZLR 495 (CA).

If he was wrong about uncertainty, the Judge said he could imply a term giving efficacy to cl 16.0(a), both as to the date by which and the terms upon which the maintenance agreement must be concluded. As to the latter, Judge Watson proposed various options: the equal contribution from all lot holders mentioned originally by the vendor's agent, the "proportionate to lot size" suggestion made by the vendor [in January 1998] and the grant of a right of way on terms implied in the 9th schedule of the Property Law Act 1952. In addition the Judge found there was an implied term that the vendor should make all reasonable efforts to lay before the purchaser a maintenance agreement which a reasonable man acting fairly would consider satisfactory in the circumstances of the case. Citing *Scott v Rania* with reference to *New Zealand Shipping Co Ltd v Societe des Ateliers et Shantiers de France* [1919] AC 1, His Honour said:

> The position is that where a contract required that some action be taken on the part of a party to fulfil a condition, then that party cannot assert non-fulfilment of the contract without first showing that this non-fulfilment has occurred despite reasonable steps having been taken by that party.

In conclusion His Honour Judge Watson ordered the vendor to specifically perform the contract, including reaching an agreement upon the terms of maintenance for the right of way.

THE HIGH COURT

In the High Court Wild J summarised the District Court's conclusions on the law and then counsel for the appellant's arguments. These in essence were that *Willetts v Ryan* and *Barrett v IBC* applied to the situation because the parties had reserved a "material term" for future negotiation; the contract was only an "agreement to agree".

Wild J pointed out that in *Barrett* Hardie Boys had suggested that it was not difficult to draw an agreement in order to avoid the effect of *Willetts v Ryan*. Wild J considered that that was exactly what the drafter of the REINZ/NZLS standard form, which the parties used this case, did by inserting cl 8.2(1). Clause 8.2(1) stated:

> 8.2 In relation to every financial condition and, if this contract is expressed to be subject to any other condition(s) then in relation to each such condition the following shall apply unless otherwise expressly provided:
>
> (1) the condition shall be a condition subsequent ....

Thus said Wild J, the effect of cl 8.2(1) was to make cl 16.0(a) a condition subsequent, a condition which attaches to a concluded and enforceable contract and may operate to bring it to an end. The respondent had argued that *Willetts v Ryan* was also distinguishable as cl 16.0(a) was not a "material term". Wild J thought this was not a separate or necessary argument but nonetheless looked at the meaning of "material term", not defined in either *Willetts* or *Barrett*.

> I consider it means "material" in the sense that the parties have expressly stated that their agreement upon that term is necessary before their bargain is concluded and binding upon them.

In this agreement, as Wild J pointed out, the parties had expressly stated the opposite. By categorising cl 16.0(a) as a condition subsequent they expressly provided that cl 16.0(a) attached to the contract and might operate to terminate it. Wild J agreed with Judge Watson that the appellant had failed to take reasonable and necessary steps to complete the agreement required by cl 16.0(a): *Scott v Rania*, *Martin v McArthur* [1963] NZLR 403. Wild J also agreed with the way that Judge Watson dealt with this default, and that the restrictions the appellant had sought to place on the respondent's use of the right of way were entirely out of order. Wild J dismissed the appeal, both as to the Judge's order for specific performance (including the consequential orders regarding the maintenance of the right of way) and as to the appeal against costs.

COMMENT: *WILLETTS v RYAN*

In *Willets* the respondent gave the appellant an option to purchase her property in which the price and deposit were fixed, but payment of the balance was to be "by mutual arrangement". The prospective purchaser purported to accept on the date of the expiry of the option but the vendor refused to acknowledge the validity of the acceptance. The Court held there was no offer capable of acceptance. In *Barrett* it was the date of settlement which was "to be mutually agreed upon exercise of option". The Court held (with some reluctance – see per Cooke P at 173) that as the date of settlement was a material term of the contract, and because the parties had expressly agreed to defer agreement as to the date until later, *Willetts v Ryan* applied.

In contrast, in *Waitata Holdings*, both the District Court and High Court had no doubt that the contract was a concluded binding contract. Both Judges classified cl 16.0(a) as a condition subsequent, Wild J stating reliance on cl 8.0 of the contract which His Honour thought had been inserted into the standard form agreement in order to avoid the *Willetts v Ryan* "agreement to agree" situation. In Wild J's view this classification sufficed to distinguish *Willetts v Ryan*. Judge Watson also distinguished *Willetts* on the facts, there being clear evidence in *Waitata* that the parties did consider they had a concluded agreement prior to the purported termination by the appellant. He found too, that cl 16.0(a) was not a material term of the contract. So indeed did Wild J, who held that a "material term" meant a term which must be agreed upon before an agreement becomes binding, whereas cl 16.0 was expressly stated to be the opposite: a condition subsequent to the concluded agreement, the antithesis of a term reserved for later negotiation and agreement.

Conditional contracts: conditions subsequent and precedent

The traditional approach has been that where a contract was subject to the fulfilment of conditions, the condition was considered as either a condition subsequent or a condition precedent. But in *Hunt v Wilson* [1978] 2 NZLR 261 (CA) both Cooke and Richardson JJ noted the ambiguity of the labels "precedent" and "subsequent" and doubted their usefulness:

> [T]he meaning to be given to a provision in a contract is a question of construction; of arriving at the true intention of the parties as expressed in the instrument, considered as a whole and against the surrounding circumstances as they existed at the time of its execution. Because it is a question of construction, the effect of a provision in a particular case turns in the end on careful analysis of the transaction into which the parties have entered, rather than on a classification of types of provisions found in other cases. (at 278 per Richardson J.)

"Gentle protests" against the use of the terms have been reiterated by the Court of Appeal, for example in *Robertson Enterprises Ltd v Cope* [1989] 3 NZLR 391. The recent practice of New Zealand Courts has been to avoid the use of the "precedent" and "subsequent" labels, according to the authors of *The Law of Contract in New Zealand* (J F Burrows J Finn & S M D Todd, Butterworths, 1997) at 222.

However, the terms do have their uses and this case is a good example of their usefulness. If the term "condition subsequent" was inserted into the REINZ/NZLS standard form (cl 8) for the purpose of allowing parties to conditional contracts to avoid *Willetts v Ryan* this seems a good enough reason for the continued use of the term. The agreement in the *Waitata Holdings* case was not one where something had to be done before the agreement became a binding contract; it was a contract where certain conditions had to be fulfilled before conveyance and completion. It was, as Judge Watson said, following *Hunt v Wilson*, a contract from which neither party was at liberty to withdraw and under which there were certain obligations imposed. Nonetheless it was a conditional contract which made it vulnerable to the *Willetts v Ryan* analysis. It could be argued (and was so argued) that a term had been left for negotiation and agreement.

Willetts v Ryan sits uneasily with the jurisprudence of leading cases such as *Attorney-General v Barker Bros* and *Scammell v Ouston* [1941] AC 251, and the principle of giving effect to the parties' intentions by looking at the substance of the agreement and not mere form. Although *Willetts* is distinguishable, it is not easy to distinguish if the parties have used some formula such as "to be agreed" in one of the terms of their agreement. However, if this term is specifically made a condition subsequent, there should be no argument that the agreement, albeit a conditional one, is a concluded, binding contract. ❑

HEALTH PROFESSIONALS' STANDARDS

Jackie Pearse, NZ College of Midwives,

responds to Graham Rossiter on standards for the different professions

As legal adviser to the New Zealand College of Midwives and junior counsel for the defendant midwife in *A v B*, HC Palmerston North, CP 9/98, Ellis J 18 October 1999, I read with considerable interest the article by Graham Rossiter "Cross-Disciplinary Standards in Health Services" [2000] NZLJ 193. Rossiter is correct in recognising that the 1990 Amendment to the Nurses Act 1977, returned to registered midwives the legal authority to provide total midwifery care to childbearing women. However this right is not contingent as he suggests, on the need to first be a registered nurse. While some New Zealand midwives may additionally hold nursing qualifications, the three year midwifery degree is increasingly undertaken by women who have backgrounds and degrees in other disciplines which may or may not have a health basis. Rossiter raised the issue of which standards would be used to judge the conduct of these "alternative" practitioners of birth. (I suspect that most midwives would not welcome the label "alternative" as midwives see themselves as the "core practitioners" of birth: no birth takes place without a midwife, whereas doctors are increasingly absent.)

The article also pointed out that the current funding policies encourage a woman to choose a lead maternity carer ("LMC") and this may be a midwife, GP or obstetrician. While this is correct, the requirement of a choice of caregiver does not arise purely from a financial imperative. Women and women's groups in making representations to government on maternity care, voiced a concern that hospital care was fragmented and divided between a number of caregivers who changed with each eight hour shift. This was seen as providing unsatisfactory and de-personalised care. The policy makers responded to these concerns and one of the fundamental premises upon which the current regime is based, is the recognition of women's preference for a known caregiver, or caregivers in a shared care arrangement, and continuity of care. The woman may change her LMC at any time so the choice of carer is not set in concrete. The LMC midwife or GP might also recognise that the nature of the pregnancy or labour has moved out of the range of normal and so she/he will consult a specialist or hand over the LMC role to either the specialist or the hospital.

Rossiter's theme appeared to be that midwives are subject to a lesser standard of care than "doctors" and therefore impose a greater risk for women. The writer draws the conclusion that women should be warned if they engage the services of midwifery practitioners, the midwife will be held less accountable than a medical practitioner.

Rossiter then moved to consideration of *A v B*. In this case a self-employed midwife referred her client to the specialist unit of the local hospital for monitoring, consultation and a plan for the remainder of the pregnancy. The midwife expected that the labour would be induced and prepared the woman for that possibility. The obstetric Registrar felt that induction was not warranted and instead he provided advice for the woman and instituted a plan of management which the midwife closely followed. Sadly, as does sometimes occur despite the best efforts of all involved, the baby was later found to have died in utero.

As Rossiter acknowledged, the midwife provided comprehensive and meticulous attention to the plaintiff's circumstances and appropriately referred the woman for review. Her defence was successful, not because she was held to a lower standard of care than a doctor, but because she was not found to have been negligent in her care. In his judgment Ellis J wrote that the "test for a midwife's standard of care is not that of a Registrar or specialist medical practitioner".

On the basis of this, Rossiter concludes that a midwife will be judged by a less onerous standard than a doctor. This conclusion makes two wrong assumptions. The first is that there is a hierarchy of standards where the standard expected of a doctor is higher than that required of a midwife whereas I would argue that the two standards are simply different. The practice of midwifery is different from the practice of medicine and the reasonable midwife will not practice as a reasonable "doctor" any more than a reasonable doctor will practice as a reasonable midwife.

The second assumption and the one that in my opinion is the most critical, is Rossiter's apparent view that "a doctor is a doctor is a doctor". Throughout his article he uses the term "doctor" in a generic way and does not recognise the differing roles of the specialist obstetrician, house surgeon, GP and Registrar. They are not all the same. If a pregnancy or birth becomes abnormal and complicating factors are recognised there should be a referral by the midwife or GP of the woman to the specialist obstetric team, Registrar or to the obstetrician.

When Ellis J states that the test for a midwife's standard is not that of a Registrar or a specialist medical practitioner (ie:obstetrician), he could equally have been saying that the test for a GP's standard is not that of a Registrar or a specialist medical practitioner. His Honour was acknowledging that Registrars and specialists, who deal in the abnormal pregnancy and birth, have a different role and standard due to their qualifications, expertise and area of practice. (The law has long recognised that specialists have a different standard of care from the ordinary practitioner.

Bolam v Friern Hospital Management Committee [1981] 1 WLR 246 at 258, *Maynard v West Midlands RHA* [1985] 1 All ER 638, *McMarey v Hague* [1949] 4 DLR 291.)

Rossiter having concluded that the midwife is judged by a lesser standard of care then questions whether the law should allow a graduated scale of standards depending on the status and qualifications of the particular health professional involved. He quotes two cases in his analysis. The first was *Wilsher v Essex Area Health Authority* [1986] 3 All ER 801. Rossiter in apparently quoting the headnote extrapolated the view that the duty should be tailored to the acts which the doctor has elected to perform rather that to the [rank of the] doctor himself. Yet the headnote continues that "an inexperienced doctor who was called on to exercise a specialist skill and who made a mistake nevertheless satisfied the necessary standard of care if he had sought the advice and help of his superior when necessary".

In the judgment Mustill LJ wrote of his preference for the following proposition regarding the standard of care:

> This relates the duty of care, not to the individual but to the post which he occupies; I would differentiate "post" from "rank" or "status". In a case such as the present, the standard is not just that of the averagely competent and well informed junior houseman (or whatever the position of the doctor) but of such a person who fills a post in a unit offering a highly specialised service. But, even so, it must be recognised that different posts make different demands. (813 j.)

Martin Wilsher was born premature and was admitted into a neonatal unit for specialist care. As part of his respiratory management he was administered high percentages of oxygen. This oxygen level had to be carefully monitored to ensure a type of retinal damage resulting in "blindness" did not occur. The first doctor, Dr Wiles was a house surgeon, a recently trained doctor, and he incorrectly placed an arterial catheter in Martin to monitor his blood oxygen levels. That error in itself was not held by the Court to be actionably negligent as it was a mistake which the evidence showed any reasonably competent doctor could make. Dr Wiles arranged an X-ray to check the placement of the catheter and asked his senior Registrar Dr Kawa, to look at the X-ray with him. Neither doctor identified that the catheter was in the wrong place. This caused inaccurate monitoring results overnight and the baby received inappropriately high levels of oxygen.

The following day Dr Wiles, to his credit, was unhappy with the conflicting oxygen results and brought these to the notice of Dr Kawa who resited the catheter. Dr Kawa repeated the earlier placement error and once again this was not picked up on X-ray. The result was that Baby Martin was supersaturated with oxygen and he went on to develop "near blindness". The employing health authority appealed to the Court of Appeal against a finding that Dr Kawa was negligent.

It is significant for the purposes of the appeal that both parties agreed that the standards expected of a house surgeon and a Registrar were not the same (812), even though the plaintiff argued for a "team standard" of care whereby each of the persons who formed the staff of the specialist unit held themselves out as capable of performing specialised procedures which that unit set out to perform (812). In effect this is what Rossiter seems to be arguing for – that everyone who is involved in the tasks of obstetric care shares the same standard of care. The Court rejected that approach. Mustill LJ while acknowledging the force of the submission held:

> If it seeks to attribute to each individual member of a team, a duty to live up to the standards demanded of a unit as a whole, it cannot be right, for it would expose a student nurse to an action in negligence for a failure to possess the skill and experience of a consultant. (813.)

It is difficult to know how *Wilsher* supports the proposition that midwives have a less onerous standard of care than doctors or that there is a sliding scale operating. The junior intern who while inexperienced assumed a routine task within of his job description and made a mistake, was not found negligent because he checked with a more experienced practitioner. The Registrar on the other hand, was described by the Court as careless and therefore negligent. The case illustrates two doctors holding different posts, with varying skill both performed the same wrong act, both checked the placement by X-ray and failed to detect the misplacement on two occasions but only one of the doctors being held to be negligent. The Court clearly did not tailor the duty to the act.

Wilsher is distinguishable from *A v B* where the midwife was not hampered by inexperience, acted within her scope of practice, recognised subtle abnormalities, referred appropriately to the specialist unit and consulted and carried out the plan of management which was instigated.

The second case Rossiter considered was *Vancouver General Hospital v Fraser* [1952] 3 DLR 785. Mr Fraser was injured in a car accident and went into hospital to be assessed. Two interns were involved in his assessment over a shift change. The first intern ordered X-rays and he and second intern, Dr Heffelfinger, checked the X-rays but missed the two fractures and dislocation of the neck. They compounded their error by not requesting the specialist radiologist available for consultation to come and check their interpretation of the X-rays. Dr Heffelfinger had only recently graduated and held a temporary licence to practice medicine. Despite the voiced concerns of Mrs Fraser, he reassured the couple that there was nothing seriously wrong and sent Mr Fraser home. Once home Mr Fraser became increasingly unwell, was readmitted the following morning and five days later died of complications. The Supreme Court of Canada upheld a finding that Dr Heffelfinger was negligent and that the hospital was liable.

The standard applied by Rand, J was that:

> for that examination and report he must use the undertaken degree of skill, and that cannot be less be less than the ordinary skill of a junior doctor in appreciation of the indications and symptoms of injury before him, as well as an appreciation of his own limitations and of the necessity for caution in anything he does. (791.)

Whereas Rossiter emphasised the phrase "the undertaken degree of skill", I would emphasis the phrase "the ordinary skill of a junior doctor". The difficulty with Dr Heffelfinger was not so much that he could not read X-rays, which he admitted knowing little about, but that as a junior doctor he failed to recognise or acknowledge the danger of his limitations. He also ignored critical clinical danger signs, failed to get the available specialist radiological opinion for the crucial X-ray and lulled Mr and Mrs Fraser by his negligent advice that there was nothing seriously wrong. As Sir Nicholas Browne-Wilkinson VC said in *Wilsher*:

> One of the chief hazards of inexperience is that one does not always know the risks which exist. (833.)

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PRACTISING WITHOUT IMMUNITY

Michael Winer, Barrister, Wellington and Miami

explains a technique for barristers to protect themselves from suits for professional negligence and to protect their clients on appeal

Barristers of New Zealand – take note! The threat of your former clients suing you for professional negligence will most likely add another dimension to your practice. Now, as you charge up the hill sword in hand to protect your clients' rights, you will have to make sure that your back is covered. If you do not, you may well face a professional negligence action, have your reputation tarnished or destroyed, and pay dearly for the harm you caused your ex-client and present enemy.

Thank God, after practising in America for 23 years with this threat, I have never had a claim lodged against me. In this article, I wish to share with you the principal technique that I attribute this good fortune to. After practising as a barrister in New Zealand for three years, I am convinced that it might also benefit my colleagues.

One of the surest ways for barristers to be sued is for their clients to witness an obvious error or omission at trial. The technique I will speak about substantially reduces the chances of this happening.

North American barristers call the technique a "trial brief". Essentially, it is a blueprint for trial preparation. The trial brief can easily be set up as a template on a computer. It does not require any special software. In its skeletal form, the trial brief simply enumerates general categories that competent practitioners must consider before trial. Reason suggests that the more time they have to meaningfully consider these factors, the more likely they will prevail at trial and on appeal, should there be one.

Properly used, the trial brief focuses practitioners' attention on these elements early in the case. This is because the trial brief should first be used while drafting the initial pleadings. Thereafter, it is continually updated with new information. It should even be relied upon in preparing closing argument and in drafting appellate submissions.

I have found that using the trial brief greatly enhances practitioners' confidence at trial. This is because when they start trial, they know their case, and their opponent's case inside out. They do not have to spend the last few days before trial frantically sorting things out. Rather, they know precisely what they have to do to prove their case and disprove their opponent's. Equally important, they have prepared for it.

This is not to say though that everything at trial will go as planned. However, having thoroughly prepared the case and with a trial brief at their side during trial, the litigator should have a better chance of handling the challenge than without it.

Another advantage of the trial brief is that it significantly advances the ability to recommend settlement before trial. This is the consequence of having competently analysed the strengths and weaknesses of your and your opponents well before trial.

The trial brief becomes invaluable when more than one lawyer is working on the case. It puts everyone instantly on the same page when discussing vital aspects of the case. This is most significant when the lawyers share the same database. Since the ability to render sound advice is dependant on information, the more facts that are known by all working on the case, the more meaningful will be their participation.

ELEMENTS OF A TRIAL BRIEF

There are no fixed categories that must be included in every trial brief. It's a matter of personal preference. One might even use different categories depending on the type of the case. Yet, there are some fundamental categories that I suggest you consider. They are as follows:

- *The facts of the case*

Under this heading, I recommend keeping a detailed chronology of the facts. At first, many may not be known. However, as discovery progresses more will be uncovered. Consequently, the chronology must be continually updated as new facts come to light.

Usually, if the source of information is a document, I record an entry in the chronology by starting with the date of the document, then, a brief description of the document (letter from X to Y), and a synopsis of the information in it. Facts that are referred to in documents, such as earlier meetings, and facts from witnesses should be recorded by their date. Then write the fact and lastly its source. Computers simplify this task because they allow interlineations. They also permit the data to be readily available to the client and/or other counsel working on the case.

If the initial chronology is sent to the client before the pleadings are finalised, it will not only show that you are "on the ball", but it also can act as a catalyst for discussion that may lead to the discovery of additional facts.

- *The pleadings*

Here, the essence of the Statement of Claim and Defence and Affirmative Defences and Counter or Cross Claims is set forth. The purpose of this section is to help keep attention directed to the issues that lie ahead. It gives the ability, in a few seconds and at any time, to always keep in mind what is relevant to the case and what is not. While you may have drafted part of the pleadings and were obviously familiar with them at the time, memories of their details tend to fade over the months, and in some cases, years.

- *The law*

The elements of the cause of action and defences should first be listed under this category. If any statutes, rules or regulations are relevant, set forth only their pertinent provisions – omit the irrelevant language. Then, add applicable rules of law and equitable maximums. Authorities follow each of the above entries. If any problems are anticipated at trial, such as evidential or procedural, include the cases relating to them and what they stand for.

- *All legal issues you see*

- *The theme of both your and your opponent's cases*

Try in fifty words or less to sum up the "guts" of both your case and your opponent's.

- *The merits of your case*

Forget about what you learned in law school, no matter how hard it is. Under this category, put down why your client, in fairness, deserves to win and why your opponent should lose.

- *The facts you will have to prove, how you intend to do it and how your opponent will try to disprove your facts*

Referring to the elements of law that you need to establish, list each one and the facts (and references) that will support them. Also, jot down how you anticipate your opposition will attempt to disprove the facts you intend to rely upon.

- *The facts you suspect your opponent will introduce to support the elements of his or her causes of action or defences.*

Referring to the elements of law that your opponent will need to prove, enumerate them and the facts that you believe will be introduced to support them. Then, note down how you will disprove them.

- *All factual issues you see*

- *The witness list*

Here, not only include the names of your witnesses but also the order you intend to call them. Often, the order will change, as the final trial strategy is determined.

A FINAL OBSERVATION

On appeal, barristers are generally bound by the evidence in the record. If some critical evidence was omitted from it, the appellate litigators' hands are tied more often than not. By using a "trial brief", the chances of this are greatly diminished. ❑

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Wilsher and *Vancouver General* are largely about inexperienced doctors who made errors. In *Wilsher* Dr Wiles was found not guilty of negligence because he appropriately referred and sought a second opinion from the Registrar, Dr Kawa. The Registrar who made the same mistakes was found to be negligent. In *Vancouver General* Dr Heffelfinger, knowing he was inexperienced in X-ray diagnosis, failed to consult a radiologist and sent the patient home with tragic results. He also was found negligent. Both cases are distinguishable from *A v B* which was not about junior doctors acting negligently, it was not about the failure to acknowledge limitations or the boundaries of practice and was not about the failure to make appropriate referrals.

From consideration of these cases Rossiter questions whether hospitals should be able to escape accountability for the services they provide on the basis that health professionals have differing qualifications and expertise and so should be held to a lesser standard of care. This comes back to an hierarchical view of hospital staff. A hospital may be held vicariously liable for the negligence of any employee acting within his or her scope of practice, be they a midwife or a house surgeon, a Registrar or a specialist obstetrician. That negligence is determined by reference not to the acts or tasks which they are individually called upon to perform but to the standards set down by each professional group and the "reasonable" standard expected from a practitioner holding that post, as articulated by appropriate experts. In A v B the midwife was found to have fulfilled the standards of care required of her by her profession. To suggest that she was meeting a lesser standard of care simply because she was acting as a midwife and not as a "doctor" is not borne out in the facts. The recognition of Ellis J that when a midwife refers for specialist advice, that advice is very likely to be followed, is simply a statement of fact. It is equally likely that the GP who refers a woman for specialist advice will also follow that advice – that is why referral occurs.

CONCLUSION

There are very different realms of obstetric practice and there is no such beast as the "ordinary competent provider of obstetric services". Rossiter's conclusion that women who engage a midwife rather than a doctor need to be aware that midwives will be held accountable to a lesser standard of care than medical practitioners is flawed for three reasons:

- he does not differentiate between GPs, house surgeons, Registrars or obstetricians;
- his view does not reflect the ratio of the cases discussed or the evidence in *A v B*;
- in my experience as the legal adviser to a large percentage of our nation's midwives, I have yet to see the attribution of less onerous standards and less severe sanctions for midwives than their medical counterparts.

For those interested in this final premise I suggest consideration of the multiple penalties incurred by the midwife in *Nursing Council v O* [1999] NZLJ 377, and those incurred by negligent doctors in an arguably worse clinical scenario reported in the (1998) 111 *NZ Med J* 84. Consideration of such cases should reassure readers that the standard required of midwives does not lead to leniency when it comes to either consideration of the standard of care required, or with respect to penalty imposed. ❑

COMPLETING GIFTS IN THE PRIVY COUNCIL

TRANSACTIONS

with

Jane Anderson

In *T Choithram International SA v Pagarani* (2000) 3 ITELR 254 the Privy Council considered an appeal from the Court of Appeal of the British Virgin Islands on the issue of whether the actions of a wealthy Hindu businessman ("TCP") just prior to his death were sufficient to constitute a completed gift of all his wealth to a philanthropic body ("the Foundation") created by him at the same time as the gift. As Lord Browne-Wilkinson characterised the issue, the case raised "... with a new twist, the question 'when is a gift completed'".

There are two well-established ways of making a perfect gift:

(a) by a transfer of the gifted asset to the donee, accompanied by an intention in the donor to make a gift. The donor has to have done everything necessary to transfer the gifted asset to the donee, and if he or she has not done so, the gift is not complete. This is because the donee is a volunteer and has no equity to perfect the gift (*Milroy v Lord* (1862) 4 De GF & J 264; *Richards v Delbridge* (1874) LR 18 Eq; *In re Rose* [1949] Ch 78; *In re Rose* [1952] Ch 499);

(b) by the donor declaring himself or herself to be a trustee of the gifted property for the donee.

It is well settled that the Court will not give a beneficial construction to words of outright gift to allow a gift to take effect as if the donor had declared himself or herself a trustee (*Milroy v Lord*). That is, a failed type (a) gift will not be construed as an effective type (b) gift in an effort to save the gift.

The trial Judge had found that TCP had a clear intention to make a gift of all his wealth to the Foundation. However, the BVI Court of Appeal held that the gift failed because at the time he died, TCP had not in fact done everything necessary to transfer his various shares and deposits to the trustees of the Foundation. Accordingly, the gift did not qualify under type (a). Moreover, the words TCP had used were words of outright gift (ie, I give all my wealth to the Foundation). The gift was therefore held by the Court of Appeal not to qualify under type (b) either, because it was impossible to treat TCP's words of gift as a declaration of trust as there was no reference to trusts.

The Privy Council reversed the Court of Appeal's decision. Their Lordships opined that the two methods of making a complete gift were not exhaustive and that this case raised a novel point that required an analysis of the rules of equity in this area.

The key to the case was that the only possible meaning of TCPs words "I give to the Foundation") were, "I give to the trustees of the Foundation trust deed to be held by them on the trusts of the trust deed". The Foundation had no legal existence apart from the trust declared by that deed. Crucially, TCP was one of the trustees under the trust deed. The Privy Council determined that a completed gift was established by TCP, in one composite transaction, when he declared that he was giving property to a trust that he was establishing of which he appointed himself one of the trustees. In the view of Their Lordships, there was no distinction between such a case and the type (b) method of gifting under which the donor declares himself sole trustee for a donee or purpose. The mistake of the Court of Appeal had been to overlook that the trust property was in fact vested in one of the trustees (TCP).

TCP having died, the order sought in the case was an order that the gifted property be vested in the whole body of trustees. It was argued that such an order in favour of a volunteer was inconsistent with the rule that equity will not assist a volunteer. The Privy Council considered that this was an oversimplification of the rules of equity because equity does of course assist a volunteer where a trust relationship has been established between trustee and beneficiary:

> In Their Lordships' judgment in the absence of special factors where one out of a larger body of trustees has the trust property vested in him he is bound by the trust and must give effect to it by transferring the trust property into the name of all the Trustees.

The Privy Council rejected a related argument that the vesting of the trust property in only one trustee (TCP) was insufficient to constitute the trust.

On one view, the Privy Council decision is further evidence of a trend in favour of giving effect to clear intentions despite the situation not fitting within traditional formal requirements. As a general proposition, this elevation of substance over form is to be applauded.

However, the words "in the absence of special factors" in the above passage are curious. There is no discussion on this qualification, or on what situations might be contemplated where a gift of the nature described would be ineffective. The qualification takes away somewhat from Their Lordships' analytical approach to the issue. It also leaves a residual uncertainty in the robustness of this method of effecting a gift.

CONTRACTUAL CONFIDENTIALITY CLAUSES

Cecily Brick

In Astra Pharmaceuticals (NZ) Ltd v Pharmaceutical Management Agency

Ltd (CA 72/00; Thomas, Keith, Blanchard, Tipping and McGrath JJ; 23 November 2000) the Court of Appeal considered whether use of information provided by one party to another during negotiation of a contract amounted to a disclosure in breach of a contractual confidentiality clause, and how damages were to be calculated for breach of the clause.

Astra and Pharmac had entered into an agreement relating to the supply of a drug distributed by Astra. During negotiation of the agreement, Astra supplied financial forecasts to Pharmac, based partly on information not available to Pharmac. The agreement stipulated that information exchanged by the parties, and the terms of the agreement itself (which were commercially sensitive), were confidential and not to be disclosed by either party except for certain specified purposes, in which case the other party was to be given prior notice of the intention to disclose.

While negotiating a separate agreement with P&U, another distributor, Pharmac supplied P&U with forecasts that incorporated or were based on information that had been provided to it by Astra, and it disclosed details of its agreement with Astra. Pharmac failed to notify Astra that it intended to disclose this information. As a result of the contract with P&U, Pharmac lifted restrictions that applied to prescription of P&U's drug, and reduced the subsidy it paid to Astra in respect of its drug.

Astra claimed, inter alia, breach of the confidentiality clause. The claim was unsuccessful in the High Court and Astra appealed.

Disclosure in breach of confidentiality provision

It was evident that Pharmac had made use of the information in Astra's forecasts when compiling the information that it provided to P&U. As Pharmac had expanded and revised the information there were competing arguments as to whether this meant there had been a "disclosure" of information in breach of the clause.

Gendall J in the High Court had held the clause did not prevent Pharmac from providing forecasts to other distributors in the future which were based on information which had been provided to it by Astra. This was because His Honour found that if Pharmac could not provide these forecasts, it would be unable to enter into informed negotiations with other parties, and this was not the intention of the clause.

The Court of Appeal disagreed with this interpretation. Its starting point was that the words used by the parties are taken to be expressing their contractual intention. The Court noted that Pharmac's ability to provide forecasts to third parties in order to continue to exercise its (non-statutory) function of managing the funding of prescription drugs was not a term of the agreement with Astra, and consideration of this point did not assist in interpreting the contract. The Court found that even if Pharmac had entered into a contract that inhibited its future exercise of its public function, that did not immunise it from the consequence of any breach of contract.

The Court noted that the clause created an obligation to refrain from *disclosure*, and that the clause was not expressed as a prohibition on general *use* of the information for purposes outside the agreement. Accordingly, what was prohibited was use of the material in a way that communicated to others what the parties had agreed should remain secret. There was no prohibited disclosure where Pharmac altered Astra's data after evaluating it in light of its own material. The Court held (para 40):

> The mere fact that in a particular forecast a relationship, in terms of data, can be identified with an earlier forecast in a sequence is not enough to give the information protection. It must be established that in a particular forecast which was communicated to a third person information of Astra was disclosed by Pharmac.

A limited portion of the data that Astra provided to Pharmac had been incorporated unchanged into the forecasts that Pharmac supplied to P&U, and the Court found that the disclosure of this information was a breach of contract.

Calculation of damages

The Court then considered the proper basis for the calculation of damages. The basis differed for the two categories of breach of contract, being the prohibited disclosure of confidential information, and the failure to notify Astra of the intended disclosure as required by the clause.

The Court held that damages for the prohibited disclosure were to be assessed on the basis of compensation for an improper headstart, on the principles set out in *Hospital Products v US Surgical Corporation* [1983] 2 NSWLR 157. P&U had obtained the advantage of a "springboard effect" in obtaining information which it would have taken time to gather from its own sources. Provision of the information enabled P&U to conclude its contract with Pharmac earlier than would otherwise have been the case, with the consequent effect of the early lifting of restrictions on prescription of the P&U drug, and reduction of subsidies payable to Astra.

In respect of Pharmac's failure to notify Astra that protected information was to be disclosed, Astra claimed that if it had been notified of Pharmac's intention it would have sought injunctive relief to prevent the disclosure, which would have delayed the lifting of the restrictions on the P&U product.

To establish causation on this point, Astra had to prove on the balance of probabilities that it would have taken injunctive action. The Court found (overturning the finding in the High Court) that it was likely Astra would have sought an injunction because it would have perceived a high risk of damage to its commercial position if the disclosure were made.

The value of the loss of Astra's opportunity to take the injunctive action was assessed in accordance with the principles of "loss of a chance". The Court referred to the statement of these principles in *Mallet v McMonagle* [1970] AC 166, 176:

> In determining what [happened] in the past a Court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

The Court assessed the likely period of the delay the injunctive action would have caused if it had gone ahead. It then discounted that period to reflect its view of the likelihood of success of that action, and the possibility that without the benefit of the information, P&U could still have entered an agreement with Pharmac (albeit in slightly different form), leading to the same result. The judgment contains some judicial guesswork in an appraisal of the factors bearing on the prospect of success of the hypothetical injunctive action.

The essential point to be taken from this judgment from a transactional viewpoint is that careful thought needs to be put into the drafting of confidentiality clauses. Depending on how the clause is drafted, use of information to generate new data may not to amount to a disclosure of information. Lawyers who advise clients who are concerned to protect information which they provide to prospective business partners should be aware that if the intention is to protect the information from being repackaged or used as a starting point for development of new information, it would be wise to reflect that intention in a written agreement.

NON EST FACTUM

Cecily Brick

Ms O's live-in partner, Mr C, calls her into a room where he is carrying out a business transaction with Mr D, and asks her to "come and witness a document". Ms O writes her name, address and occupation on the document and signs where instructed by Mr C. Mr C takes a refundable deposit on the transaction, and after the transaction falls through he is adjudged bankrupt. Mr D then calls on Ms O to repay the deposit because the document she signed made her guarantor of its repayment. Does the plea of non est factum apply? Ms O claimed it did and the District Court agreed. On appeal to the High Court, *De Silva v Ogilvie*, (HC Auckland; AP 67-SW00; 25 September 2000), Fisher J disagreed, and the judgment is a reminder of the heavy onus placed on a defendant who seeks to rely on the doctrine to escape obligations arising under signed documents.

The well-established requirements of the plea are set out in the judgment. These are that the person must have signed the document believing it had a particular character or effect which is radically different from the document's true character or effect, giving rise to a wholly different result from that intended by the signatory. The signatory's mistaken belief must have resulted from an erroneous explanation or description of the document given to him by someone else. The signatory must also show that in spite of the error he acted with all reasonable care. The plea is not available if the error arose through simple reliance upon a solicitor or other trusted adviser and the signatory failed to take steps to read and understand the document.

Fisher J held that a person seeking to rely on the plea carries a heavy burden of proof, relying on the authority of *Saunders v Anglia Building Society* [1971] AC 1004. His Honour noted that commercial convenience and practice requires that other persons be able to rely upon the authenticity of signatures. If a choice must be made between detriment to a mistaken signatory or another party who has justifiably relied upon the signature, it will usually be more equitable to place the detriment upon the signatory.

Ms O claimed that she did not read the document and relied on her understanding that she had been asked to witness the document. His Honour found that while Ms O may have been asked to witness a document, when she came into the room nothing further was said about the character of the document. There was no allegation that either of the two men had tried to deliberately deceive her about the true nature of what she was signing. The document itself was unambiguous, headed "Deed of guarantee", and with Ms O's name clearly inserted on the first page. Fisher J found that anyone looking at the document would know that it created a personal guarantee by Ms O.

The evidence was that Ms O, aged 25 years, a flight attendant and previously secretary for some property companies, had entered other contracts in the past, including an employment contract and the purchase of a residential property. In the circumstances, and bearing in mind that Ms O had signed in at least three different parts of the document, it was held that it was simply not believable that she thought she was signing only as a witness. Ms O was unable to discharge the onus of proving a misrepresentation had been made to her, and it was held that even if she had, she had failed to exercise reasonable care.

CHATTELS, FIXTURES AND INCORPOREAL HEREDITAMENTS

Roger Fenton

In *Auckland City Council v Ports of Auckland Ltd* [2000] 3 NZLR 614 (also noted in [2000] 9 BCB 93) the Court of Appeal was required to determine the rateable status of facilities at the Port of Auckland within the Waitemata Harbour. A number of items along the Auckland waterfront were in dispute including the pontoons, piles and floating facilities at Westhaven. Although the Court decided that the Westhaven facilities were outside Auckland City and not rateable, it went on to determine whether they were "land" for the purposes of s 3 of the Rating Powers Act 1988. It did so by deciding (1) whether the facilities had become part of the land by recourse to what has traditionally been regarded as the law of "fixtures" (2) whether they came within the words "... hereditaments, whether corporeal or incorporeal, and all chattel or other interests therein ..." found in s 3.

Leaving aside the rating issues, the principal significance of the judgment for property law lies in the decision to apply the approach of the House of Lords in *Elitestone Ltd v Morris* [1997] 1 WLR 687; [1997] 2 All ER 513. In *Elitestone Ltd v Morris* Lord Lloyd of Berwick (as did Lord Clyde giving the only other judgment) expressly avoided using the word "fixture" and asked whether the bungalow in issue had become part of the land. Instead of the twofold classification between (a) a chattel and (b) a fixture, Lord Lloyd preferred the threefold classification found in Woodfall *Landlord and Tenant* (1994) Vol 1, p 13/83, para 13.131 between (a) a chattel (b) a fixture (c) being part and parcel of the land itself. Under this formulation houses and trees are part and parcel of the land rather than fixtures. Lord Lloyd preferred the threefold classification for two reasons. First, he said that in ordinary language a building itself is not thought of as a fixture and in ordinary language a fixture is thought of as something fixed to a building. Secondly, the terminology avoids confusion with the term "tenant's fixture" ie chattels which a tenant can remove at the end of a tenancy. Lord Lloyd emphasised the need to maintain the distinction (not always maintained in modern case law) between the question of whether a chattel has become part of the land or a fixture and the question of removability which depends on whether a relationship exists under which the items may be removed such as landlord and tenant. The question of removability arises after it has been determined whether the item in question is a chattel, a fixture or has become part of the land itself.

McGrath J, giving the judgment of the Court (comprising also Richardson

P and Blanchard J), stated (p 632) "In our view it is appropriate to apply *Elitestone* in New Zealand to establish whether a chattel has become part of realty". McGrath J pointed out that the present case provided an instance of the value of the *Elitestone* approach as it enabled the Court to concentrate on whether the item had become part of the land avoiding technical analysis in terms of "fixtures". Although they started life as chattels, the Court upheld William J's finding in the Court below that once attached to their piles the pontoons became an integral part of the composite jetty structure and had become part of the land. Approaching the question from the point of view of the degree and object of annexation (the two traditional indicators) the Court held that the Westhaven facilities came within the definition of "land" within s 3 of the Rating Powers Act 1988.

The Court also upheld a subsidiary argument that the pontoons were incorporeal hereditaments and came within the definition of "land" under s 3 of the Rating Powers Act 1988. The Court applied *Telecom Auckland Ltd v Auckland City Council* [1999] 1 NZLR 426 CA in which it was held that the right of a network operator to install telephone lines under or above streets and in telephone booths was an interest in land. Blanchard J, giving the judgment of the Court of Appeal, held that an exclusive right of occupation of this kind, even for a limited purpose, is more than an easement, "because the owner of the rest of the soil is ousted" (p 440). The Court in *Ports of Auckland* held that the port company had a right of exclusive occupation derived in part from contract (two lease agreements leasing portions of the seabed) and in part from a statutory permit (a resource consent). As such these rights were held to be incorporeal hereditaments. Both decisions add life to the ancient category of interests in real property known as the incorporeal hereditament (property which at common law descended to the heir on intestacy): in medieval times rights such as tithes, advowsons, commons and ways were the principal examples. Now, however, assisted by the inclusion of the term in s 3 of the Rating Powers Act 1988, we can include the rights of telecommunication network operators to install telephone booths and the right to maintain the pontoon marina structure at Westhaven.

LEGAL PRIVILEGE AND JOINT VENTURES

Cecily Brick

In *Morgan & Banks Ltd v Gemini Personnel Ltd* (CA 108/00; Gault, Keith and McGrath JJ; 14 September 2000), the Court of Appeal considered the circumstances in which legal advice provided to one party to a joint venture by solicitors holding a joint retainer to act for the venture could be privileged from production to the other.

M&B and Gemini negotiated a deal whereby they would together establish and take shares in a new company, Alectus Recruitment Consultants, which would buy and attempt to expand the Gemini business. Simpson Grierson, who were already retained by M&B on other matters, were appointed as solicitors for the new company.

The joint venture parties fell out, and SG provided further advice to Alectus (for the joint venture partners) and to M&B (individually) on matters relating to the joint venture. M&B later purchased Gemini's shares in Alectus. Gemini commenced proceedings, claiming that it had suffered loss and that M&B had acted dishonestly and fraudulently in its dealings with it. SG were joined as a party, Gemini alleging that in providing separate advice to M&B on matters relating to the joint venture, and in the way they carried out their instructions under the joint retainer, they had acted contrary to their fiduciary duty to Gemini.

Gemini sought discovery of documents exchanged between M&B and SG. M&B resisted. Discovery was ordered in the High Court on the ground that there was a joint retainer between Gemini/M&B and SG, and there could be no privilege between the parties to the joint retainer. A further ground (not dealt with in this note) was that the fraud exception to privilege applied. M&B appealed.

It was argued for M&B that the separate interests of the principals to a joint venture could be the subject of privileged advice, whether or not the solicitor also held a joint retainer.

The Court of Appeal agreed that privilege might properly be claimed in some circumstances even where there is a joint retainer. Keith J, delivering the judgment of the Court, noted the established principle that parties who grant a joint retainer to a solicitor cannot claim privilege against each other in respect of documents generated pursuant to the joint retainer and the passage from *Phipson on Evidence* (15th ed, 2000; para 21-01):

> Where one of the parties who jointly instructs the solicitor consults the solicitor confidentially on matters in dispute between the persons who have created the joint retainer, he may claim privilege against the other for those communications.

The footnote to the passage notes that the solicitor "may well be embarrassed by a conflict of interest in such circumstances". The Court said that the question of whether the solicitor acted in conflict of interest is a separate issue not relevant to the question of privilege.

The Court noted with approval the submission for M&B that parties involved in a joint venture hold a number of different interests. The principals have their own separate interests in the agreement and the joint venture business. They also have their joint interest in these. The vehicle for the joint venture has its own interest in the running of its business. Advice given by the solicitor to one of the parties in respect of its *separate* interest will be privileged notwithstanding that there was a joint retainer in existence.

To determine whether the documents were generated in respect of the joint retainer, the Court considered the scope and duration of the joint retainer, and the interest to which the advice was directed. The Court considered that the joint retainer was probably still in existence at the time the advice was provided, and that the scope of the joint retainer extended beyond the preparation of the initial contractual documents to the provision of general advice relating to the venture. However, the Court was unable to decide on the information before it whether the documents in question were directed to providing advice on the joint interests of both Gemini and M&B, or to M&B separate interests only. The Court directed that the claim to privilege be upheld if the documents related to legal advice provided to M&B in respect of its separate interests.

The transactional lawyer who takes instructions to act for a joint venture needs to be aware that advice provided to one party to the joint venture may be privileged from production to the other. An assumption that there is no privilege between the parties to a joint retainer will not suffice to discharge obligations to observe a client's right to claim privilege. ❑

ARE YOU A VICTIM OF YOUR WORKMATE'S MURDER?

CRIMINAL PRACTICE

with

Robert Lithgow

Carlos Namana pleaded guilty to the murder of Constable Murray Stretch on the basis that it was a felony murder, ie that he used grievous bodily harm to resist apprehension for burglary.

Two issues arose. First, who is a victim of such a crime and how do they place their views before the Court on sentence? The second is the sentence itself – life with 18 years minimum non-parole for killing a policeman. The Court of Appeal reduced that to 16 years. How and why?

In the High Court

R v Namana (T992180, 5 September 2000, HC Rotorua, Nicholson J)

Namana pleaded guilty to the murder of Constable Stretch in Mangakino in 1999. When he appeared for sentence in the High Court, in September 2000, the issue was whether the Court should impose a minimum period of non-parole. The Criminal Justice Act had been amended in 1999 to lower the threshold for s 80 orders from circumstances "so exceptional" that more than ten years is justified, to circumstances "sufficiently serious" to justify more than ten years. The section provides that it is sufficiently serious if the circumstances take the case out of the ordinary range of offending of a particular kind but the circumstances need not be exceptional. Therefore, the issues were: whether the circumstances of the offence were sufficiently serious to justify more than ten years and, if so, what was the appropriate period.

The first question depended on the facts of the offending. Namana pleaded guilty but he disputed certain aspects of the summary of facts and the depositions. The real dispute was the intent he was guilty of – intentional killing or recklessly in the course of avoiding apprehension. At the request of both counsel, the sentencing Judge determined that question based solely on the undisputed segments of the summary of facts and on the deposition evidence (without seeing the witnesses). The Judge found as a fact that Namana intended to kill. The Judge held that the brutality of the killing, stomping on the victim's head, took it out of the ordinary and, in any event, the fact that such brutality was visited on a police officer made it exceptional.

The second question concerned what material could properly be taken into account. The Crown tendered 13 victim impact statements – seven by family members and six by police colleagues. The defence argued that the VISs were irrelevant to the issue of minimum non-parole and, even if they were relevant, they went too far. Nicholson J held that s 80 provides that the circumstances of the offence are relevant to the term to be imposed and the circumstances include the consequences. The Victims of Offences Act 1987 provides for victim impact statements setting out the physical and emotional harm suffered by victims. The definition of victim includes immediate family if the offence has resulted in death. But His Honour held the definition is inclusive, not exclusive, and therefore there is no reason to restrict "victim" to immediate family. Constable Stretch was killed in the course of his duties and therefore his colleagues were also victims. As to the content of the VISs, His Honour noted that some were "very emotive" but that he had made due allowance for that. On that basis, all of the VISs were taken into account.

Namana was sentenced to 18 years minimum non-parole and appealed to the Court of Appeal against sentence. He did not challenge the finding of intentional killing.

In the meantime

R v Burns (T991986, 18 September 2000, HC Auckland, Chambers J)

In an equally tragic murder, this time of a civilian at her own home, Chambers J considered the breadth of the expression "victim". His Honour took the trouble to analyse the Victims of Offences Act and, in particular, the s 2 definition "where the offence results in death, the term includes the members of the immediate family of the deceased". The definition projects a peculiarly nuclear view of the family. But Chambers J guarded against the ability to self-define as a victim and therefore to have the right to direct access to the sentencing Court. In short His Honour confined those who could file a VIS. He also culled material that was irrelevant or expressed views on Burns' mental state.

In the Court of Appeal

R v Namana (CA 335/00, 27 November 2000, Gault, Thomas and Keith JJ)

Namana appealed against sentence on grounds that some of the victim impact statements should not have been before the Court and in any event 18-years minimum non-parole was excessive.

The victim impact statements:

The Court found on this ground that Nicholson J's wide view of the matter was permissible without really saying why. The unfortunate aspect is that the Court appears not to have been aware of Chambers J's careful analysis in *Burns*. As far as the inappropriate VIS content goes, the Court of Appeal endorsed the Judge identifying the problem and warning himself not to place too much weight on the unduly emotive parts. The CA found that to be sufficient protection. However, even with that self-warning, Nicholson J gave a very high non-parole period.

The non-parole period:

Counsel for Namana directly challenged the proposition that a policeman's life is more important than anyone else's. The Court did not agree. The denial is put like this:

> [27] The need to protect police officers in the discharge of their duties has been repeatedly recognised by this Court. It has consistently proclaimed that an attack upon a police officer is a serious aggravating factor. ...
>
> [28] The present appeal is the first time that a case involving the murder of a serving police officer has fallen to be considered under s 80. There can be no question but that the above principle requiring the protection of police officers on duty must apply in full measure. Mr Namana's murderous attack on a police officer who was seeking to arrest him is deserving of the sternest denunciation from the Court. Violent responses from those who choose to attack the police also require a significant deterrent sentence.
>
> [29] Adopting such a view does not, as [defence counsel] suggested, elevate the life of a police officer above the life of another human being. Rather, it recognises the public interest in protecting the police from unwarranted attacks when discharging their duties.

With respect, that last proposition [29] appears to be a distinction without a difference. The result is clear. The fact remains that the Judges say it is more serious to kill the king's men. Why are policemen's duties the mantle of greater worth? Why does the "public interest" condemn a policeman's murder more than the murdered battered wife and mother. Police at least get training, access to back-up, weapons, a vehicle. The child of the household has nothing. Is it consistent with egalitarian democracy to justify the sentence in that way? To invert, why is it a lesser crime to stomp the head of an innocent civilian rather than a police head?

The Court also noted that when Parliament amended s 80 of the Criminal Justice Act in 1999, the threshold for minimum non-parole periods was lowered with the clear intention of extending the range of circumstances that would attract a minimum period of non-parole. However there was nothing to indicate that the length of the periods imposed should also be extended. The appeal was allowed to the extent of reducing the non-parole period to 16 years to make allowance for the guilty plea.

Lessons for lawyers:

A lot of lessons for lawyers in this case but precious few answers. Namana pleaded guilty on the lowest common denominator of murder but ended up sentenced as an intentional killing plus. Because the Crown did not accept the basis of the accused's own view of the matter it was left to a Judge to decide. The Judge said he was unhappy to decide these things without real witnesses but was asked to do it on deposition statements. There was evidence both ways and he had to decide but serious consequences flowed from short phrases unexplained in evidence. For example, the accused said: "If the cunt's not dead yet he soon will be". That was held to demonstrate a callous and vindictive determination rather than a bitter and resigned insight into how serious the matter was.

So, in a rare event in the case of murder, he pleads guilty early on, albeit on a minimised basis. He ends up with a severe sentence because of who or what the victim is. No discernable credit was given for the guilty plea. In the event, no doubt to preserve some glimmer of hope that there is recognition/reward for a guilty plea even in a murder (or especially), the Court of Appeal had to tone it down a bit but is heavily criticised for having done so. At the end of the day, what is the point of pleading guilty to a crime that will attract public outrage? Probably no point.

RETROSPECTIVE LEGISLATION

Whys after the event:

R v Pora (CA 225/00, 20 December 2000, Elias CJ, Richardson P, Gault, Thomas, Keith, Tipping & McGrath JJ)

Section 4(2) Criminal Justice Act 1985 states that no Court shall have the power to make any order in the nature of a penalty that it could not have made against an offender at the time the offence was committed. This is simply a declaration of the ancient common law prohibition on retrospectivity. However, the 1999 amendment to s 80 Criminal Justice Act provided for a mandatory 13-year minimum non-parole period for murder involving "home invasion" even if the offence was committed before the date on which s 80 was amended. In other words, on a literal reading s 80 as amended is retrospective. The Court of Appeal first got a look at the problem in *R v Poumako*. In that case, the Court was able to sidestep the issue to some extent because, at the time that Poumako committed murder, minimum non-parole was an available penalty. As a 13-year period of non-parole would have been available under the old "exceptional circumstances" rule, the mandatory 13-year home invasion penalty did not have to be invoked and the retrospectivity point was avoided.

In *Pora*, retrospectivity was directly in issue: he was sentenced in 2000 for a murder committed in 1992 and the power to impose a minimum period of non-parole was not enacted until s 80 was inserted by the 1993 Criminal Justice Amendment Act. Therefore, the 13-year mandatory minimum non-parole order made against Pora was an order in the nature of a penalty that the Court could not have made against him at the time the offence was committed.

A Bench of seven heard the appeal and gave four judgments.

The Chief Justice and Tipping J held that s 4 specifically states that, with two express exceptions, s 4 overrides any other enactment or rule of law to the contrary, s 80 was not added to the express exceptions and therefore s 4 overrides it. Their Honours acknowledge that their interpretation goes against canons of interpretation such as implied repeal, the specific overriding the general, and the rule that Parliament cannot bind its successors. However, Their Honours considered that the language of s 4 and the prominence of place it was accorded in the Act suggested that it was a dominant provision and, therefore, the subordinate s 80 amendment must give way. That was not to say that Parliament cannot legislate in contravention of fundamental rights, simply that it must speak plainly to do so as "general or ambiguous words will seldom be sufficient".

In a separate judgment, Thomas J concurred with Elias CJ and Tipping J. His Honour challenged the majority reasoning. I quote his decision at length hereunder, first because he is right, a view I have already expressed in relation to *Poumako* at [2000] NZLJ 293 and second because this judgment is an astute contemporary account of the tensions within our Court of Appeal. In this case it is an argument well worth the cost of the ammunition. The case should be read by all criminal practitioners.

[118] ... I regard the judgment of the Chief Justice as a work of outstanding merit. ....

[120] ... Fundamental rights are to be taken seriously. This Court will not accept that, in enacting legislation, Parliament has intended to erode those rights unless it makes its intention manifest to do so in clear and unambiguous language. Where there is a conflict between two provisions the specific intent to abridge those rights must be plainly evident.

[121] Without challenging Parliament's supremacy, for Parliament can curb fundamental rights by making its intention to do so clear, this approach assumes a constitutional function. It provides a barrier against inadvertent legislation which would have the effect of abridging human rights. The conventional interpretative process whereby the Courts deem Parliament to have had an intention, even where it may have had no intention on the provision in issue at all, is arrested where fundamental rights are involved.

...

[123] The present case provides a compelling example of the risk that legislation of considerable constitutional significance can be passed without its import attracting the attention of the House. As recounted in *R v Poumako* [2000] NZLR 695, at 700 and 718-719, s 2(4) was introduced by a private member during the Committee Stage of the Criminal Justice Amendment Bill (No 2) 1999. Because it was introduced by way of Supplementary Order Paper it had not been subject to the scrutiny of the Attorney-General as required by s 7 of the Bill of Rights in respect of all Bills introduced into Parliament. A provision which is contrary to s 25(g) of the Bill of Rights; is in breach of this country's commitment to the International Covenant on Civil and Political Rights; is repugnant to the rule of law; and is condemned in any number of international instruments or treaties, was then passed without debate or demurrer.

[124] ... In essence, the difference [between the majority and minority judgments] reflects a different judicial philosophy and approach resulting in a different perception of the Court's role. But an examination of such factors as these would be outside the proper ambit of a judgment. Attention must be directed to the overt and discernible difference.

...

[128] It will be apparent that the canons of construction constitute a premise which is entrenched in Keith J's approach to the resolution of the conflict between the two subsections. This premise is absent from the Chief Justice's thinking. She accepts, as I do, that there is a choice, and that in the modern era a rights-centred approach is required to resolve the conflict – and to resolve it in a manner which can be said to take rights seriously.

Gault, Keith and McGrath JJ held that s 80 was retrospective but only until 1993 when minimum non-parole first became available as a penalty. The minority reasoning was also debated. This argument essentially holds that Parliament, having done it, demonstrates its right to do so.

Richardson P agreed with Gault, Keith and McGrath JJ but issued a separate decision stating that he expressed no opinion on "the alternative canvassed only in oral argument, that the amendment has no retrospective effect at all".

This repugnant legislation was the product of a parliamentary scramble to win the Law and Order badges for the forthcoming election.

There is an interesting division between the two packs of watch dogs. The biters, though otherwise well behaved and disciplined are prepared to protect, even if it means a (minor) confrontation with Parliament. The barkers are awake to the intrusion but really only raise the alarm. It is left to others to get up and sort it out. It is the barkers, three of whom at least – the President (ex Crown law Office), Keith J (ex academic and law commissioner) and McGrath J (ex Solicitor-General) – have the wider experience of both government and parliamentary workings. What is not so clear is who or what they think they are the watch dogs for: the citizenry, Parliament or the concept of constitutional law?

HELP POLICE: HELP YOURSELF

R v S (CA 236/00, 30 October 2000, Richardson P, Heron and Baragwanath JJ)

It is a fact of life that the Crown will reward one criminal if he or she will help them to prosecute another. It is a dirty business. Serious offenders demand benefits, favours, privileges but most of all they want time off the sentence they are serving. Usually, the way in which this is done is for police to write a letter to the Court outlining the assistance that has been given. The recent trial for the murder of Terry King featured a number of these sentenced witnesses who gave evidence for the Crown. All had received substantial reductions in their own sentences.

It should be made clear that the deals that are made, although generally suppressed if the witness is still in custody, are known to the trial Judge and admissible as jury evidence to the extent the trial Judge considers appropriate.

R v S reviews a number of significant reported and unreported decisions. It is a decision of the President assisted by a trial Judge who is well familiar with these problems and a former Crown prosecutor, so it is a useful guide.

After listing the relevant cases, the Court said:

> [18] It is to the advantage of the community that criminals should be encouraged to provide information which may assist in the prosecution and conviction of other offenders. As well, they should be encouraged to take the further step of giving evidence against those charged. Providing assistance of those kinds may well lead to the risk of reprisals and, if the consequence of assistance is a sentence which is more onerous on a prisoner, that too is relevant in assessing an appropriate discount, but it is not possible to lay down any hard and fast rule as to the amount by which a sentence is to be reduced.

The 12-year sentence, which already purported to give credit for assistance was (further) reduced to eight years. The tactical question of whether one should appeal in time and seek a benefit before the giving of evidence, or appeal out of time after the evidence is given, does not have an easy answer. The Court does not want to be subject to a form of blackmail but, equally, the appellant wants to know and does not want to stick the head out without an assurance that it will be worthwhile. Practitioners who find themselves acting for a criminal who is needed to give evidence will be bemused by the way police turn themselves into a "can-do" unit and suddenly concern themselves with all kinds of apparently minor requests. I do not think anyone outside the prison system really understands the way in which a little can go a long way: a private phone call, a walk out and about, private time with family or girlfriend, a letter to the Parole Board – little things that we take for granted become desperately important if you are doing years.

BAIL

Bail Act 2000

The Bail Act 2000 came into force on 1 January 2001. The Act gathers together all bail provisions into one place, codifies the common law rules relating to bail, and sets them out in a simpler form. There are one or two changes – most notably it extends the reverse onus to serious offenders who offend on bail and those with a history of offending on bail and those who have previously been sentenced to 14 custodial sentences and have at least one conviction for an offence committed on bail. There is also a mandatory requirement to take into account the views of victims of sexual offences and certain assault based offences. One more reckless change is the denial of the inherent jurisdiction of the High Court in relation to anyone refused bail in the District Court.

Inherent jurisdiction

Whaiapu v Wellington District Court & Police (M235/00, HC Wellington, 28 November 2000, Goddard J)

The inherent jurisdiction of the High Court is a valued taonga of our system. Entrusted to the few, it allows the High Court to mould procedure and remedies to work justice when black letter law does not cover the situation. The most common use of the inherent jurisdiction is, or was, in relation to bail. The superior Courts considered liberty of the subject important and were charged with the oversight of the so-called inferior Courts. If bail was refused in the District Court, you could appeal. But you could also apply in the inherent jurisdiction and start again from scratch. The additional benefit was that you could then appeal to the Court of Appeal, which you could not do – and still cannot do – if you began in the District Court. The Bail Act 2000 abolishes that right. In its place there is the tantalising but emasculated phrase "every bail appeal shall be by way of a rehearing". The High Court has, over many decades, made the so-called rehearing into an entirely elastic procedure that only may or may not have any features of a rehearing. It will be interesting to see if the High Court will give up the inherent power to supervise bail quite so easily but the answer to that one will have to wait for another day.

Last year, Emma Whaiapu was charged with disorderly behaviour. The offence did not carry a possible term of imprisonment; the maximum penalty is a fine. If and when there is a defended hearing, it could be conducted in her absence, she could plead guilty by letter and the case could be advanced through its various stages without any need for her to attend and take time off whatever else is pressing. In other words, a purely summary, minor matter. Except for one thing.

When she first appeared, a Deputy Registrar – at the request of the Police – ordered that she be bailed. The main obligation therefore became the obligation to attend at Court from time to time as the matter is called. The Registrar did not give any reason for bailing her. Her counsel asked a District Court Judge to release Whaiapu at large but that application was declined. Again, no reason was given. Counsel applied to the High Court at Wellington, under the aegis of the inherent jurisdiction, in order to put her grievance. The High Court decision, for no discernable reason, gave her what-for. You would think that she had challenged the very rule of law itself.

> [5] ... As [the Crown Solicitor] correctly pointed out, the High Court has the power to grant bail in its inherent jurisdiction should the necessity arise. However, the present situation is governed by the clear statutory procedure provided in the Summary Proceedings Act 1957, which includes rights of appeal in s 115D of the Act. Any challenge to this statutory process could therefore only be brought by way of judicial review, if a basis for review were shown to exist.

With respect, this appears to be fundamentally flawed. Firstly, judicial review is normally discouraged if a concomitant appeal avenue is available. Secondly, the inherent jurisdiction of the High Court was, at that time (ie before the Bail Act 2000 came into force on 1 January 2001), specifically preserved by s 115D SPA. In any event, it is unusual for criminal related matters to be questioned for want of form – for obvious reasons. The decision does not say what power to do justice the Court was deprived of by the use of this method. There is no doubt that the SPA allows bail to be imposed on people who do not face imprisonment and who otherwise do not have to come in person at all. Many criminal lawyers have pondered why that should be or how it can be justified. Section 24(b) of the Bill of Rights Act provides the right to be released on appropriate terms – it does not use the word "bail".

Here is the conclusion:

> [8] ... The application is quite misconceived. [The Crown Solicitor] is clearly right in his submission that the High Court has no jurisdiction to revisit a decision of the District Court by invoking its inherent jurisdiction when a right of appeal exists governed by a prescribed statutory process. To attempt to circumvent the statutory procedure by invoking the inherent jurisdiction is an abuse of the Court's process.

What is circumvented is not set out and no precedent is given for the proposition that it amounts to an abuse of process.

> [9] I turn to the added ground of appeal, namely, that the imposition of bail was unreasonable in the applicant's case. If the District Court had erred in this regard, then it would be the role of this Court on appeal, or in its supervisory jurisdiction, to correct the error. In the present case however, all that is at issue is the exercise of discretion. The alleged facts and the applicant's antecedents had to be weighed in the balance in exercising that discretion. There is not the slightest indication that the discretion has been wrongly exercised by the Registrar or [Judge] in the applicant's case. Therefore, even if this case had proceeded as an appeal under the prescribed statutory procedure, or by way of judicial review, it would have been doomed to failure.

At no point is it suggested that the Registrar or the Judge gave reasons for their decision. So to say "there is not the slightest indication" etc has to be seen in that light.

And so an opportunity lost. What are the criteria, post-Bill of Rights Act, that entitle a Court to force a person to come to Court when the substantive law relating to that offence does not require it? Don't know. ❑

COUNSEL IN MEDIATION

ALTERNATIVE DISPUTE RESOLUTION

edited by Carol Powell

The judgment of Glazebrook J in *Sunnex Logging Ltd v Carter Holt Harvey Forest Ltd* HC Auckland, 16 November 2000, CP 166/SD00, raises interesting questions about the role and duties of counsel appearing in a mediation and the effect that such appearance could have on a lawyer or firm who acts for a number of parties with claims against the same defendant.

Two different parties brought claims based on similar facts during an overlapping time period and involving similar representations made by a former employee of Carter Holt. One of the claims was a subject of two confidential mediations, which resulted in a settlement. The same barrister and firm of solicitors who were instructed in this case to act for Sunnex had acted for the plaintiffs, both for the Court proceedings and in the mediations, in the claim that was settled.

All who had attended the mediations had agreed in writing that: "As the condition of my being present or participating in this mediation, I agree that I will unless otherwise compelled by law, preserve total confidentiality in relation to the course of proceedings in this mediation and in relation to any exchanges that may come to my knowledge, whether oral or documentary, concerning the dispute passing between any of the parties and the mediator or between any two or more of the parties during the course of the mediation. This agreement does not restrict my freedom to disclose and discuss the course of proceedings and exchanges in the mediation within the organisation and legitimate field of intimacy of the party on whose behalf or at whose request I am present at the mediation, including the advisers and insurer of that party provided always that any such disclosures and discussions will only be on this same basis of confidentiality."

There were also confidentiality provisions in each of the settlement agreements reached at the mediations. There was no dispute that the terms of settlement were and should have remained confidential.

There was no allegation that counsel had breached confidentiality.

Carter Holt did not raise any specific confidential information that had been given or shown to counsel during the mediations. The concern, which Carter Holt expressed, related to the position and attitude of its personnel during the mediations, which it believed could have provided assistance with the current litigation. No specific details of this were given.

Carter Holt submitted that it would be impossible for counsel to discharge their professional obligation to Sunnex in the current proceeding without using or disclosing confidential information obtained in the conduct of the earlier claim in breach of the confidentiality provisions in respect of the mediations.

Sunnex opposed the application on the basis that there had been no breach nor would there be any future breach of confidentiality by its barristers and solicitors. It also raised the issue of unnecessary expense in changing counsel.

It was submitted that there was no real prejudice to Carter Holt in counsel continuing to act as the resolution of the present case depended upon whether the alleged representations were in fact made. This needed to be proved independently and whether or not there had been a settlement in the other similar case was largely irrelevant.

Glazebrook J distinguished this situation from the usual cases where there is an application to disqualify counsel on the grounds of conflict of interest, which usually occur to restrain counsel from acting against current or former clients. Further she clarified that there was no suggestion that there were any fiduciary duties owed by counsel to Carter Holt.

The main question before the Court was whether in such a case, the inherent jurisdiction and *Black v Taylor* [1993] 3 NZLR 403 (CA) applied, and if so, what were the considerations that needed to be taken into account.

Glazebrook J distinguished *Black v Taylor* on two main grounds:

- In *Black v Taylor* (a testamentary promises claim) the solicitor had acted for a number of family members over a period of years including both the plaintiff and the deceased. In the present case counsel had not acted for Carter Holt.
- The nature of the substantive proceedings in *Black v Taylor* and the wide-ranging factors that could be of importance in that case, made the knowledge of the family gleaned over the years very important. This was a contrast to the present case where the issues were relatively narrow.

Carter Holt had also argued that to allow counsel to continue to act for Sunnex would inhibit settlement, which would not be in the public interest. It was contended that settlement was such an integral part of the litigation process that if counsel could not advise on settlement (and it was argued and accepted by the plaintiff in this case that they could not), then they could not conduct the case at all.

Glazebrook J took the view that the fact that counsel could not advise on settlement did not necessarily lessen the prospects of settlement. What it did mean was that Sunnex would have to instruct another counsel for that purpose. Whether it was wise to continue with existing counsel in that circumstance was a decision for Sunnex and not Carter Holt.

Carter Holt also submitted that the Court should be vigilant not to allow the effectiveness of mediation in achieving settlements to be negated by permitting doubt over the confidentiality upon which they rely to be effective. Glazebrook J took the view that this was an argument for protecting the confidentiality of settlement terms by restraining counsel in question from acting in settlement negotiations. It was not an argument for total disqualification.

Finally, it was argued that counsel would not be able to fulfil their ethical duties to Sunnex, as these would involve disclosing the terms of the settlement in the other case, given that it would be relevant information in the case.

Glazebrook dismissed this argument for two reasons, first the duty would arise when advice was sought on settlement and it had already been accepted that the counsel would not act on any settlement negotiations and second any breach of an ethical duty owed to Sunnex was an issue for Sunnex and not for Carter Holt.

The Court then went on to consider the tests in *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 and *Prince Jefri Bolkiah v KPMG* [1999] 1 All ER 517.

Her Honour found that *Tower* set out a three-step test:

(a) is confidential information held which, if disclosed, is likely to affect the former client's interests adversely?

(b) is there a real or appreciable risk that the confidential information will be disclosed?

(c) should, balancing all factors, the Court's discretionary power to disqualify be exercised?

Prince Jefri had a two-step test, the first test was the same as *Tower*, but the second was a stronger test, whether there was any risk that the confidential information would be disclosed.

The Judge noted that in both *Tower* and *Prince Jefri*, the Courts had stressed the importance of the prior fiduciary relationship. There was no such relationship in this case and it was therefore arguable that neither test applied. Nonetheless the Judge chose to apply the tests in *Tower*.

The only confidential information to which Carter Holt had pointed was the terms of settlement. The defendant had been unable to show how this was relevant to the actual conduct of the litigation. Further the Judge noted that had the mediation failed to achieve a settlement the counsel involved would have been able to continue to act for that party in any subsequent litigation and could therefore have used their knowledge of the position and attitude of the defendant's personnel during the mediation.

Secondly, the Judge noted the contrast between the type of information which was important in *Black v Taylor* and that which was available in the present case. She noted "the information in this case may even come (given the nature of the case) within the category of information set out by Blanchard J in *Tower* as being too generalised to be of use" (para [81]).

Finally she noted that it was unlikely whether general knowledge gleaned, even in a situation where the context is a confidential one, can be seen as confidential information unless something more specific could be pointed to. In this case Carter Holt were unable to do this.

The next part of the test was to establish whether the confidential information, if disclosed, would be relevant. The Judge considered that it would be relevant in any settlement negotiations but there was nothing to indicate how that information was relevant to the litigation proceedings.

The Judge applied the second part of the test, whether there was a real or appreciable risk that the information would be disclosed. Again the Judge found that there was a real risk in so far as settlement negotiations were concerned but not in relation to the running of the litigation.

The Judge then applied the balancing part of the test, given that the counsel would not be acting in any settlement negotiations. She found "in respect of the more general information gleaned during the mediations ... the Court could not contemplate blanket protection of such information without showing particular prejudice ... or a particular public interest in such protection". Neither of these could be established in this case.

CONCLUSION

Parties to mediation need to treat mediation in the same way as they would any other negotiation. While there is still clear judiciary support for the confidentiality provisions of mediation and any agreement reached, there are some areas that are not protected by this confidentiality. Parties are likely to reveal some personal characteristics and other features which could be used, at least by counsel acting for another party to the mediation, in subsequent litigation.

This should not be a deterrent to use the process but simply a warning that full and proper preparation is essential and that the process is treated with respect. Where a party to a mediation has claims involving other parties arising from a similar period and series of events, parties may wish to impose further conditions on the mediation to ensure that no one who participates in the mediation is able to subsequently become involved with the other similar actions.

NEGOTIATION STYLES AND THEIR PRACTICE

Everyone appreciates the importance of strong negotiation skills, although there may well be a divergence of view on what makes a good negotiator. Is it the person who always gets everything they want, the one who gets more that the other guy or the one who enables everyone at the table to walk away feeling that they have achieved what they needed? Is it the quietly spoken charmer, the table-banging aggressor or the hard and firm person who holds resolutely to their position?

Any one of those styles will have its place in one type of negotiation or another and in many cases a combination of styles may be most effective.

While a principled or interest based approach to negotiation is recommended by leading practitioners and educationalists, there is still a large sector of the legal community which favours the competitive style. Indeed some may feel that clients expect this style of representation.

It may well be the case that where there is no continuing relationship between the parties and there are no other relevant considerations, that a competitive approach to a dispute or negotiation may result in an outcome closer to the client's original position than if another style was adopted.

The purpose of this article is not to establish which is better, but to discuss tactics and approach, which may be used for each bargaining approach to obtain an effective outcome in terms of that approach.

DISTRIBUTIVE OR COMPETITIVE NEGOTIATION

Competitive Negotiation is a style that effectively results in a winner and a loser. It often involves positional bargaining, where the parties begin negotiations with divergent positions and gradually chip away each other's position until they meet somewhere between the two original positions. A mark of a success in this kind of negotiation is to have moved as little as possible from the initial position.

Preparation and tactics

As with all negotiation, success requires preparation. Some of the issues that a competitive negotiator may consider in preparation include:

1. ***Arrange the negotiation venue.*** Choose a venue where you will have more control, such as your own office, you will be in a comfortable space and your opponent will be the visitor.
2. ***Arrange the meeting room.*** You can arrange the room to give yourself a competitive advantage in a number of ways, such as putting yourself with your back to the window, this means that it is harder to see your face and there may be light in your opponent's eyes, arranging the chairs so that your opponent's chair is lower than your own, you can even arrange the meeting in your own office and allow them less space for their documents at the edge of your desk.
3. ***Number of people attending.*** There can be a psychological advantage in having a large negotiation team when the other party has a smaller team. A sizable team does require management and each person's role should be clarified prior to the negotiation.
4. ***Timing.*** Pressure of needing to reach an outcome before a particular event, such as a trial date, or some other more individual deadline can give the party without that time pressure negotiating strength.
5. ***Prepare thoroughly.*** There is no substitute for knowing your material. A party faced with facts or information that they are unfamiliar with will struggle and may well accept the facts as presented as well as feeling on the back foot.
6. ***Lock yourself in.*** This is a tactic used by some negotiators and should be exercised with care. It involves the negotiator determining in advance a position and not being prepared to move from that position during the course of the negotiation. This tactic can be intimidating and can cause some parties to move drastically towards the intransigent position. The risk is obviously that the party will not move, which would result in severe frustration and no agreement. There is also the risk of loss of face if a party which has used this tactic is subsequently forced to move from it.
7. ***Consider legal precedent.*** If there is a legal principle or precedent which is beneficial to the position being taken, cite the precedent as part of the negotiation. This can be useful if the position taken is supported by the precedent or if the position taken by the other party is legally prohibited or troublesome.
8. ***Increase some demands.*** Traditionally, the positional bargaining approach involves parties moving incrementally towards one another until a compromise is reached. Another tactic which can be used is to increase some demands, in other words to move further away from the other party's position. This can create a situation of pressure, where the other party needs to reach a settlement, if they can see that their goal is becoming further out of reach. This again is a tactic to be used with care.
9. ***Reduce the agreement to writing.*** Once an agreement is reached it needs to be put into a written and binding form. It is not unusual for there to be more than one way of interpreting parts of the agreement reached and it can therefore be an advantage to be actively involved in the process of drafting the settlement agreement. It is also an advantage to do this at the meeting rather than afterwards so that the issues are finalised and there is no room for either party to come back later with additional issues.

   Refer to *Dispute Resolution* by Goldberg, Sanders and Rogers (Little Brown and Co).

PRINCIPLED NEGOTIATION

Principled negotiation works in an entirely different mode from competitive bargaining. This approach is described in Fisher and Ury's book, *Getting to Yes.* This type of negotiation process involves the parties working together to find a solution to the dispute or problem which meets all of the needs of all of the parties. The term "win-win" has often been coined with this process, as with mediation, although there is not always a clear win-win outcome and a better term might be to say that each party reaches an outcome that they can live with.

Fisher and Ury develop five basic elements to principled negotiation.

1. ***Separate the people from the problem.*** People often become very immersed in a dispute and can take the issues very personally. This makes it very hard for the parties to let go of a position and to move towards a resolution. It is therefore important, for this style of negotiating, to discuss the issues in dispute as being distinct from the parties or the negotiator. Avoid attacking the party or negotiator.
2. ***Focus on interests, not positions.*** Parties to a dispute and to any other type of negotiation, generally have some fixed ideas about what they want to achieve in an agreement. These "wants" are known as positions. Another way of approaching a negotiation is to look at what you want to achieve and why. The "why" is the interest. Once the interests of all parties are uncovered it may be possible for outcomes to be put forward which meet a party's interests in a different way from the original position.
3. ***Invent options for mutual gain.*** Once the parties have put their interests on the negotiating table, and before moving into a negotiation about who gets what, parties can raise a number of varying ways of achieving each parties' interests. This is often called enlarging the pie. One party might offer something that has money's worth to the other party but costs the offering party little or no money, eg the provision of services or the use of a family bach or boat. Or one can explore ways of both parties getting what they want from the same item eg subdividing a property or coming to a shared arrangement for the use of a holiday house.

   This process should take place in two steps. Initially the parties simply spend a period of time coming up with as many options as they can think of, without evaluating any. The next stage is to look objectively at the options and to begin to evaluate each to establish which are genuine possibilities.
4. ***Establish objective criteria.*** Positions are often based on subjective criteria. For example, a party may wish to sell their car. That party will want to achieve as high a price for the vehicle as possible. Conversely the person buying the car will want to pay as little as possible. In a competitive bargaining situation each would state a price that was better for them than what they would be prepared to accept. The two would then start moving towards each other in price until some middle ground was reached.

   In a principled negotiation the parties would look at finding an objective criteria to establish the value of the vehicle. The question the parties would ask is "what is the car worth?" and "how can we establish that value?" The discussion would then involve evaluating various methods of establishing the value of the car. Once a method was agreed upon then that method would determine an objective price.
5. ***Know your best alternative to a negotiated agreement (BATNA).*** The best alternative to a negotiated agreement or BATNA, represents the situation a party would be in if they did not achieve agreement as a result of the negotiation. The purpose of the negotiation is to achieve a result better than or at least as good as the party's BATNA. In a number of contentious situations, the BATNA involves Court proceedings or some other formal process. The BATNA would be the situation that a party would be in if they won those proceedings. As part of the evaluative process a party should also look at the WATNA (worst alternative to a negotiated agreement) and evaluate what is the most likely scenario – the MLATNA (most likely alternative to a negotiated agreement).

   This is essential preparation for a negotiation to enable a party to properly evaluate any offer that is on the table.

   There is also value in knowing what are the other party's BATNA, WATNA and MLATNA. Reference can then be made to the alternatives open to that other party when promoting an offer that has been made.

CONCLUSION

When electing an approach to negotiation the negotiator should spend time considering the value of each style taking into account factors such as the type of relationship that exists between the negotiators. In circumstances where there is likely to be a continuing relationship, tactics employed in a competitive bargaining situation may only work once or may create an element of distrust. Other tactics within the same style may be quite acceptable in some continuing relationships.

In every case there is a need for careful preparation and for consideration of what style and tactics will be most effective. ❑

LEADR UPDATE

The AGM of LEADR was held in Sydney on 23 November last year. At that meeting the new board of directors was elected and Mike Crosbie was elected to represent New Zealand members.

The relationship between LEADR and LEADR NZ as a chapter of that organisation has been through a period of major discussion and LEADR NZ is now confident that LEADR will be able to respond to the specific needs of the New Zealand membership in a more efficient manner.

One of the major changes relates to the accreditation procedure for mediators advancing from the Interim to Full Panel or on to the Advanced Panel. While the fine tuning is still being finalised in general terms mediators will now be able to be assessed by New Zealand assessors within a relatively short time.

LEADR NZ recognises that mediation is becoming of increasing relevance in New Zealand, as is demonstrated by the introduction of a mediation service in the new Employment Relations Act. Most legal practitioners are now likely to come across mediation or another form of dispute resolution process during the course of their practice and the skills relating to mediation are becoming more relevant.

LEADR continues to offer its four-day workshop, which has been revitalised to keep pace with changes in the ADR industry and to incorporate leading edge use of technology. The workshop is designed to enhance the skills of would-be mediators and other practitioners who either participate in mediations or will use negotiation and other skills in their practice.

This year there are four four-day workshops planned (see the What's Happening box) There will also continue to be locally based activities in the main centres with plans to include wider provincial areas.

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LAND LAW LANGUAGE

Julia Pedley, Massey University

reviews the* Encyclopedia of Real Estate Terms*, (2nd ed) by Damien Abbott, Delta Alpha Publishing, London and Washington DC

Anyone who has an involvement in real estate will find this book an invaluable resource. Published some 14 years since publication of the first edition, the book (which has been completely rewritten and enlarged), draws on material from the North American, United Kingdom, French, Canadian, Irish, Australian and New Zealand jurisdictions. The emphasis of the text however is weighted towards North America. The book claims to be "a comprehensive reference book on real estate – a dictionary, a thesaurus and an Encyclopedia, rolled into one". (preface vii.) Entries are current as at the end of 1999.

Following the preface and acknowledgments, the 1,472 page book, commences with a User's Guide and an alphabetical list of References and Abbreviations. These are followed by the main substance of this single-volume text, 1,289 pages, an A-Z Text of Entries, where the author guides the reader through a meticulously researched explanation of over 8000 words and phrases used in connection with real property. These terms are based on American and English practice, as well as terms from the civil law, French and Scots law and the Commonwealth. Familiar terms such as "fee simple", "mortgagor", and "landlord and tenant" abound, as well as some obscure ones such as "common of pannage", "bedroom community", "white rent" and "widow's quarantine". Within these pages the reader can discover what a "white bonnet", a "puffer", a "capper" and a "decoy duck" all have in common.

The aim of the *Encyclopedia* "is to help the user to understand the meaning of a particular term and its many facets; to appreciate its practical significance in practice; and to provide a ready means for further reference and specialist research". (User's Guide xv.) This has been achieved by the author in that for each of the alphabetised entries, the word or phrase is generally followed by a clear and authoritative definition containing references to cases (in many instances with quotations from the case being selected), statutory references, cross-references to other entries and bibliographical references.

The author, a specialist in real estate, has extensive experience in real estate development, investment, management and finance. Hence the book is not only a comprehensive reference on real estate terminology, but also extends to in-depth coverage of related terms on aspects of contract law, tort, finance, insurance and investment. This gives insight into the interrelationship between real estate and other associated disciplines.

What makes the book special is both its sheer breadth of coverage which makes for wide and fascinating reading, and the clarity of exposition in which terms are defined and explained. The scope of the work is astonishing and boasts some impressive statistics, containing more than 11,000 references (including over 3,900 cases, 2,100 statutory or code references, and 4,750 bibliographical references – the majority of which are referenced directly by page or paragraph number). In addition, a cross-referencing system which extends to more than 30,000 entries results in a remarkably extensive and thorough reference work. Here, the reader will encounter a vast array of real property terms at both the macro and micro level covering every aspect of real estate (appraisal, law, management, economics, finance, insurance, investment, taxation and urban planning). For a book of this depth and volume, the contents are presented in an easy accessible style. Words or phrases appear in the Text of Entries in boldface type in a word-by-word order. Cross-references are also shown in boldface type. The extensive use of cross-referencing is an important feature of this outstanding work, in that it ensures the reader is directed to refer to related meanings, related subject-matter and other matters of related significance. Case citations are clearly identified and are sourced from a wide range of jurisdictions. The inclusion of bibliographical references will appeal to those seeking a comparative analysis and sources for further research. All of this guarantees the book is straightforward to use with words or phrases able to be quickly located and cross-referencing followed up on.

Whilst undeniably a major work, this is not a text designed to be read from page to page. Rather, as an encyclopedia, it is designed to assist and enhance the reader's understanding of real estate terminology and provides a concise yet thorough explanation of the legal and practical significance of that terminology. Thus for anyone wishing to discover the meaning of a real estate term, without having to trawl through pages of text, this book will prove to be inestimable. Of particular value is the fact that many terms are placed in a historical context. This extends to an explanation of the feudal terms associated with land law, and the fact that much of the real estate terminology which is used today has developed through a chain of Roman, Norman, ecclesiastical, civil, common, equitable and administrative law.

The book concludes with a set of appendices which include a bibliography of over 900 books referenced under subject headings for ease of locating; a selection of major English and US laws and enactments; a compilation of professional associations; table of measurements; financial formulae and acronyms.

The magnitude of its content and style of presentation should guarantee wide appeal to the academic and, principally, property lawyers and all those involved in the real estate industry as well as anyone who is interested in real estate. This monumental book looks set to be the authoritative work on this area of the law, and can be strongly recommended as an indispensable reference text. ❑

UNDERSTANDING THE PPSA

Stuart Anderson, University of Otago

reviews Widdup and Mayne Personal Property Securities Act: a conceptual approach (Butterworths, 2000) and takes off from there

This commentary began life as a review of a book by two members of Russell McVeagh, Linda Widdup and Laurie Mayne. Its title is *Personal Property Securities Act, a conceptual approach*, published by Butterworths at $90, running to 329 pages of text, it is without doubt a very competent book. But the PPSA, as Widdup and Mayne say, is a "complicated, provocative, yet fascinating scramble of legislation". One thing it may provoke is disagreement, as, alas, I shall have to demonstrate in some detail below, not because I want to insist upon my own view, but because the book raises an interesting and very difficult question about how the PPSA should be understood. It arises because the Act is a close copy of Saskatchewan legislation, itself a representative of the western Canadian model PPSA. Should our Act be treated as a New Zealand code, entire within itself, or as a text which brings with it a network of conventional understandings, controversies, practices and decisions located in a literature to which many, perhaps most, New Zealand practitioners will not have easy access?

First, to the book. By taking a conceptual approach the authors are freed from the tyranny of section number order that besets the "handbooks" on Canadian provincial PPSAs, enabling a wider ranging analysis of the Act's main principles and applications. Thus they can draw on scattered provisions in the Act to craft a text which combines "how it works" with "do it this way" and "what if?" in whatever proportions suit. Their first stated aim is to bridge the conceptual gap between pre-PPSA law and the PPSA. By this they mean to show how the PPSA fits with bedrock legal and equitable concepts – like, for example, postponement of the passing of title, or the acquisition of equitable title to after-acquired property. Thereby they domesticate the PPSA, making it seem less alien. At its best the book blends the "before" with the "what next" and the "what if" very well, the chapter on the (hoped for) demise of the floating charge deserving special mention. Canadian analogues are used extensively, reflecting both the Act's origins and Linda Widdup's practical experience in Canada.

The authors' second aim is to provide an "understanding of the PPSA that can be applied to situations as practitioners encounter them in practice". The emphasis is on "understanding". This is not a compendium of quick fixes for all known transactions, but a broadly based analysis that will help practitioners to meld the Act to their own situation. It is a book to be read and thought about, not one to be consulted quickly when need has inescapably arisen. It should be read all the way through, too, since closely related points are often to be found in widely separated chapters, and within each chapter it is common to find broad propositions in early paragraphs substantially qualified in later. It will need to be read with the Act by its side, since it does not always reproduce the exact text. And here a reviewer's gripe: the book is not always conscientious in referring readers to the exact section under discussion. There are too many general "the Act provides" without accompanying references.

Good general points? The book is always well written, it is clearly laid out, and, above all, its coverage is wide and reasonably deep – it is not a long book by PPSA standards. There is a mass of useful and thought-provoking analysis. Some of the chapters are particularly stimulating and informative: those on deemed security interests, purchase money security interests, accounts receivable financing, and chattel paper financing particularly come to mind. Less good points? The cross-referencing between chapters could have been more rigorous, there are times when it reads more like a text on Saskatchewan than on New Zealand, and there are passages where closer reference to the statute might have caused the authors to alter what they have written. It is inaccurate to say, for example, that the Act does not "specifically state" that land and interests in land are excluded (p 10); the authors themselves point out on p 36 that s 23(e)(i) and (ii) do just that. Perhaps s 23(e)(xii) and (xiii), mentioned on p 34, would have enriched and made more relevant the discussion on pp 12 to 14 of which Canadian licences and quotas have been found to be "personal property", or perhaps the authors could have looked for some New Zealand examples to localise their analysis. And it is a bit lazy to skip past the Select Committee amendment to s 53 as though it did not exist (p 116); the addition of the words "or that arises under s 45" enable an argument to be made that buyers in the ordinary course of business now take free from a wider range of security interests than just those given by the seller. I do not claim that this should be a successful argument; policy is against it even if grammar is for it. But someone somewhere will make it, and a book such as this should keep close enough to the text to notice it. I raise these detailed little points just to warn readers against treating the book's every statement as gospel.

Now to the first of the points where Canadian material may or may not help. It concerns the meaning of "security interest", the Act's central concept. Widdup and Mayne's exposition begins safely enough, with the unexceptionable truism that because a security interest is defined as an interest that secures "payment or performance of an obligation" (s 17) there is no security interest if there is no obligation. But they understand "obligation" in a peculiarly narrow way: if, at the moment, there is no money actually owing by the debtor, then there is no obligation, and hence no security interest (pp 18-19). Thus if an overdraft facility is not in debit, whether because no money has been drawn down at all or because all that has been drawn down has been repaid, then there is no security interest, though there will be one in the future when the facility is used. The point matters; probably not as against other secured parties, where priority depends upon the first to file rule (s 66), but as against intervening non-secured parties such as buyers, who may take subject to the interest if it exists, but obviously take free from non-existing interests. The alternative view, not stated in the book, is that if the lender has undertaken to advance credit, and has not simply reserved a pure discretion, then the borrower is under a contingent obligation sufficient to support a security interest. That view can be supported without recourse to Canadian material: it conduces to much greater certainty for the secured lender, whose position does not fluctuate randomly with the state of the account. And it should cause no harm, since the financing statement will disclose that the borrower's assets are encumbered. Further, the authors' view is weakened when they contradict it later in the book. At pp 63-64 they relate how "attachment" occurs when (inter alia) the secured party gives "value" (s 40), which includes purely executory consideration (s 16). The very example they give is of a promise of a loan: *Agricultural Credit Corp of Saskatchewan v Pettyjohn* (1991) 1 PPSAC (2d) 273; [1991] 3 WWR 689. Yet it cannot be possible for a non-existing security interest to "attach", since attachment is simply the statutory language for expressing existence. Should the discussion range further? From time to time, but not in this context, the authors rely on PPSA handbooks from Canada: Jacob S Ziegel and David L Denomme, *The Ontario Personal Property Security Act, Commentary and Analysis*, 1994 for Ontario, and Ronald CC Cuming and Roderick J Wood, *British Columbia Personal Property Security Act Handbook*, 4th ed 1998 for the western model. I do not have access to that, but I do have their Alberta handbook, Cuming and Wood, *Alberta Personal Property Security Act Handbook* 4th ed, 1999 and I can see that on general points their text is very close to the 1987 edition of their Saskatchewan handbook Cuming and Wood, *A Handbook on the Saskatchewan Personal Property Security Act*, 1987. I infer that they are unlikely to have changed their minds on reaching the Pacific. These commentators think that in the circumstances we are considering there is a security interest. Ziegel and Denomme, 113-114; Cuming and Wood, *Alberta*, 164; Cuming and Wood, *Saskatchewan*, 93 Further, although authority is limited, it too is against Widdup and Mayne *Central Guaranty Trust Co v Bruncor Leasing* (1992) 97 DLR 4th 133; compare *Pettyjohn* above, if we think Canadian provincial case law relevant.

The authors fret about the difficulty of complying with one of the "description" requirements for security agreements, "an adequate description of the collateral by item or kind that enables the collateral to be identified" (s 36). This too matters, since compliance with s 36 is a precondition of enforcing a security interest against third parties. Widdup and Mayne are particularly concerned about the application of "item or kind". Their argument is complex, and I cannot easily do it justice here. Broadly, they head for Saskatchewan, unfavourably contrast what they find here with what they find there, and erect "item or kind" into a hurdle that seems to work in addition to the requirement that the description enable identification. Would we reach a different conclusion, or, at least, worry less about it, if we treated the PPSA just as a New Zealand text? First, note that lenders whose security interest is equivalent to the old-style floating charge are either unaffected or are better off. A different part of s 36 enables them to reach out to all the debtor's present and future property, with or without specified exceptions. So almost by hypothesis, the authors' doubt concerns lenders who before the PPSA would have to have been specific. If "before" the PPSA takes us back to basic common law and equity, then we should be accustomed by now to property interests having to be "certain": *Re Goldcorp Exchange Ltd* [1994] 3 NZLR 385 (PC); and, generally, *National Provincial Bank v Ainsworth* [1965] AC 1175; [1965] 2 All ER 472 (HL). Every seller on conditional sale or title retention must already know that if a buyer becomes insolvent before payment, an Official Assignee, liquidator or receiver is entitled to demand proof of the interest retained, and that that may include proof of the identity of the chattel: Sally Wheeler, *Reservation of Title Clauses; impact and implications*, especially ch 4. This is not some accidental quirk of the law: it is a condition of asserting a property interest against a third party that one should be able to prove that one has it. And if the "before" includes the description requirements for "instruments by way of security" in the Chattels Transfer Act, then s 36 can be seen only as a relaxation. But if we are to look to Canada, whereabouts do we choose? This part of s 36, as the authors notice, is similar to the Ontario PPSA, rather than to the western Acts, Saskatchewan included. The authors pursue their observation, turning to the relevant pages of *Ziegel and Denomme*, but not as far as the comment on p 113 that in Ontario the requirement that the description be adequate to enable identification of the collateral was a liberalisation, inserted to head off a possible return to a more exacting standard. Perhaps "item or kind" is also a relaxation, or a spelling out of what is latent in the Ontario section: (reasonable) identification can be attained by describing the item, or by stipulating "all [class]". The authors' approach is not obviously wrong; indeed, like nearly all sections in the PPSA, s 36 carries a cross-reference to its Saskatchewan equivalent. Nor can it be said that there is any approach which will eliminate all difficulties with item identification. Ultimately we reach a question of fact, whatever approach is taken. But the authors' is not the only legitimate approach, though they present it as though it is. Ironically, in the context where s 36 is most likely to cause difficulty, debts currently secured by Romalpa clauses, the authors draw no attention to it: ch 21; contrast Dugan, [2000] NZLJ 241.

If the PPSA is regarded as a fresh start whose only history lies in what it replaces, then perhaps fresh eyes will see features that the well schooled may not. If the emperor's clothes have slipped a bit, perhaps it may take a novice to notice. With our PPSA, I think, there are problems in getting all the sections concerning buyers of encumbered goods to work harmoniously together. It is probably our own fault for tinkering with the text; I have already mentioned the problematic addition of the words "or that arises under s 45" in s 53. But some of the difficulty may well be structural. Start with the late changes made to s 52. When the Act was but a Bill, the equivalent clause freed buyers from unperfected security interests, but not if they had actual knowledge of the interest. Submissions were made to the Select Committee that the knowledge proviso introduced an unjustifiable and potentially troublesome distinction between buyers and secured parties, because the priorities regime for competing security interests operates irrespective of knowledge. So the knowledge proviso was removed from s 52, making the New Zealand PPSA different from the Canadian Acts. That raises a question here which has not arisen there: should we read s 25 so that it applies to the situation? Section 25 provides that "all rights, duties or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice". It looks important, and it is surprising that in a book promising a "conceptual approach" it gets virtually no coverage. Is our buyer, who knew about an unperfected security interest, someone exercising a "right arising under the Act"? Perhaps she is: a right under s 52 to take free from a property interest which under the general law would bind her. If so, what would constitute lack of good faith? Not mere knowledge of the interest, because s 25(2) expressly says so. Readers familiar with the meaning of "fraud" in the Land Transfer Act will recognise that situation! If our buyer had that "dishonest extra" required under the LTA, it would be tempting to apply s 25 to her. But if we do, we would presumably have to apply it also to a third party who was not a buyer but a holder of a second security interest. Is that permissible? Perhaps it would too radically disrupt the priorities regime? If so, a narrow reading of "rights" could be given to s 25 to exclude its operation in relation to third party buyers and lenders. There are difficult choices to be made here, and it is regrettable that the authors have so little to say about s 25.

A similar problem in reading disparate sections together, still in the context of sales, occurs with compulsory serial number registration. Suppose a security interest in a motor vehicle, where an erroneous Vehicle Identification Number is registered in the financing statement; the debtor wrongfully sells the vehicle to a buyer who has actual (but off-register) knowledge of the security interest. The authors give the straightforward answer (p 118): but for her knowledge, the buyer would have clear title against the secured party by virtue of s 55. But, having knowledge, she takes subject to it. But as they also relate, in a different chapter (pp 51 and 186), if registration is "seriously misleading" it is "invalid" (s 149). And, as they say in yet a different chapter (p 284), in Canadian PPSA law an "invalid" registration renders a security interest unperfected, and there is every reason to suppose that our own PPSA is meant to be interpreted in the same way. So the secured party says s 55 applies, and the buyer is bound because she had knowledge; whereas the buyer says s 149 applies, hence s 52, and she takes free despite her knowledge. Again, perhaps we can catch our unmeritorious buyer with s 25, the "good faith" section mentioned above, though more than mere knowledge would be required, if the section applies at all. More interestingly, is our posited error "seriously misleading"? There seem to be two issues. First, which errors in registering are seriously misleading? Test it by the limit case: can even a single digit error be seriously misleading? Canadian authority suggests it probably will be *Primus Automotive Financial Services Canada Ltd v Kirby* (1998) 57 AltaLR 3d 279, 1998 AltaDLexis 710 (decision of a Registrar in Bankruptcy) unless the search facility were programmed to throw up a list of near-misses, and the one it did produce included the erroneously registered number, which, if followed up, would lead to the right though partly erroneous financing statement: Cuming and Wood, *Alberta*, 402-404, 435-436. The Ministry of Economic Development's latest posting, *Changes to the Functionality of the Personal Property Securities Register*, seems to envisage no such list of near-misses (www.companies.govt.nz/search/cad/). The second issue raises a major policy choice: suppose no list of near-misses, so that a search just by serial number would not disclose the security interest, but a search by debtor's name would have done. Does an error cease to be seriously misleading if the interest can be found (albeit in its mistaken form) by that other route, or is the searcher entitled just to use whichever single search criterion she chooses? If we are tempted to say that the alternative route stops the error from being seriously misleading, is there here a hidden criterion of the "reasonable searcher", and, if so, is that person supposed to be a would-be buyer or a would-be holder of a security interest? The latter would surely search against the person, at least against the person to whom it was considering lending, while the former might very well not. The structure of s 150 suggests perhaps that the existence of an alternative route is irrelevant, though it may not say so in so many words, and, indeed, the precursor of s 150 in the New Brunswick PPSA was introduced specifically to emphasise that searchers are entitled to put their full reliance on a single search criterion: Catherine Walsh, *An Introduction to the New Brunswick Personal Property Security Act*, p 217. Our s 150 has a cross-reference to New Brunswick, so presumably this sort of material may properly be used, though I wonder how many copies there are of Catherine Walsh's guide to the New Brunswick PPSA in New Zealand.

I want now to bring my various points together. The authors' method, not always, but often, is to use Canadian experience – books, case law, general know-how – to illuminate and expand upon the Act, to analyse doubtful points and to illustrate the application of some of the Act's flexible standards. And the book is richer for it. But as I have demonstrated, similar Canadian material can be used to draw different conclusions; it is as contestable as any other sort of legal material. In preparing this commentary I have used four handbooks, the Canadian Abridgement, several sets of printed reports, LEXIS.com for some otherwise inaccessible cases, and the world wide web for checking the Ontario legislation. Is it right that understandings and interpretations of the Act should be grounded in material that few practitioners can easily access? It is something of a precondition of a legal system that its materials be accessible. Yes, the PPSA does invite Canadian comparison by its cross-references to other PPSAs, mostly Saskatchewan, sometimes New Brunswick. But to say "there is Canadian authority or commentary that helps with this question ..." is to claim a sort of additional authority for the opinion that is about to be given. There is nothing wrong with that, provided that it can be subjected to informed critical scrutiny. The opponent must be able to say, "Yes, but there are contrary cases ...", or "Yes, but in other Provinces with similar Acts ...", or "Yes, but the legislature reacted by ...", or "Yes, but such a ruling was needed to maintain consistency with other rules they have there, which we do not have here ...", or make any of the other responses acceptable within the interpretive community. I doubt that there is anything like the equality of access to Canadian materials among New Zealand practitioners needed to enable them to share the Canadian provincial interpretive community, and if deregulation of the profession brings the demise of local law society research facilities that inequality may well get worse. If the PPSA were a specialised area, specialists could no doubt be expected to gear up. But it is not. The problems I have selected in reviewing this book could arise in any practice anywhere. So perhaps we would do well to decline the invitation, and instead to treat the PPSA just as a New Zealand code replacing the previous New Zealand law, less interesting though that will make the literature in the short run. ❑

STAKEHOLDERS IN JAPANESE CORPORATE GOVERNANCE

Luke Nottage, Barrister

finds the Japanese questioning the "stakeholder" approach

From a broad perspective, corporate governance in Japan faces potentially major transformations. Corporate governance can be usefully conceptualised in terms of express or implied "agency" contracts among various stakeholders, especially managers and owner/shareholders, but also creditors, employees, suppliers or contractual partners outside the firm or other owners, and even local residents or government authorities (T Hoshi, "Japanese Corporate Governance System" in K Hopt et al (eds), *Comparative Corporate Governance: State of the Art and Emerging Research*, Oxford, Clarendon Press, 1998, at 847). This focuses attention on a common problem in the relationships between these various stakeholders: incomplete information. That gives rise to the dual problems of "adverse selection" ("hidden information", resulting eg in creditors agreeing to lend money to what turn out to be generally high-risk firms) and "moral hazard" ("hidden action", eg managers investing loaned funds in excessively high risk projects).

SHAREHOLDER/OWNERS AS PRIMARY STAKEHOLDERS

The agency problem between shareholders and managers remains usually the most important aspect of corporate governance, at least for large publicly held companies. To counter the informational advantage held by managers, basically two types of systems are available to shareholders. The first is "control oriented". Shareholders monitor management behaviour, typically delegating this to a board of directors whom they elect; and they intervene if necessary, eg by a proxy vote fight to replace directors and hence managers. However, the costs involved in this system usually make it more attractive to large shareholders with good management skills themselves. A second system available to shareholders, "arm's length" control, is more passive; the shareholders do not actively intervene in management. However they take action when unsatisfied with managers, especially by selling shares, which may lower share prices and encourage eg hostile takeovers. Employee share ownership programmes (ESOPs) can also facilitate such indirect control, by turning employees into another type of stakeholder – shareholders. Another way to motivate managers to work for shareholders is to create common interests, eg through high-powered incentive methods such as very profit-sensitive bonuses or stock options.

For most of the post-war period in Japan, "arm's length" control has been weak; but this began to change in the 1990s. On the one hand, stock option schemes were legalised in mid-1997. Bonuses have been linked to profits generated, in fact more so (ironically) than dividends paid to shareholders, yet not linked closely enough to generate a clearly "high powered" incentive for managers to work in shareholders' interests. However, more Japanese firms are beginning to introduce performance related wage differentials. Such transformations in labour relations, located in broader context below, may also reactivate ESOPs as an incentive for good management. So far in Japan, ESOPs have been adopted by a large majority of listed companies and collectively amount to significant percentage shareholdings, but they have not encouraged more dividend pay outs nor acted as a mechanism to independently control management.

On the other hand, other types of arm's length control have long operated in Japan, albeit not always so obviously; and they too are becoming increasingly important. Commentators have long stressed the lack of hostile takeovers in Japan. Yet so-called friendly takeovers or mergers often occur in the context of poor corporate performance, which may be reflected in weak share prices. Importantly, there is strong correlation between share price weakness and managers resigning "voluntarily". One reason is that firms performing badly on the sharemarket find it difficult to raise equity finance, and that makes it more difficult to obtain debt finance from banks. That pressure will be all the greater in recessionary times, as in Japan nowadays. Pressures from the Japanese share market already have forced some firms to restructure their workforces, with satisfaction with that management response reflected in higher share prices. Overall, moreover, aggregate cross-shareholding in publically traded shares has declined since the stock market collapse and burst of Japan's "bubble" economy in the early 1990s. Finally, the greater presence of foreign institutional investors in the deregulating Japanese markets should continue to inject more arm's length control into the corporate governance system.

Potentially important developments in "control-oriented" shareholder mechanisms are also apparent in Japan. One major mechanism for most of the post-war period has been the "main bank" system, involving a bank (usually with the largest shareholding – albeit hitherto statutorily limited to five per cent) sending its own managers to direct operations of debtor companies performing too badly.

This system is coming under pressure also due to the combination of recession and deregulation. By contrast, smaller or less powerful shareholders in Japanese companies have faced a major obstacle in exercising more direct control over managers: the emasculation of the board of directors, due to appointing directors from among managers. This practice may be transformed by changes in the labour market too. A few companies also have begun to appoint truly "outside" directors. That should continue to be prompted by heightened attention generally to shareholder rights in the 1990s. A key factor has been a legislative amendment in 1993 which set filing fees for derivative suits at a uniform 8200 Yen (less than US$100), leading to a rapid increase in litigation – albeit from a low base. As well as strengthening the ability of all shareholders to directly or indirectly control managers, this makes it more difficult for key shareholders (such as main banks) to act in their own interests (or of blocks of stakeholders, such as creditors) to the detriment of shareholders overall.

CREDITORS, RECESSION, AND FINANCIAL MARKETS

A distinctive feature of Japanese corporate governance has been the greater presence of creditors, due to comparatively more use of bank rather than equity finance. Yet the capital markets will undoubtedly expand in importance in the wake of ongoing economic stagnation and the current severe credit crunch, combined with globalisation and financial market deregulation. The deregulatory "Big Bang" (or "Long Bang") initiated in 1997 is now almost complete, and the legislative and structural reforms are very wide-ranging.

Japan's huge bad debt problem and ongoing credit crunch were related to problems in corporate governance which encouraged Japanese financial institutions to lend (and invest) in risky firms, and then not adequately monitor managers in those firms. To solve such problems of adverse selection and monitoring, one solution is to give creditors shares in the companies they lend to. This helps to the extent that shareholders generally can overcome agency problems vis-à-vis managers. In addition, creditors can attempt to control managers in two main ways. One, again, is more "arm's length" control. The creditor still delegates much control to managers, but may step in to force bankruptcy, thus creating an incentive for managers to pursue creditors' interests. However, forcing bankruptcy must be a credible option. Japanese insolvency law has had various problems, which have only started to be addressed at the end of the 1990s (eg the Corporate Rehabilitation Law enacted in 1999).

Alternatively, or in addition, creditors can adopt more control-oriented strategies. They more directly monitor the behaviour of managers, and intervene if necessary in their appointment or replacement. One way Japanese banks have been able to directly monitor their borrowers' managers, at least within Japan, has been by providing a range of services rather than just loans. Yet that was difficult in overseas lending, and has become more difficult domestically as competition has intensified due to deregulation. Deregulation, combined with the recessionary environment facing Japanese financial institutions in particular, also makes it more difficult to retain the long-term relationship required to be a firm's main bank. That system has involved a primary lender which held shares over lengthy periods and intervened especially in times of debtor's financial distress by seconding bank managers. As banks become strapped for funds, however, they instead may call in their loans or simply refuse to lend more. An increase in lender liability claims by debtors was noted already in the mid-1990s. More recently, there is evidence of banks selling off their shareholdings as well. This prevents them remaining or developing into a main bank, better able to monitor debtor firms. It also creates less incentive to send their own managers to debtor firms if in distress. At the same time, if financial institutions holding shares in a debtor firm continue to sell them off, there is more chance that they will refuse to delegate monitoring and intervention to another institution.

Such breakdowns become even more likely as more and more foreign financial institutions, and indeed some domestic companies from other business sectors (such as the software conglomerate, Softbank, and Sony) are taking advantage of deregulation to enter the Japanese banking market. These "outsiders" are particularly likely not to take over, and certainly not take on, even small shareholdings in debtor firms in such a changing environment. Even if they do, they may refuse to "take turns", accepting the delegation of other creditor/shareholders to send valuable management resources to help keep debtor firms alive. Their inclination, no doubt often in their short-term interest, may be to enforce their strict legal rights, calling in their security or forcing bankruptcy. After all, lending institutions (and associations) in Japan have long made sure that their strict rights are well protected by contract and commercial practice at the time of lending.

LABOUR MARKET VICISSITUDES

Another often cited aspect of Japanese corporate governance, especially through to the 1980s, is the strong influence of employees as stakeholders. Conceptually, the corporate governance issue has been how employees can constrain managers, who may prefer to fritter away company funds on themselves. The first, more "arm's length" solution to this tension is to give managers shares in the company, as with the creditor/manager agency relationship. Again, this works as far as the agency problem between shareholders and managers is resolved generally. A second approach is more control-oriented. One example is the two-tier board structure for German stock companies, in which a supervisory board is partly elected by employees, and then appoints management board members. Japanese corporate law provides no such formal mechanism for employee supervision of managers. Yet control arises in practice especially because most managers in large Japanese companies have been appointed from among existing employees, in a system of life-long employment and promotion based primarily on seniority. Correspondingly, the external labour market has not grown much in recent decades.

Yet Japan faces with record unemployment, albeit at lower levels than in Europe, along with much "under-employment". The ongoing recession creates a zero-sum situation and heightens conflicts between employees and other stakeholders, notably shareholders. They will no longer tolerate employees being treated as de facto residual claimants, for instance earning salary bonuses while dividends remain constant or decline. Capital markets also have to be relied upon more, especially as the credit crunch continues, with recession and deregulation creating more variability in corporate profitability. In addition, the service sector continues to grow in importance, bringing the need for (and the possibility of) more flexible working hours. Both factors are related to changing demographics in the labour force

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TRADE SECRETS ONLINE

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explores virtual reality in a modified version of a paper given at the September 2000 IBA meeting, Amsterdam

The issue of trade secrets in an electronic environment is not a new one. Indeed, large mainframe computers have been around since the 1950s and since the 1980s the ubiquitous PC has revolutionised the way we create and store information. However, the true revolution has occurred in the past five years with the ability to connect separate desktop computers into groups or clusters which in turn, connect to others. The result – a massive, robust network, now called the internet.

It is apparent that trade secret law remains important in the current networked digital environment and has adapted well to the rigors of this environment. Generally, it remains effective as a commercial tool. However, because of the unique character of the internet, special care needs to be taken to secure and preserve trade secrets dealt with in a digital environment. At the local and international level, technology and the tensions between the information rich and the information needy will shape the future of the law as lawmakers grapple with the contradiction of trying to keep information closeted and confined but while working in an essentially open environment.

An action for breach of confidence protects information ranging from personal information (with the potential for an attendant right of privacy) to commercial and technical information. It is this latter type of confidential information that is normally termed a trade secret.

In this article I have referred to "trade secrets" loosely. There is of course a distinction between confidential information and trade secrets, the latter being a subset of the former. For convenience I tend to use the term "trade secrets", unless a distinction needs to be made.

BACKGROUND

The notion of the transmission of trade secrets through electronic means is, in itself, and not worthy of special mention. That is, as long as the trade secret retains its character of confidence and the means of transmission is secure. However, when the internet is used as the means of transmission, the situation begins to change, some say, in a fundamental fashion.

The reason for this is that the notions of confidentiality and secrecy, which lie at the heart of the law of trade secrets and confidence are met by the opposing notion of an entity that is essentially ephemeral, open and largely unstructured.

Indeed, it could be argued that the internet and trade secrets are inherently antagonistic and inimical to each other's existence. There are a number of factors, which create this situation. Two are speed and scale. As Lucinda Jones notes, developments in digital technology are now taking place with a pace that outstrips traditional law making processes and challenges law and policy makers. She also points out the second dramatic feature of the internet is its proportion, with 150-200 million people around the world connected and having access to more than an estimated 600 million separate documents. (Lucinda Jones "An Artist's Entry into Cyberspace" [2000] EIPR 79. *The eGlobal Report* (at www.emarketer.com) reported that there were 130.6 million active users in 1999, *Time* (June 22, 1999). Estimates for January 1999 by Forrester Research Inc www.forrester.com .)

The pressures to normalise and regulate the internet are significant and growing. This is illustrated by the comment by Masden "The Clash of Technology and Human Rights" *Symposium on Privacy-Enhancing Technologies*, September 17, 1996, Ottawa that:

> We are at a crossroads; the internet can be a world-wide electronic kiosk of ideas, information, entertainment, or it can be a government restricted and monitored data highway complete with roadblocks, checkpoints and land-mines that are designed for surveillance, censorship, restricted access, and the use of government-mandated languages.

When it comes to confidential information and trade secrets the dilemma is no better illustrated than in the seminal words of John Perry Barlow in 1993, where he noted with remarkable precision of thought:

> I refer to the problem of digitised property. The enigma is this: If our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to be paid for the work we do with our minds? ("The Economy of Ideas: A Framework for rethinking patents and copyright in the Digital Age (Everything you know about intellectual property is wrong)" (1993) *Wired Online* (at www.virtualschool.edu/mon/Economics/BarlowEconomyOfIdeas.html).)

THE INTERNATIONAL ENVIRONMENT

At an international level a number of policy concerns have arisen. As noted by Baragwanath J ("Global Electronic Commerce: The Response of the Law Commission" New Zealand Law Society Conference 1999) when discussing the challenges ahead:

> The first is a vision of a better future. There is general consensus that a borderless world of electronic com-

> merce is both technically attainable and essential to the optimal social and economic development of the world. If properly managed, enhanced commerce and education, aviation safety and culture are among the benefits that can emerge, to the considerable advantage of the world community.
>
> The second message has a discordant note: of risk that the opportunity will be lost by our generation. That is because the legal systems of most of the 187 states are incompatible with one another and there are no adequate plans in place to deal with that problem.

When trade secrets are involved, it is unwise to assume that any particular viewpoint, whether it be socio-economic, political or legal, is necessarily correct. We may need to question even the assumption that trade secrets should necessarily be protected. The digital environment and the internet in particular present new challenges to law and policy makers. Some argue that inventions should be protected through intellectual property only for the purposes of creating limited rewards to those whose ideas benefit the public: access to information should be preferred to strict enforcement of rights to control inventions. As Anawalt points out, two major social policies favour the pro-access principle. The first is freedom of speech and the free exchange of ideas in the community. The second is the general social policy that favours freedom to exercise a trade or to compete. These two principles find their way into judicial thinking in a number of jurisdictions and underpin a range of decisions where access/freedom was preferred over a right to restrict. (Control of Inventions in a Networked World: Anawalt, H C: (1999) 8 *Information & Communications Technology Law* 141.

This viewpoint is widely supported in developing countries. At a recent meeting of experts, organised by UNESCO, in discussing the increasing gap between information have's and have not's and the role of recent international treaties and agreements, Wilfredo Trinidad from the Philippines noted that these treaties frustrate the public interest which includes the need for "equitable access to information" and suggested that a legal presumption that "every use is fair use" be adopted. (Expert Meeting on Legal Framework of Cyberspace: 8-10 September 1998/Seoul, Summary of the Asia-Pacific Regional Expert Meeting on Legal Framework of Cyberspace.)

This approach is reflected in the WIPO copyright treaty, which in its Preamble acknowledges the need to find "a balance between the interests of authors and the larger public interest, particularly education, research and access to information".

The suggestion that developing countries accept a new intellectual property paradigm which presumes unrestricted access to digital information by all, and recognises this as a public right to information challenges many of the West's principles. This call for "universal access" could become louder if the divide between information-rich countries and organisations and the rest is not addressed.

INTERNATIONAL TREATIES

In terms of international treaties, confidential information has, until recently, received little recognition. The only possible exception was art 10bis of the Paris Convention that provides nationals of the Paris Union with "Effective Protection Against Unfair Competition". The TRIPs Agreement was the first attempt to deal with confidential information expressly and in explicit terms. This step was controversial, with developing countries taking the position that confidential information should not be included within the Agreement because it was not strictly speaking a recognised category of intellectual property. It is suggested that the real basis for the objection was the widely held view in the developing world that information should be freely available, rather than withheld by developed countries who wish to exploit it and maintain their technological edge. (Michael Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement*, Sweet & Maxwell, 1996 para 10.01.)

In s 6 of the TRIPs Agreement under the title "Protection of Undisclosed Information" art 39(2) states:

> Natural and legal persons shall have the possibility of preventing information, lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:
>
> - is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
> - has commercial value because it is secret; and
> - has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

A footnote to the paragraph indicates that the phrase "a manner contrary to honest commercial practices" means "at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew or were grossly negligent in failing to know, that such practices were involved in the acquisition".

Article 39 clearly gives member states of the WTO a broad margin within which to protect trade secrets. They may range from relatively loose civil remedies to tough criminal sanctions, typified by the US Economic Espionage Act 1996. Importantly, however, at least there is now a common international base line from which to work.

THE TECHNICAL CONTEXT

In transmitting trade secrets through a communications network having multiple unsecure access points the holder of that information runs a risk. In most situations, when a trade secret is lost, it is lost for good. Practically, the risk increases with the number of recipients of the trade secret. As Nicolas Browne-Wilkinson VC stated: "The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere". (*A-G v Guardian Newspapers Ltd* [1987] 1 WLR 1248 at 1269.)

Likewise, a risk of unauthorised divulgement of the trade secret increases with the frequency, and number of nodes en route, and the number of access points to the network, particularly if the route and any encryption is not entirely secure. These are however practical considerations that have always affected the maintenance of trade secrets.

Where the digital world differs is that these practical problems have grown significantly in proportion. As indicated above, this is in part because of the dual factors of speed and scale. Hypothetically, a piece of information could be either transmitted to or otherwise made available to many of the 150-200 million people around the world who are connected to the internet. Hypothetically again, but not entirely in the realm of the fanciful, this information could be communicated to all internet users within minutes, hours or days. This would have been simply impossible in the older "hard copy" world.

The very essence of the internet is that it is a reality without location, hence the term "cyberspace" – a term attributed to the science-fiction author, William Gibson in *Neuromancer*.

What is significant is that when information is communicated over the internet because of its packet switching system, packets may cross the globe on a large number of paths to geographically distributed points and only re-form in an understandable form when they reach their destination. Legally, this means that the information, once transmitted, may disperse and pass through various jurisdictions and legal systems before finally reaching its destination.

This raises serious challenges to notions of national jurisdiction, whereby nation states apply their own brand of law, based primarily on the assumption that some actionable activity has occurred within its borders.

The digital environment is to a large extent multi-faceted and platform neutral. This makes both control and monitoring of activities extremely difficult (but many governments are trying to re-assert control). The process is highly democratic in the sense that large corporations and individuals are equally able to utilise the information disseminating advantages of the medium. For example, information can be disseminated and collected through the World Wide Web, e-mail, news groups, bulletin boards and chat rooms, as well as through localised networks such as extranets, intranets and other controlled groupings.

Recent government attempts to monitor e-mail communications are likely to prove to be difficult. The internet has proved to be flexible and innovative in avoiding control. It may be found that more users by-pass traditional ISP's and resort to high level encryption and other means of evasion.

To make the situation even more complicated, information is transmitted in an invisible and ephemeral world where transience is the principal feature. This makes effective detection and enforcement a real problem. It also allows information to be moved off-shore or reflected in "mirror sites" in jurisdictions where regulation is less rigorous. Finally, it allows information to be manipulated and altered so as to render its source uncertain.

The problem here is that in countries where unlimited access to information is regarded as a basic human right the owners of trade secrets may have extreme difficulty in tracking down and apprehending those who choose to intercept or otherwise appropriate their trade secrets. In a world where industrial espionage is a serious growth industry, repackaged trade secrets may become a commodity of a new breed of digital Mafia.

One of the consequences of burgeoning digital communication and electronic commerce is that the often more settled and secure hard copy world has given way to a far more transient and uncertain business environment where sensitive business data is electronically communicated with far greater frequency. The greater the frequency and number of nodes involved in the communication the greater the risk that the digital data can be intercepted and copied without detection. This leads to a greater likelihood of theft or misuse and in a trade secret context the potential for loss of a trade secret through dissemination in the public domain. There are two reasons why the potential for harm is so much higher in the digital world:

- an entire database or a company's entire business records can be copied with relative ease; and
- security measures and tracking devices are not always adequate.

In the old days an intruder would need a pick-up truck and avoid security guards to steal a company's entire records. Now it can be done effectively but invisibly through an off the shelf modem.

In trade secret terms the problem is severe. As security expert Bruce Schneier said:

> we can't prevent network attacks. We can install prophylactic technologies – encryption, firewalls, authentication mechanisms – but they can never be perfect. Attackers will find and exploit flaws in the software, figure out way to bypass the technologies, or social engineer their way through them. The only way to maintain security is through detection and response. (4 April 2000; ZDNet: Special Report: Lines of Defense: Issues: Opinion: The Importance of Vigilance; www.zdnet.com/special/stories/defense/0,10459,2510681,00.html .)

With trade secrets it is often too late to close the door when the horse has bolted. On the internet a single posting can do a lot of damage.

A visit to a hacking site shows some of the topics at a hacker's recent H2K conference on 13 July 2000 and in particular topics like:

- ***hacktivism – terrorism or a new hope?***;
- ***bypassing modern IDS products***;
- ***telephone systems of the world***;
- ***lock picking***;
- ***counterfeiting IDS and identity theft***;
- ***how I got my own area code.***

(www.2600.com/
www.h2k.net/panels.html .)

Allied to this is an increasing concern about the maintenance of privacy and the verification of the identities of participants in electronic transactions. A key technical tool has been encryption. Brazell "Electronic Security: Encryption in the Real World" [1999] EIPR 17 tells us:

> Any business needs to be able to maintain a degree of security over its information, be it trade secrets, client information, details of a research programme or simply the business' own accounts. And any business which uses electronic means of data storage and has connections to the outside world via the internet, is at risk from the possibility of external attack. A further level of vulnerability arises when data is transmitted electronically by any means, including but not limited to e-mail.

Even with the best will in the world, the use of virtual private networks, firewalls, encryption and passwords will not stop a determined hacker or cracker from simply deleting filestores and crashing machines or deciding to distribute free copies of confidential material to all and sundry. Also of concern is the potential for a trapdoor entry into confidential data and materials whereby the normal security measures are bypassed and system protection mechanisms are circumvented in some non-apparent manner. A firewall would not necessarily be effective against such an attack, as the unauthenticated login from an unauthorised source would not go through the firewall but around it.

The conduct of electronic commerce in the B2B (business to business) environment is now established and has built on the foundation created by the electronic data interchange ("EDI") structures to the late 80s. Unlike general business to consumer (B2C) transactions they tend to be closed and handled in a controlled environment governed by contract, rules and standards. B2B environments are essentially private, unlike the B2C environment which is open.

Many businesses involved in multi- jurisdictional marketing wish to use the internet as both informational and communication vehicle for conducting its business and marketing its services to a wider public. They may thus seek to move from a private network to a public one, or at least a quasi-open environment. The primary focus of this paper will be on such an environment.

As security, encryption and privacy are major topics in their own right they will not be discussed any further here.

THE COMMERCIAL CONTEXT

Trade secrets may arise and be commercialised in a range of commercial settings. By way of example only, a typical commercial situation might be the licensing of an on-line trade directory. The original directory might be developed in one country and licensed into others, thereby creating an international trade directory owned by a company in one country and accessible by users through a series of licensed nodes in other countries. Revenue would be generated by the licensees in each country, with the owner deriving both licence revenue from licensees and also from other users who access the directory on a formal or casual basis and view banner advertisements. To use the jargon, the business would operate B2C (business to consumer).

In this relatively straightforward example the organisation, either separately or collectively, would in all likelihood create a range of intellectual property rights. These might include brand names, logos, slogans and bylines and other indicia designed to attract custom. There might also be rights arising under copyright and database protection and patentable inventions in the functionality of the database products, search tools, etc.

If the international trade directory was widely published, in the absence of an ability to maintain confidentiality through contractual means, the bulk of the organisation's intellectual property rights would probably vest in the traditional forms of protection. However, trade secret protection may be available separately in parts of the system that are not disclosed to end-users and remain inaccessible to them. These could comprise business schemes, licensee manuals and internal documentation and even the directory content where access is controlled by encryption, firewalls and passwords.

The possible extent of trade secret protection would vary depending on the extent to which proprietary information is kept secret. Therefore, the greater the extent of restriction of access and use of effective technical protection measures the greater the likely level of trade secret protection. By the same token, in so far as these measures are either difficult to implement or commercially counterproductive, the organisation would need to rely more heavily on other forms of protection, some of which are identified above. ❑

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generally, characterised by more elderly people and women. In short, the market for corporate control (through capital markets) and the external labour market appear to be expanding, challenging the resilience of lifelong employment practices and hence the strong stakeholding interests of such employees. There has already been a movement away from seniority-based wages to more performance based appraisals (eg determining salaries based on last year's performance). The following major changes to labour laws in the 1990s also indicate the depth and breadth of labour market transformations in Japan:

- 1998 amendments to the Labour Standards Law: allowing longer-term labour contracts; requiring clarifications of work conditions upon hire and reasons for termination; and divorcing overtime payments from hours worked (indicating more stress on quality of work);
- 1997 amendments to the Equal Employment Opportunity Law: now prohibiting discrimination in recruitment, assignment, promotion, as well as in dismissal and retirement; compelling employers to mediation if requested by employees; and addressing problems of sexual harassment (still a frequent source of litigation, since the early 1990s);
- 1995 amendments (in effect from April 1999) to the Child Care Law: extending leave to provide care to elderly family members;
- 1999 amendments to the Working Dispatching Law: abolishing the "positive list" system of limiting dispatching to specified (professional) job categories, in favour of a "negative list" system; and putting pressure on companies using such temporary helpers to offer them employment first if the company decides to hire for work done by them (potentially creating a new hybrid category of employees);
- simultaneous amendments to the Employment Security Law: also changing to a "negative list" system for private placement of non-temporary workers; clearer licensing for businesses doing this; and replacement of a blanket fee maximum chargeable (which hampered attempts to head-hunt and place managers);
- 1999 enactment of a Fundamental Law for a Gender-equal Society (which may, albeit over the longer term, encourage affirmative action programmes, etc).

AT THE CROSSROADS

Thus, three trends appear to be emerging impacting on Japan's corporate governance system, linked by common "agency" problems among stakeholders: the (re-)emergence of shareholder interests, the decline of creditor influence, and (perhaps more slowly or less obviously) a decline in orientation towards life-long employees even in the largest of Japanese corporations. These trends are closely interrelated. They also will be affected by pressures on long-term relationships involving other stakeholders: outside contractors (especially those hitherto in vertical or manufacturing *keiretsu* – corporate groupings) and regulators (especially those who used to "descend from heaven" into hitherto highly regulated industries – *amakudari*). This does not necessarily mean convergence on an Anglo-American model, but Japan's system seems to be set on a process of major realignment. All those doing business with Japan, and interested in a major influence on developments in other Asian countries, should keep this broader picture in mind. ❑

SECTION 167(D) MURDER

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queries the judicial interpretation of the fault element for murder under s 167(d)

In a series of decisions, the Court of Appeal has been called upon to differentiate between the two types of mental elements for murder specified in s 167(b) and (d) of the Crimes Act 1961. In doing so, the Court has sought to interpret these paragraphs in a way which, in its opinion, remains true to the drafter's intention by giving meaning to certain phrases which would otherwise be made redundant. Laudable as this objective is, I query the judicial interpretation given to the two paragraphs which does more to confuse than clarify the law. An alternative interpretation is suggested which more accurately reflects the drafter's intention, and which goes a long way to clarifying our understanding of s 167(d) and increasing its ease of application. The two relevant paragraphs read as follows:

> S 167. **Murder defined** – Culpable homicide is murder in each of the following cases:
>
> (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not;
>
> (d) If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

JUDICIAL INTERPRETATION

Starting from the premise that both paragraphs require that the offender must have known of the likelihood of causing death, the Court of Appeal has regarded the salient difference between them to be that para (b) deals with an intention to cause bodily injury whilst para (d) does not. This is said to be derived from the wording. Section 167(b) expressly states that the offender must have meant (that is, intended) to cause bodily injury whereas s 167(d) expressly says that an offender may be liable under that paragraph even though he or she may have desired to effect the unlawful object without hurting any one. In the words of the Court of Appeal in *R v Aramakutu* [1991] 3 NZLR 429 at 432:

> The common essential ingredient in both paras (b) and (d) is that the offender knows that what he is doing is likely to cause death .... The main difference between paras (b) and (d) is that para (b) covers the case where the offender means to cause bodily injury to the person killed, whereas under para (d) he has some other unlawful object. ... In so far as the offender's object is to cause bodily injury to the person killed, knowing it to be likely to cause death, the case is covered by para (b). It would make no sense to try to apply (d), which concludes with "though he may have desired that his object should be effected without hurting any one".

In *Aramakutu*, the defendant had set fire to a box of paper on the verandah of a timber house. When he did so, he knew that the deceased was intoxicated and was either asleep or had passed out on a bed in the house. The Court of Appeal rejected the defendant's contention that the jury should have been left to consider s 167(b) alone, and not s 167(d) as an alternative. After expressing the above comments, the Court concluded by saying (at 433) that "if the jury are satisfied that the offender knew of the likelihood of causing death, whether para (b) or (d) applies turns on whether he meant to injure the person killed by acting as he did or merely to commit arson". Should the jury decide that it was the former, para (b) would apply; if it was the latter, then para (d) would apply.

This interpretation of paras (b) and (d) was also given by the Court of Appeal in *Downey v R* [1971] NZLR 97. Downey had set fire to a piece of newspaper in the room next to where the deceased slept in order to teach him a lesson for taking sexual liberties with him. The appellant believed at the time that the deceased was feigning sleep. The Court of Appeal explained its refusal to apply para (d) to the facts in this way (at 103):

> In our opinion the unlawful purpose which para (d) postulates must be something other than personal injury to the victim. If *that* is the unlawful purpose, it is impossible to see how the concluding words of para (d) can make sense .... Where personal injury to the victim is the unlawful object relied upon, in our opinion the prosecution must rely upon paras (a) or (b) if it is contended that the act amounts to murder. Paragraph (d), in our opinion, relates only to injuries effected in the pursuit of some *other* unlawful object; acts which cause death in the pursuit of some other unlawful object, if known to the accused to be likely to cause death, will render him guilty of murder even if he desired to achieve his purpose without hurting anyone. (Original emphasis.)

Read at face value, this would likewise have excluded the facts in *Aramakutu* from the application of para (d). However, in subsequent cases, the Court of Appeal has qualified this explanation in *Downey* by saying that it was not intended to lay down a general rule but was confined to its particular facts: see *R v McKeown* [1984] 1 NZLR 630, 634-635; *R v Hakaraia* [1989] 1 NZLR 745, 748. Those facts were that the defendant's unlawful object was "the very kind of bodily injury to the victim which caused his death" so as to permit only the operation of paras (a) or (b): see *Hakaraia* at 748. (Paragraph (a) provides that a defendant is guilty of murder who means to cause death to the person killed.)

With respect, distinguishing paras (b) and (d) in this way is apt to confuse. First, is the Court of Appeal saying that para (d) is inapplicable whenever a defendant intended to cause bodily injury to the victim, irrespective of the type of injury intended? The various rulings seem to give an affirmative answer. Secondly (the converse of the first question), is the Court saying that para (d) is applicable only when a defendant did not desire to hurt the victim? Again, the various rulings seem to provide an affirmative answer. In practical terms, the Court's approach is as follows: when considering whether para (b) or para (d) applies, the trier of fact will initially have to identify the defendant's unlawful object and then proceed to determine whether such object involved an intention to cause bodily injury to the victim. If so, only para (b) would apply.

Application of this approach to a case like *Aramakutu* may be relatively straightforward since one could contend that the unlawful object of committing arson is an offence against property and therefore devoid of any intention to cause bodily injury. However, problems are bound to arise whenever the unlawful object was a crime against the person such as assault which frequently involves an intent to cause bodily injury of some kind or other. For instance, in *McKeown* [1984] 1 NZLR 630 (CA), to achieve his unlawful object of indecent assault, the appellant struck and trussed up the victim knowing that this was likely to cause her death. Nevertheless, the Court held that the facts were covered by para (d). Can a defendant whose unlawful object is to commit indecent physical assault realistically claim that he did not intend to injure his victim? To be fair, the Court in *McKeown* (at 635) did accept that para (d) could apply even where the defendant's unlawful object was to inflict some form of bodily injury on the victim, provided that it was not the same injury as that which caused the victim's death. Unfortunately, this specific ruling seems to have gotten lost in later decisions of the Court. In *Hakaraia* [1989] 1 NZLR 745, the Court of Appeal held that para (d) covered a situation where the appellant's unlawful object comprised assaulting the victim by pulling hard on a sheet wrapped around the victim's mouth to stop him from calling for help. Again, one might ask whether a defendant who forcefully stifles another's screams with a sheet can realistically claim that he did not intend to injure his victim? Surely not. Something is therefore remiss in the recent decisions of the Court of Appeal which deny the application of para (d) to cases where a defendant intended to cause bodily injury pursuant to her or his unlawful object.

EXPLAINING THE CONFUSION

The Court of Appeal appears to have arrived at this unfortunate state of affairs by misreading paras (b) and (d) on two matters. First, when comparing the two paragraphs, the Court seems to have overlooked the fact that para (b) is confined in its operation to defendants who meant to cause bodily injury which was known by them to be likely to cause death. Paragraph (b) does not cover cases where the defendant meant to cause bodily injury which she/he knew to be likely to cause bodily injury of a non-fatal kind. Accordingly, it was wrong for the Court of Appeal to state that all cases involving an intention by the defendant to cause bodily injury per se were solely covered by para (b). There is another explanation for this error which is that, while the Court was correct to note that both paragraphs require knowledge of the likelihood of causing death, it failed to appreciate that the subject-matter relating to such a likelihood is different for the two paragraphs. For para (b) it is the *bodily injury* intended by the defendant whereas for para (d) it is the *act* of the defendant performed in pursuance of her or his unlawful object. This oversight is clearly borne out in the previously cited statement by the Court of Appeal in *Aramakutu* [1991] 3 NZLR 429 at 433 that "if the jury are satisfied that the offender knew of the likelihood of causing death, whether para (b) or (d) applies turns on whether he meant to injure the person killed *by acting* as he did or merely to commit arson". Instead, the Court should have said that "whether para (b) or (d) applies turns on whether he meant to cause bodily injury which he knew to be likely to cause death or merely to do the act of arson which he knew to be likely to cause death".

The point of all of this is that the Court of Appeal was incorrect in ruling that para (d) is inapplicable to cases where the defendant, for an unlawful object, intends to cause bodily injury and that only para (b) covers such cases. The correct position is that para (b) alone covers cases where the defendant intended to cause bodily injury which she/he knew to be likely to cause death, and that para (d) covers all other cases where the defendant, in effecting an unlawful object, intentionally causes bodily injury of a lesser kind.

One might well join the Court of Appeal in asking: is not this submission contrary to the closing words of para (d) of "though he may desired that his object should be effected without hurting anyone?" By asking such a question, the second misreading of para (d) by the Court of Appeal is revealed. My submission is that the closing words of the paragraph were not intended by the drafter to be prescriptive of its operation. They were merely intended to contrast the type of mental element for murder under the paragraph with the preceding ones under paras (a) and (b). While these latter types comprise what may be described as intentional murder, para (d) is of a different genre altogether and the said words merely indicate this difference. That it was not the purpose of the drafter to exclude from the scope of para (d) cases where the defendant desired to cause hurt is evinced by the use of the word "may" in the equation. Perhaps, the drafter could have clarified the provision by using the expression "irrespective of whether or not" in place of the word "though". The Canadian Criminal Code, whose provision for murder under s 229 closely resembles s 167 of our Act, uses the word "notwithstanding" which also arguably conveys the drafter's purpose more clearly than does the word "though". So understood, para (d) could apply even where the defendant may have desired, in pursuance of her or his unlawful object, to cause hurt to someone.

Accordingly, the Court of Appeal is wrong to treat the closing words of para (d) as excluding cases where the defendant desired to cause hurt to the victim. Not only does this interpretation impose an unwarranted restriction on the scope of para (d), it strains the application of the paragraph in cases where the defendant's unlawful objective comprises a crime against the person such as assault. For instance, in the Court of Appeal case of *R v Piri* [1987] 1 NZLR 66, the defendants had tied the victim to a tree in remote bushland and left her exposed to the elements from which she died. In holding that para (d) applied, the Court said (at 78) that the defendants had "committed acts of assault and false imprisonment which were known to be likely to cause death in the circumstances, though they may have desired that she should not be *seriously* hurt". The Court probably felt the need to use the qualifier "seriously" in an effort to comply with the closing words of para (d). However, in doing so, the Court simply demonstrated the incongruity of its ruling in other cases that para (d) is inapplicable whenever the defendant desired to cause hurt. To be consistent with that ruling, a desire to cause hurt of any kind, and not just of a serious nature, would render para (d) inoperable. Based on that interpretation, the Court in *Piri* should have held that para (d) did not apply to the facts of the case. Once again, something was remiss with the Court's interpretation of the closing words of the paragraph.

INTENDED SCOPE OF s 167(d)

From the preceding discussion the scope of s 167(d), as intended by its drafter, may be expressed as that it:

- does not cover cases where the defendant meant to cause death or bodily injury which was known by the defendant to be likely to cause death. These cases are covered by paras (a) and (b) respectively;
- does cover all other cases where the defendant's unlawful object may have involved an intention to cause bodily harm of a lesser kind than that envisaged by paras (a) and (b);
- applies irrespective of whether or not the defendant desired that her or his unlawful object should be effected without hurting any one;
- covers cases where the defendant's unlawful object was other than causing bodily injury to another person;
- in all cases, requires the defendant to have done an act which she/he knows to be likely to cause death and thereby kills any person.

Viewing paras (b) and (d) in this way may not have altered the outcomes of cases like *Aramakutu*, *Downey*, *McKeown*, *Hakaraia* or *Piri*. However, it would certainly have simplified our understanding and application of para (d) to these cases. In particular, the concern by the Court of Appeal to exclude from para (d) cases where the defendant intended to cause bodily injury would have been removed and, somewhat ironically, a full appreciation of the distinction between cases covered by paras (b) and (d) would have been achieved.

SIMPLIFYING s 167(d)

Should the opportunity to tidy up this area of the law of murder present itself, serious consideration could be given to replacing the present para (d) with the following:

> Culpable homicide is murder if the offender does an act which he knows to be likely to cause death.

This proposal removes the need for the Crown to establish an unlawful object and also removes the concluding words of the present para (d). (Notably, cl 122(3) Crimes Bill 1989 does the latter but not the former.) In doing so, those parts of the paragraph which have confused the Court of Appeal are done away with, leaving bare the core of the mental element for murder which the drafter had always intended. Support for this alteration comes from the historical origins of s 167 itself. That section virtually reproduces s 174 of the English 1879 Draft Code (C 2345, relevant portion helpfully reproduced in *Piri* at 79-82). After comparing its own provisions on murder and manslaughter with those of the earlier Criminal Code Indictable Offences Bill 1878, the Commissioners concluded as follows:

> The difference between the Draft Code and the Bill upon the whole comes to this. A, in order to facilitate robbery, pushes something into B's mouth to stop his breath and thus to prevent him from crying out; the death of B results. This is murder according to the Draft Code. According to the Bill it is murder if A knew that such an act would probably cause death; manslaughter if he did not .... It will thus be seen that the Bill and the Draft Code approach [each] other very closely. (cited in *Piri* at 81-82.)

The factual illustration used by the Commissioners broadly approximates the facts in *Hakaraia* stated earlier. The result of that case, which was that para (d) applied to convict the defendant of murder, would also have been reached were the paragraph to be replaced with my proposed rewording. This is only to be expected since that rewording is identical to the provision contained in the 1878 Bill which the Commissioners spoke of. Furthermore, the Commissioners thought that there was no difference between their Draft Code and the then existing common law on the fault element for murder which, in the words of the Commissioners, included "knowledge that the act done is likely to produce [death or serious bodily injury], whether coupled with an intention to produce them or not". (cited in *Piri* at 80.)

Should it be thought that removing the unlawful object requirement unduly lowers the degree of moral culpability for murder under para (d), we should not overlook the fact that s 160(2)(a) still requires a person to have committed an "unlawful act" before he or she can be convicted of murder, with the Courts holding that such an act must have been "likely to do harm to the deceased or to some class of persons of whom he was one". See *R v Grant* [1966] NZLR 968 at 972; *R v Myatt* [1991] 1 NZLR 674 at 679. This is more than the law in New South Wales demands, with s 18 Crimes Act (NSW) providing simply that a defendant may be liable for murder who, knowing that her or his act would probably cause death, nevertheless took that risk with the result that a person was killed. (See *Royall v The Queen* (1991) 172 CLR 378 interpreting the phrase "reckless indifference to human life" appearing in the provision.)

All told, shedding the unnecessary appendages of unlawful object and the closing words of the present para (d) produces a cleaner and simpler rendition of this type of mental element for murder. This is because those appendages cloud the true nature of culpability for murder under this paragraph by introducing notions of intention. As the Court of Appeal has itself observed in *Piri* at 82:

> Under para (d) ... it has always been recognised in this country, following the view of the English Commissioners of 1879 preserved in the Crimes Act, that there are cases fully deserving to be categorised as murder where it would be artificial to say that liability depends on *intent* to injure. (Original emphasis.)

Revising para (d) so that it reads simply that persons are guilty of murder who commit acts which they know to be likely to cause death and which thereby kill a person, more lucidly bears out the above observation.

CONCLUSION

From this discussion, one may question the claim by the Court of Appeal in *Aramakutu* at 433 that the particular interpretation it has given to s 167(d) is "reasonably straightforward and follows from the natural and ordinary meaning of the New Zealand code". Until the legislature has occasion to tidy up the wording of para (d) in the way suggested in this article, the Court of Appeal should revise its interpretation of that paragraph and its relationship with para (b). Permitting the paragraph to include cases where a defendant intended to cause bodily harm of a lesser kind than that covered by para (b) would return the law to its intended place. ❑

"FRAUD" AND "FRAUDULENTLY"

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examines what ought to be basic criminal law concepts

"Fraud is a satisfying, fudgy, word. We use it with abandon and often with no more than a vague sense of what it entails. In fact, such vagueness is not entirely misplaced since it is an inherently problematic concept." (Weait, "The Serious Fraud Office: Nightmares (and Pipe Dreams) on Elm Street" in Loveland, *Frontiers of Criminality* (Sweet & Maxwell, 1995) 83, 86). Fraud is defined in *Collins English Dictionary, 3rd ed* as:

1. deliberate deception, trickery or cheating, intended to gain an advantage;
2. an act or instance of such deception;
3. something false or spurious.

Fraud, acting fraudulently or with an intention to defraud, is a moral concept that has not always been accepted as immoral or criminal. In 1513, Machiavelli (Rhys, ed, *The Prince* (Dent & Sons, 1944) 137) thought that although rulers should live a good and praiseworthy life that:

> Nevertheless our experience has been that those princes who have done great things have held good faith of little account, and have known how to circumvent the intellect of men by craft, and in the end have overcome those who have relied on their word.

The people of Lilliput did not accept Machiavelli's view on the morality of acting fraudulently. In this society, acting fraudulently was not acceptable conduct:

> They look upon Fraud as a greater Crime than Theft, and therefore seldom fail to punish it with Death: for they allege that Care and Vigilance, with a very common Understanding, may preserve a Man's Goods from Thieves; but Honesty hath no Fence against superior Cunning: And since it is necessary that there should be a perpetual Intercourse of buying and selling, and dealing upon Credit, where Fraud is permitted or connived at, or hath no Law to punish it, the honest Dealer is always undone, and the Knave gets the advantage (Swift, *Gulliver's Travels* (1726) noted in Weait).

The terms "fraudulently", "intent to defraud" or "fraudulent" appear in 30 of the 97 sections in Part X of the Crimes Act 1961. Convictions for Part X crimes account for 44 to 51 per cent of all convictions (Spier, *Convictions & Sentencing of Offenders In New Zealand: 1987 to 1996* (Ministry of Justice, 1997) Ch 2.3 (traffic offences excluded). A Ministry of Justice paper suggests that this figure will increase significantly by the year 2000 (Triggs, *Interpreting Trends in Recorded Crime in New Zealand* (Ministry of Justice, 1997). This article will analyse the Crimes Act meaning of "fraudulently" and "intent to defraud"; an adverb and verb which the Court of Appeal says has one settled meaning.

COOMBRIDGE

Surprisingly, the meaning of "intent to defraud" and "fraudulently" was not considered until *R v Coombridge* [1976] 2 NZLR 381 (CA). Coombridge had been convicted on one count of theft (s 220(1)(d)) and on four counts of theft by a person required to account (s 222). Richmond P set out the question on appeal as follows:

> [W]hether or not the Judge should have gone further than he did and left it to the jury to decide whether, in all the circumstances, the actions of the appellant were not only deliberate and in conscious breach of his arrangements with Mr Schindler but were also dishonest. (p 385.)

Richmond P derived "considerable assistance" (p 386) from *R v Feely* [1973] QB 530 (CA). *Feely* was concerned with s 1(1) of the Theft Act 1968 (E&W):

> A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it ....

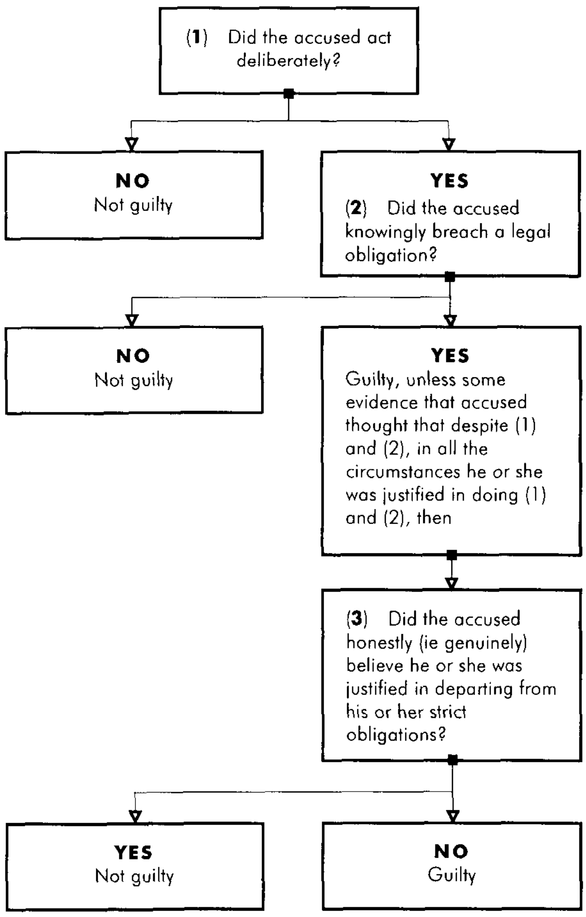
This section can be contrasted with our s 220. The English had recently replaced "fraudulently and without a claim of right made in good faith" with "dishonestly", because "'[d]ishonesty' is something which laymen can easily recognise when they see it, whereas 'fraud' may seem to involve technicalities which have to be explained by a lawyer". (Eighth Report, *Theft and Related Offences*, Cmnd 2977, para 39.) Crucially, they did not define the new incumbent completely, unexpectedly setting out instances that are not dishonest. Richmond P was certain that his English counterparts equated "dishonestly" with "fraudulently" and moved to apply this to s 222 of the Crimes Act.

The definition of "fraudulently" that followed has become the locus classicus for New Zealand. Richmond P stipulated that for an accused to act fraudulently he must:

> ... *act deliberately and with knowledge that he is acting in breach of his legal obligation. But* we are of the opinion that *if* an accused person sets up a claim that in all the circumstances he *honestly believed that he was justified in departing from his strict obligations*, albeit for some purpose of his own, *then his defence should be left to the jury for consideration* provided at least that there is evidence on which it would be open to a jury to conclude that in all the circumstances his conduct, although *legally wrong*, might nevertheless be regarded as honest. In other words the jury should be told that *the accused cannot be convicted unless he has been shown to have acted dishonestly.* (p 387, emphasis mine.)

Richmond P's definition is easier to understand broken down into manageable segments and set out as follows:

The meaning of "fraudulently"



Act deliberately

Richmond P began by saying that the accused must "act deliberately". The Judge can only have meant that the accused's acts or omissions must have been a voluntary act or a culpable omission and that the accused's acts must have been committed intentionally.

Knowingly breach a legal obligation

The accused must do more than act deliberately, he must also act "with knowledge that he is acting in breach of his legal obligation". It is this requirement that has the least clarity and has caused confusion. There are two terms in this one phrase. Firstly, the accused must know that he or she is subject to a legal obligation. Secondly, he or she must act in breach of that obligation. Fraud therefore appears to be an exception to s 25 of the Crimes Act which states that "[t]he fact that an offender is ignorant of the law is not an excuse for any offence committed by him". The fact that ignorance of one's legal obligations can be an excuse is a fundamental exception to the basic rule. This exception does not appear to have been discussed at all in New Zealand.

The need to act knowingly is not obvious from the offences examined in *Coombridge*. However, the need to prove that the defendant knew of the fraud, falsehood or deceit, is found in common law decisions (*Derry v Peek* (1889) 14 App Cas 337, 361). This requirement is more apparent in sections that use the phrase "with intent to defraud". However, Devlin J said that "knowingly" "only says expressly what is normally implied" (*Roper v Taylor's Central Garages Ltd* [1951] 2 TLR 284, 288). This requirement is in a sense, redundant once it is accepted that the offence requires intention, for "intention itself presupposes knowledge of the circumstances". (Glanville Williams, *Criminal Law* (Stevens & Sons Ltd, 1953) 82.)

To act fraudulently one must breach a legal obligation. In the same paragraph, Richmond P referred to a breach of the defendant's "strict obligations" and that the departure from his obligation must be "legally wrong". The selection of the word "obligation" set New Zealand's definition of "fraudulently" on a different course from other jurisdictions. Neither English, Australian nor Canadian case law, before or after *Coombridge*, use the term. The Court of Appeal had previously stated that s 222 unlike s 220 "is not based on the ownership of property but on the duties arising out of the relationship of principal and agent". (*Shields v Jefferies* [1953] NZLR 666, 670.) Thus, the use of the word "obligation" sits comfortably in s 222.

However, Richmond P selected this word for his definition of "fraudulently" without confining it to s 222. The term "legal obligation" is fundamental to legal theorists and philosophers. J C Smith, in his work devoted to this concept, stated that:

> There is a necessary and close relationship between the concept of obligation and rationality. A proper understanding of the concept of obligation is essential to an understanding and an appreciation of the role of reason in law *Legal Obligation* (Athlone Press, 1976) vii.

The general absence of the words "legal obligation" when discussing elements of crimes may be explained by the fact that society does not see the prohibition as a burden or that it is "burdensome to refrain from murdering, raping, stealing or assaulting". (Smith, p 67.) An obligation does not exist in a vacuum; if one is under an obligation it must be to something or someone. Thus to "understand obligation one must first ascertain those facts or states of affairs which bind, oblige or obligate and therefore can be said to give rise to obligations" (Smith, p 51). Legal philosophers differ on the meaning of obligation. All agree that there are differing types of obligations which can be divided into moral and legal obligations. Richmond P in *Coombridge* must have been aware of the differing theories, specifically referring to a breach of a legal obligation rather than the broader concept of moral obligations.

However, the line between what is a legal obligation and what is a moral obligation is often unclear, especially in cases concerning allegations of dishonesty. So, what was Coombridge's legal obligation? Coombridge was given money on terms requiring him to account for it or the proceeds. According to s 222 he was legally obliged to comply with those terms. His legal obligation was to comply with the accepted conditions that created a fiduciary relationship. While the legal obligation in s 222 is clear, it becomes a problem in other crimes of dishonesty where the legal obligation is not spelt out. Its inclusion by Richmond P in *Coombridge* is understandable considering one of the crimes he was discussing. Section 222 uses the phrase "on terms requiring him to account" and must refer to a fiduciary relationship; a relationship which imposes duties. However, it is the later application of this requirement to all crimes requiring a fraudulent intent that is remarkable.

Claim of right and honest belief

Lastly, the accused must have acted without an honest belief that he or she was justified in departing from his or her strict obligations. The fact that the accused was subject to a legal obligation and knowingly and deliberately breached that legal obligation is not enough. The accused must have also been subjectively dishonest. Richmond P was expressing a concept offered by the founder of the Crimes Act, who wrote, "[f]raud involves, speaking generally, the idea of injury wilfully effected or intended to be effected either by deceit or secrecy. It is essential to fraud that the fraudulent person's conduct should not be merely wrongful, but should be intentionally and knowingly wrongful ... Fraud is inconsistent with a claim of right made in good faith to do the act complained of". (Stephen, *History of the Criminal Law of England, Vol 2* (Macmillan, 1883) 124).

Richmond P was incorporating the concept of "colour of right" or "claim of right". This concept expressly appears in s 220 and is defined in s 2 of the Crimes Act as follows:

> "Colour of right", in relation to any act, means an honest belief that the act is justifiable, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed:

"Justifiable" should presumably be understood in the same sense as "justified" which is defined in s 2 of the Crimes Act as meaning "not guilty of an offence and not liable to any civil proceedings".

The excuse of absence of colour of right is not mentioned in ss 222 or 224. *Coombridge* concerned s 220(1)(d) and s 222. Richmond P was clear that he wished to incorporate the concept of "colour of right" in his definition of "fraudulently". In the sentence before his definition of "fraudulently" he stated: "In s 222 of the Crimes Act 1961 no express mention is made of colour of right and the word 'fraudulently' is used on its own." (p 387). Richmond P has added this requirement to s 222. Such an addition is in keeping with early associations of combining "fraudulently" with "colour of right" (Glanville Williams, p 418). "Colour of right" has always been understood to mean that it was excusable if the accused thought, even if in fact such a belief was wrong, that what he or she did was justified. Justified is defined as not guilty of an offence. In other words, the accused did not think his or her actions were criminal. Richmond P retained this meaning but expanded it significantly to include "a moral justification for the act" (Simester & Brookbanks, *Principles of Criminal Law* (Brooker's Ltd) 17.3.2.1 and 18.1.3) while the traditional definition of colour of right is limited to legal justification. This extension is a significant departure from the English, Australian and Canadian position.

GHOSH VERSUS *FEELY*

In *R v Williams* [1985] 1 NZLR 294 (CA) the focus was on the trial Judge's direction on the elements of ss 222 and 224 and in particular his explanation of the *Coombridge* requirement of honest belief. The trial Judge read from *R v Ghosh* [1982] QB 1053. *Ghosh* departed from *Feely* by proposing a two-tier standard of honest belief. This test was based on the standard of ordinary decent people (objective), but qualified by the subjective requirement that the accused must have been aware that his or her behaviour would be regarded as dishonest according to those standards. The New Zealand Court of Appeal saw the trial Judge's reference to the *Ghosh* standard of honest belief as a significant departure from *Coombridge*. Greig J held that as a result of *Ghosh* "in England an accused's belief in the morality of his own acts is not itself a defence to a charge of theft" (p 307).

Greig J was critical of the *Ghosh* test. The Court of Appeal in *Williams* pointed out that "the word 'fraudulently' had been part of the definition of 'theft by failing to account' and 'misappropriation' since the passing of the Criminal Code Act 1893" (p 308). The Court contrasted this stability of usage with the English law considered in Ghosh which no longer used the term "fraudulently". Having done this, Greig J reaffirmed the meaning to be given to "fraudulently" as provided by Richmond P in *Coombridge*. The appeal was then dismissed.

"INTENT TO DEFRAUD"

In *R v Speakman* (1989) 5 CRNZ 250 (CA) the appellant had "pledged" shares to a finance company. Speakman gave a written undertaking to send the share certificates to the lender. He did not honour this undertaking. Speakman later re-pledged these same shares to another finance company in order to obtain funds. He was convicted on two charges of using a document with intent to defraud (s 229A(b) Crimes Act 1961) and one charge of obtaining by false pretences (s 246(1) Crimes Act 1961). Each charge contains the phrase "intent to defraud", rather than "fraudulently". Hardie Boys J began with the proposition "dishonestly" is equivalent to "intent to defraud" and that the meaning of "intent to defraud" is the same as for "fraudulently". His Honour confirmed Richmond P's definition.

Unlike ss 222 and 224, s 229A(b) contains no hint of obligation at all. Section 229A is wide ranging (See Quin, "Section 229A Crimes Act" [1996] NZLJ 330). However, this does not expose an offender to a raft of hitherto unknown duties and obligations. The accused must knowingly breach the legal obligation. If he or she does not know of the obligation, then mutatis mutandis there will be no known breach. Hardie Boys J confirmed this by his statement that "the accused was alleged to have acted deliberately in breach of a known legal obligation ..." (p 253) that is, an obligation presumably known to the accused. In this case, the obligation on Speakman, a businessman, to not knowingly double pledge his shares must have been so obvious that it did not require any further mention.

FIRTH

R v Firth [1998] 1 NZLR 513 (CA) was an appeal against conviction on 21 charges of using a document with intent to defraud (s 229A(b)). Firth's appeal was dismissed. In reaching its decision the Court of Appeal revisited the meaning of "intent to defraud".

Firth was a media-advertising specialist who acted as an intermediary between a number of clients, who wanted to advertise, and two media providers, TVNZ and Radio Pacific. TVNZ published its advertising rates. Firth was able to obtain better rates for his clients. He achieved this by obtaining from the media provider special deals such as a volume incentive discount of up to 15 per cent. Firth received his income from commission paid by TVNZ or Radio Pacific. Firth's method of accounting and reporting to his clients lay at the heart of the prosecution. Firth's client would inform him of the budget for the desired advertising, known as "the spend". Firth would negotiate with the media provider the value he could obtain for the spend. Due to the special deals offered, Firth was able to obtain advertising for his clients at a cheaper rate than the spend. Firth did not advise his clients of these discounts or the actual cost of the advertising and instructed his staff to conceal such information from his clients, retaining these discounts for himself. Firth's contracts with his clients were silent or not clear as to whether Firth could retain the discounts.

Eichelbaum CJ examined s 229A(b). He listed the ingredients of the crime as follows:

1. the accused must have obtained or attempted to obtain a pecuniary advantage;
2. the accused must have had an intent to defraud.

Eichelbaum CJ did not say that the accused must have used a document, but this can perhaps be assumed because it is so obviously an element. In addressing his second ingredient, Eichelbaum CJ recorded that *Coombridge* held that over and above the need for a finding that an accused had acted deliberately, the accused must act "with knowledge that he was acting in breach of his *express* legal obligation under s 220 and 224". (p 517, my emphasis.) His Honour traced the progression of this issue to *Williams*. He concluded that the definition offered for the term "fraudulently" in these two cases applied equally to the phrase "intent to defraud" used in s 229A. His reasoning was simple:

> Grammatically it would not have been appropriate to use "fraudulently" in the latter [s 229A], while conversely that word is the appropriate one in the context of s 222. However, the basic notion of dishonesty must be common to both. That was the approach of this Court in *R v Speakman* (1989) 5 CRNZ 250 in the context of a case involving charges under s 229A and 246: (p 518)

The Chief Justice considered English decisions and noted the following characteristics of "intent to defraud":

1. there does not have to be an intent to inflict injury or loss on the victim. To deceive someone from discharging his or her public duty will suffice (*Welham v DPP* [1961] AC 103);
2. the prime objective of the fraudster is to gain an advantage for him or herself and the detriment or prejudice to another is often not desired (*Scott v Metropolitan Police Commissioner* [1975] AC 819 and *Wai Yu-tsang v R* [1992] AC 269).

No attempt was made to compare the *Welham*, *Scott* and *Wai Yu-tsang*, meaning of "intent to defraud" with the earlier New Zealand cases. These English authorities do not mention that there must be a legal obligation and that it must be breached. In contrast, the need for a legal obligation is an integral part of New Zealand's criminal definition of "intent to defraud".

His Honour was aware of the limitations of Richmond P's definition and sympathetic to a "broader definition of dishonesty". However, he rejected a suggested alternative of different meanings for the term "fraudulently" and "intent to defraud". Eichelbaum CJ, reaffirmed Richmond P's test and said:

> In summary our views are:
>
> 1. as to "pecuniary advantage", at any rate in cases such as the present, which are dependent on the issuing of an invoice or similar claim for payment, the prosecution must prove that the defendant was not entitled to charge on the basis he did;
> 2. "fraudulently" and "with intent to defraud" have the same meaning. The basic notion of dishonesty is common to both;
> 3. as to the element of intent to defraud, the prosecution must prove that the defendant acted deliberately and with knowledge that he was acting in breach of his legal obligation. That is, in present circumstances, the prosecution has to prove the appellant knew he was not entitled to invoice his clients on the basis followed;
> 4. for completeness we note the second leg of the *Williams* test: if the defendant sets up a claim of honest belief that he was justified in departing from his strict obligations, his defence must be left to the jury if there is some evidence from which the jury might conclude that his conduct, although legally wrong, might nevertheless be regarded as honest. It is for the prosecution to prove the defendant did not have such a belief. That issue however does not arise in the present case, which must stand or fall on the first two elements. (p 519.)

Eichelbaum CJ referred three times to legal obligation in the quotation above; indirectly in point 1 in what must be the actus reus of the crime: "the defendant was not entitled to charge on the basis he did". Then directly in point 3 and 4, when referring to the mens rea. The third point listed by the Chief Justice is the intention notion of the definition of "intent to defraud" expressed as "deliberately" and "with knowledge". However, even in this attempt by Eichelbaum CJ to separate the concepts he also brings point 1 into point 3 – "the appellant knew he was not entitled to invoice his clients on the basis followed". Point 4 is also part of the mens rea of the offence, it is the "without an honest belief" part of Richmond P's definition. This, with respect, has been the problem with the New Zealand Court of Appeal's decisions in this area, namely their failure to make a clear distinction between the actus reus and mens rea of the crime. This leads to an inability to recognise that the legal obligation is not a part of the mental element of the crime. Rather it is a part of the actus reus.

LEGAL OBLIGATION

Every crime must have two parts: the act that is prohibited, plus knowledge that what one has done is a proscribed act (Smith, "On *Actus Reus* and *Mens Rea*" in Glazebrook, *Reshaping the Criminal Law* (London: Stevens & Sons, 1978) 96). In certain crimes the prohibited act is obviously unlawful. In murder the unlawful act is the killing of a human being by another. Fulfilling this part does not make one guilty of the crime of murder or manslaughter; over and above committing the unlawful act, one must also possess a certain state of mind. The mental element required to make the offender guilty of murder primarily turns on intention to commit the unlawful act.

In contrast, crimes of dishonesty do not always clearly define the unlawful act and then set out the mental elements necessary to find the accused culpable or blameworthy. Section 229A certainly does not divide the two requirements and set them out clearly in the section. This has led to misunderstanding by Courts and commentators. This is understandable due to the complexity of the concept of "obligation" and is explained by the additional complication of an inadequate traditional theory concerning the make up of a crime. It is clear that it is in novel cases, such as *Firth*, where the legal obligation is not obviously apparent, that the Judge's methodology becomes crucial.

Crimes of dishonesty suffer a blurring of the actus reus and mens rea by the placing of the unlawful act into the mens rea component. This has led one commentator to state that s 229A imposes "liability for having dishonest thoughts, unconnected with any criminal actus reus". (Quin, at p 332.) This conclusion is due to his inability to take "breach of a legal obligation" out of the definition of "intent to defraud". He has placed it in the mens rea of the crime due to the New Zealand Court of Appeal definitions.

The actus reus

Despite the fact that Eichelbaum CJ has followed in the footsteps of Hardie Boys, Greig JJ and Richmond P by seeming to place the unlawful act in the mens rea (which it is submitted is wrong) it is evident from His Honour's reasoning that in fact he placed the breach of the legal obligation in the actus reus of the crime. This can be seen in his examination of the facts as addressed by the trial Judge. The correct placement of the unlawful act is not obvious because the "legal obligation" has been linked into the pecuniary advantage requirement:

> First, it is clear that notwithstanding the apparent concession regarding proof of "pecuniary advantage" the Judge was not misled into thinking that the question of the appellant's *legal entitlement* to invoice as he did, was not an issue in the case. (p 520, my emphasis.)

In other words, the issue was whether Firth had a right to invoice as he did and keep for himself the special discounts. If he could, then his acts were not unlawful, despite that fact that he had "used a document", which might otherwise appear to be the only actus reus necessary in s 229A. In other words, the use of invoices by Firth was not prohibited conduct. If Firth was not entitled to invoice as he did, then he had breached a legal obligation. He had committed an unlawful act. Whether he was guilty or not is another matter, and turns on blameworthiness in the form of his knowledge that he was breaching his obligation and his deliberate continuing in this activity without a belief that he was entitled to invoice in that manner.

Eichelbaum CJ concluded, "[a]ccordingly there is a finding that in terms of the arrangements between the appellant and the particular client, the appellant was not entitled to charge on the basis he did". (p 521.) The determination by the Judge as to whether there is an obligation is a judgment of legal policy based upon, but not derived from, facts. In other words the decision by the Judge that there was a legal obligation on Firth to not invoice in the manner he did was the adoption of a norm or a standard. Glanville Williams illustrated the point in showing how one decides whether a defendant is dishonest or not (in relation to an example of a grossly over priced contract):

> For the criminal law to make the dishonest party guilty of theft, in holding on to his bargain, implies a judgment that he acts wrongly in receiving the money. For the civil law to say that he can enforce the bargain and need not give the money back implies a judgment that there is no sufficient reason to make him give it back. ("Theft, Consent and Illegality (1)" [1977] Crim LR 126, 130.)

It is often the inability to grasp this conceptual point that has caused the placement of the obligation in the mens rea and the misunderstanding that the imposition of the norm (or obligation) is a matter of fact when it is a matter of law pertaining to facts. Thus, the trial Judge could equally have decided that, despite what the complainants understood were the terms of the relationship and the terms of the contract, there was no legal obligation on Firth to pass on the special discounts. *Firth* is not the first case where the Court was unsure as to the status of a legal obligation. Earlier examples of such confusion are seen in *R v Norris* (1993) 11 CRNZ 56 and *R v Scale* [1977] 1 NZLR 178 on s 222 and *R v Prast* [1975] 2 NZLR 248, 251 on s 224.

In *Firth* the trial Judge was able to find further comfort when looking at the actions of the accused. Firth took deliberate steps to conceal the special discounts from the complainants. The concealment was unnecessary unless it was to hide the fact that Firth was breaching his obligations. However, if there was no obligation on Firth to account to his clients for the special discount, the fact that he thought there was such an obligation (evidenced by his concealment) would not make the conduct fraudulent. The finding of concealment was not used to support the trial Judge's decision that there was an obligation. Her Honour realised that it went to the mens rea of the crime once there has been a finding that there was a breach of a legal obligation. It showed that Firth did not have an honest subjective belief in his entitlement to depart from his strict legal obligations.

Thus the trial Judge and the Court of Appeal have moved through all of the steps set out by Richmond P in *Coombridge*.

In most cases, the first and second requirements will not be in dispute, the legal obligation is well known and the acts of the accused are usually obviously intentional or deliberate. *Firth* was an exception. The existence of the legal obligation was not clear, from the legislation itself, precedent, or from the facts of the case. Once it was found that there was a legal obligation on Firth to not act as he did, it was the actions of Firth himself that showed knowledge and absence of an honest belief that he was entitled to depart from his strict legal obligations.

CONCLUSION

At the outset it was noted that fraud is a vague notion and an inherently problematic concept. Everyone has an understanding of "fraudulently" and "intent to defraud". Tying this understanding down to one settled universal meaning is difficult. One person's fraud is another person's sharp business practice and unlike theft, fraud does not always lend itself to easy identification. Deciding whether certain acts have been committed with such an intent necessarily draws in policy and philosophical questions turning on morality. This is true for all crimes but particularly so for crimes of dishonesty.

Richmond P's definition has a unique central component that the accused breach a legal obligation and places a premium on subjectivity. In 1991, a law reform committee examined New Zealand's crimes of dishonesty. In 1999 parliamentary counsel revisited the matter with initial drafts suggesting that New Zealand substitute "fraudulently" and "intent to defraud" for "dishonestly" and that this more modern term be defined by Parliament. The role that such a definition is to play in penalising certain activity must be carefully considered. This, coupled with an awareness that traditional legal principles may not be suitable, is essential if one is to ensure that a rational and logical set of criminal rules are created to govern property and commercial relationships. ❑