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TEAC AND THE LAW SCHOOLS

When the Tertiary Education Advisory Commission's second report *Shaping the System* was launched the Minister for Tertiary Education, the Hon Steve Maharey MP, made specific mention of law schools. We could, he opined, have just one generalist law school and three or four specialist ones.

This immediately raises one of the challenges posed by a centrally directed system, that one has to waste time and effort explaining what is wrong with suggestions made by people who have no idea what they are talking about but are in a position to have their ideas implemented.

Public discussion of legal education tends to rest on the vulgar assumption that the purpose of legal education is to train lawyers. The Law Society has a natural interest in pushing this view and a number of vociferous but uninformed lawyers believe it. It even underlies much of what goes on at law school.

It is difficult to obtain accurate figures, but it seems that fewer than 50 per cent of law graduates practise law for any significant period. In addition to industries such as legal publishing which are traditionally staffed, if not headed, by law graduates, there are numerous public and semi-public figures in New Zealand who have attended law school but have never practised law. The Hon Simon Upton, now in a position of international significance, Sir Michael Fay, Sir Robert Jones leap to mind, but there are many more law graduates making a significant contribution to New Zealand life other than by practising law. The nature and quality of the education such people receive is at least as important as the training of the mass of lawyers.

The idea of a specialist law school requires some examination. At present law students can specialise by the way they choose their senior level papers and by the route they take within law firms in their first couple of years of practice. But there are plenty of tax lawyers who never did tax at law school, plenty of examples of lawyers who have changed course radically at some stage.

A law school has to be able to teach law as a coherent whole. Every law school will have to be able to teach the basic second year subjects as well as property and equity as they are the conceptual building blocks on which the remainder of the structure is built. What then of the contract teacher at a specialist public law school? Is he or she to be condemned to nothing but second year teaching? In which case what kind of person will this be? Certainly not an academic of any ambition.

The TEAC then thinks it can encourage the creation of centres of excellence. Unless the TEAC thinks that this is an idea that has never occurred to anyone else, it might be reasonable to ask why we do not already have centres of excellence. The answer is the degree of centralisation that we already have. This means that promotion and pay increases are decided upon by central bodies in the universities and any increase in the number of professors in a law faculty has to be approved by processes which include all the faculty's jealous competitors for the more or less fixed resources dished out to the universities by the government.

The result is that anyone ambitious and successful has to move to be promoted rapidly. Frequently that move will be overseas, but the TEAC report is notable for treating the New Zealand tertiary system as if it were a closed system. The TEAC's method of creating centres of excellence is to prescribe more centralisation. So if a faculty wishes to create a centre of excellence it will now have to convince the bureaucrats and barrow-pushers who will work for the new Tertiary Education Commission.

One of the reasons legal scholars leave New Zealand or leave academia is that they have to spend too much time attending meetings or filling in returns to explain in what way they teach the law of cyberspace so as to accord with the principles of the Treaty of Waitangi or in an environmentally sustainable manner. The TEAC's answer is to prescribe more of the same. Institutions will have to negotiate charters containing thirteen matters, only one of which relates to education.

Centralisation also raises the fear that some bureaucrat will decide that we do not need so many law schools and the one that gets cut will, of course, be the one least politically congenial to the educational establishment. That will be one of the South Island law schools, the North Island faculties all being hopelessly dominated by political correctness.

There is plenty wrong in the law schools, ranging from their political correctness to the pathetic provision of masters' level teaching, especially outside Auckland. But the TEAC's prescription is to accentuate the worst and to make improvement more difficult.

The members of TEAC have created continuing jobs for themselves with a rolling programme of reports culminating in the winding up of TEAC and its succession by the TEC. This cannot be stopped by getting into argument about detail, or by working within the system. It can only be stopped by loud public statements by people in a position to carry weight, that this whole project is ridiculous and should be stopped immediately,

The North Island law schools have acquired a reputation for being very cosy with the Labour Party and the self-congratulatory establishment. All three now have new Deans. They now have the opportunity to show what they are made of. ❑

LAW COMMISSION PAPERS

D F Dugdale, the Law Commission

introduces two new Commission papers

CHAMPERTY CAN BE FUN

There are three lots of rules founded on the basic premise that officious inter-meddling in the litigation of others is contrary to public policy.

There are the torts of maintenance and champerty (a subset of maintenance where the maintainer shares in the fruits of the litigation) under which the maintainer may be liable in damages to the maintained party's opponent.

A second set of rules makes champertous contracts illegal. A third prohibits of the assignment of bare rights to litigate.

In England, Victoria, New South Wales and South Australia the torts have been abolished, but the other two applications of the basic rule have been carefully preserved.

Should New Zealand follow suit? No, says the Law Commission in its May 2001 report *Subsidising Litigation* (NZLC R72). Abolishing the tort while preserving the other applications of the doctrine achieves no great simplification.

More fundamentally, although New Zealand in 2001 lacks the unruly barons of medieval England whose misconduct provoked the basic rule, there is no lack of unruly commercial entities prepared to employ ruthlessly aggressive litigious processes against business rivals, hiding behind nominal litigants if need be.

The Commission points to such a case as *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R213 as one that should give pause to abolitionists. In that case the maintainer financed litigation against a defendant whom the maintainer wanted wound up as an effective way of disposing of an unrelated claim by that defendant against the maintainer.

Present New Zealand law is that a no win/no fee arrangement is perfectly legal if all it provides for is a normal fee. But such an agreement is contrary to public policy and so illegal if it provides for a greater than normal fee, whether or not such greater fee is calculated as a percentage of amounts recovered.

The Law Commission's recommendation is that the proposed legislation to replace the Law Practitioners Act 1982 should declare that a no win/no fee arrangement is not tortious or illegal if it provides for either a normal fee, or a fee that is a normal fee plus compensation to the practitioner for the risk run of not being paid at all and for receiving no payment prior to the conclusion of the matter.

The contract would have to identify which part of the fee was the normal fee and which part represented the success uplift. The "success" entitling the practitioner to payment would need to be precisely defined. Because a fee calculated as a percentage of recovery is capricious in that it bears no necessary relation to the work expended by the practitioner, the proposed new rules would not permit fee-charging on that basis. The new dispensation would not apply to criminal, Family Court and immigration cases. The fee-reviewing machinery under the new statute would need to permit unfair retainer contract terms to be overridden.

Most submissions on the Law Commission's preliminary paper favoured such a relaxation of the law on the ground that it would improve access to justice at a time when legal aid is unavailable to most. The Commission notes that the proposal will exclude all defendants, plaintiffs seeking other than financial redress, plaintiffs whose claims are not obviously winners and plaintiffs likely to fall at the hurdle of a successful application for security for costs.

The Commission prefers to put its recommendation on the basis that the freedom of practitioners and clients to enter into whatever contract that may agree upon should be restricted only to the extent that this is essential. The argument that arrangements for contingency fees demote the lawyer from his role as detached adviser is noted. The Commission's view is that New Zealand has allowed lawyers to have a stake in the outcome of a case ever since *Sievewright v Ward* [1935] NZLR 43, and that realistically viewed the lawyer has a stake in any litigation in the sense that a win assists client retention and by enhancing the lawyer's reputation helps attract new clients.

The proposal to permit contingent fees may be seen as a further step in the desacralisation of the legal services industry. One by one there are being removed restrictive rules and practices, many of them owing their ultimate origin to the obsession with distinctions of social class of the former colonial power. ("Only persons in trade advertise or seek to limit their liability.") The legal profession made its own decision to permit advertising. Wigs and gowns have been largely, though not entirely, done away with. (The High Court Judges are still prepared to dress up in scarlet to provide a splash of colour at parliamentary openings. It would be cruel to deprive them of the pleasure they seem to get from functioning as interior decoration in this way.)

We have been promised that the new legislation will permit incorporated and multi-disciplinary practices. We may have seen the last of QCs. Rationality is creeping in.

SAVING GRANNY FROM HER ATTORNEY

The statute styled (in defiance of the rule that short titles should be short) the Protection of Personal and Property Rights Act 1998 had added to it during the course of its passage Part IX providing for enduring powers of attorney (that is to say for powers of attorney that remained effective despite the donor's subsequent loss of capacity).

Although Part IX was undoubtedly a valuable reform, a defect was the absence of proper safeguards for donors. In this respect Part IX contrasts markedly with the earlier parts of the Act under which appointed welfare guardians

and property managers are subject to a careful regime aimed at preserving the welfare of the affected party.

Alerted by concerned voluntary agencies the Law Commission advanced various reform proposals in a discussion paper in May 2000 (*Misuse of Enduring Powers of Attorney* NZLC PP 40) and has now published its final report (NZLC R71).

Problems relating to the initial granting of the power include the obtaining of signatures from donors who in fact lack capacity or are unduly influenced, and a failure properly to advise donors. Donors should be told of the various possibilities other than a bald general power in favour of a single individual. Their right of revocation should be explained.

The current prudent practice of having clients sign an enduring power at the same time as their wills as a normal estate planning step successfully avoids the capacity problem, but because the likely time of need lies so far ahead makes fine-tuning very difficult.

The Law Commission is anxious to interfere as little as possible with Part IX's great virtue of enabling a donor without excessive expense to appoint a substituted decision-maker of the donor's own choosing. The safeguard the Commission proposes (witnessing and certifying by a lawyer) is therefore confined to grants by donors who are either 68 years or over, or are institutionalised where the grant is in favour of an attorney who is not the donor's spouse or quasi-connubial partner. The advice that the lawyer would be required to certify to have been given is designed to ensure that donors are told of the options available to them.

The problems of high-handed behaviour and failure to consult the donor (usually where the attorney is a bossy daughter or a bullying son) are tackled by imposing on attorneys the same "least restrictive intervention" approach as governs the earlier provisions of the statute. The attorney will be subjected to the same obligation to consult others concerned for the donor's welfare as the Act imposes on welfare guardians and property managers. Breach would be a ground to remove the attorney.

This solution should help with the fierce sibling rivalries that can develop where one child is appointed attorney and there are others who are not. Enduring powers of attorney seem like wills not to bring out the best in people. The change proposed will give standing to social workers concerned at the neglect or mistreatment of a donor. It is not unknown for the institutionalisation of a donor to be delayed by an attorney concerned that having the donor properly looked after will eat up an estate that the attorney hopes to inherit.

It is proposed to limit s 107 permitting gifts to the attorney that "the donor might be expected to provide". The section is seen as creating a mindset leading to embezzlement. Peculating attorneys say to themselves "I'm sure if Mum could understand she wouldn't mind".

The report recommends the creation of the position of Commissioner for the Aged to act as an old people's champion both generally by advocacy of improvements in the welfare of the aged and in relation to specific situations. A socially isolated and bedridden donor worried that her son who is her attorney may be stealing her possessions is in no position to make a formal application to the Family Court, but could make an informal call to an official champion who could take up the cudgels on her behalf.

Models for the proposed role are the Commissioner for Children and the Queensland legislation providing for an adult guardian. The Queensland guardian's role is "to protect the rights and interests of adults who have impaired capacity". Functions include "protecting adults who have impaired capacity from neglect, exploitation and abuse" and investigating complaints about the actions of attorneys.

The comment on this proposal by one lawyer submitter was "God forbid". It may prove to be the Treasurer's veto rather than any divine intervention that frustrates this proposal, but workers in the field had no doubt of the need for such an officer. ❑

TAX UPDATE

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discuss yet another tax Bill

Taxation (Annual Rates, Taxpayer Assessment and Miscellaneous Provisions) Bill (the "Bill") was introduced to the House in early April. The Bill will effect various technical amendments to the unit trust rules in the Income Tax Act 1994 (the "Act"), the assessment rules in the Tax Administration Act 1994 and to GST. Of greater import, however, are provisions concerning the deductibility of research and development ("R&D") expenditure and interest incurred by companies. These amendments will apply from the 2001-2002 income year.

RESEARCH AND DEVELOPMENT

The tax treatment of R&D expenditure has always created uncertainty. This uncertainty stems from difficulties in distinguishing R&D expenditure of a revenue nature (and deductible) from that of a capital nature (and either non-deductible, or giving rise to an asset which is depreciable over time) and difficulties in complying with a narrow provision in the Act allowing deductions for "scientific research".

Deductions for R&D expenditure have often been claimed in the income year in which they are incurred, but in circumstances in which the entitlement to do so has been far from clear. Claiming a deduction without a clear entitlement to do so carries obvious risks.

Under the Bill, the tax and accounting treatments of R&D expenditure are to be aligned along the lines of an existing Financial Reporting Standard – FRS 13, "Accounting for Research or Development Activities". Alignment will be voluntary, taxpayers being permitted to continue applying the existing R&D tax rules if they choose.

Research expenditure

Under FRS 13, all "research" ("original and planned investigation undertaken with the prospect of gaining new scientific or technical knowledge") expenditure is immediately written off. Under the proposed new provisions, "research" expenditure will be characterised as non-capital expenditure and will be tax deductible in the year incurred, assuming it complies with the general requirements for claiming any tax deduction.

Development expenditure

"Development" (the application of research findings to a plan or design for a new product, process etc) is also immediately written off under FRS 13 until such time that the expenditure has resulted in a "valuable asset" with sufficiently certain economic benefits, after which further development expenditure is likely to be recognised as an asset (ie capitalised) for financial reporting purposes. A "valuable asset" comes into existence for the purposes of FRS 13 when:

- the product or process is clearly defined and the costs attributable to the product or process can be identified separately and measured reliably; and
- the technical feasibility of the product or process can be demonstrated; and
- the developer intends to produce and market, or use internally, the product or process; and
- the existence of a market for the product or process or its usefulness to the developer, if it is to be used internally, can be demonstrated; and
- adequate resources exist, or their availability can be demonstrated, to complete the project and market or use the product or process.

Under the proposed new rules, "development" expenditure incurred before a "valuable asset" exists (under the five criteria in FRS 13) will be deductible in the year incurred. Subsequent development expenditure will not be immediately deductible, as it will remain capital expenditure for tax purposes.

Expenditure incurred on capital assets used in carrying out R&D will not be subject to the new rules (unless the assets themselves are created by the taxpayer through R&D). If such an asset is a depreciable asset (eg buildings, plant, machinery, the right to use intellectual property), it will be subject to the existing depreciation regime. If it is not a depreciable asset (eg goodwill), expenditure in respect of that asset will remain non-deductible.

Anti-avoidance

A specific provision is included in the amendments to address the government's concern about the re-categorisation as R&D expenditure, of capital expenditure which it does not view as properly falling within the R&D basket, or deserving of inclusion within the policy of same year deductibility. Certain activities will be able to be removed from the definitions of "research" and "development" by regulation, rather than requiring an amendment to the Act itself.

Comment

While the proposed amendments will constitute an improvement on the current uncertainty, it is unfortunate that they rely on accounting guidelines which in some ways are themselves vague and capable of varying interpretations. Specifically, the criteria for determining when the "valuable asset" threshold is crossed are inexact.

In respect of publicly listed companies, there will undoubtedly be a tension between the natural inclination to claim tax deductions for as much business expenditure as possible, and the desire to maximise accounting profits (in this context, by recognising development expenditure as an asset) so that it is apparent to the public and shareholders that the company is performing strongly.

Finally, there will be criticism from some circles that the government has not emulated Australia, the Republic of Ireland or Finland by allowing "inflated" deductions for R&D expenditure, particularly in certain "high tech" areas. In Australia, for example, a 150 per cent deduction is available for most types of R&D expenditure.

COMPANY INTEREST DEDUCTIONS

The Bill proposes amendments to the deductibility of interest based on proposals set out in a government Discussion Document entitled *Interest Deductions for Companies* published in September 1999.

The proposed amendments

The proposed amendments will allow deductions to be claimed for all interest incurred by a company, other than a qualifying company (a closely held company which has elected to be treated effectively as a partnership for tax purposes) or a company deriving exempt income other than dividends, unless certain other regimes which prohibit deductions of interest, or limit relief, based on levels of debt funding apply (namely the thin capitalisation rules or the conduit interest allocation rules).

According to the Discussion Document and the explanatory note to the Bill, the changes are intended to reduce compliance costs for taxpayers by removing the uncertainty that currently surrounds the ability to deduct interest expenditure. In particular, the changes remove the cost associated with specifically structuring funding arrangements to ensure interest deductibility.

The current law and its failings

Currently, the Act has the effect, except as expressly provided, of prohibiting deductions by a taxpayer for interest incurred, except so far as the interest:

- is payable in deriving the taxpayer's gross income;
- is necessarily payable in carrying on a business for the purpose of deriving the taxpayer's gross income; or
- is payable by one company in a group of companies in respect of money borrowed to acquire shares in another company in that group of companies.

New Zealand does not have a comprehensive tax system under which all gains are taxed. Certain gains, such as capital gains and exempt income (which includes dividends paid between members of the same wholly owned group) are not taxed because they are not "gross income".

The existing interest deductibility provisions (together with a general provision which excludes as a deduction expenditure (including interest) incurred in deriving exempt income), are intended to permit a deduction for interest incurred on money borrowed to fund activities generating gross income, but not for interest incurred in relation to activities which generate gains that are not gross income.

Given its reliance on the nebulous distinctions between capital gains and income and gross income and exempt income, and on the required nexus between interest expenditure and the derivation of gross income, the current law has involved complexity and uncertainty. Further, the natural fungibility of money means practically it may be difficult to trace the use of borrowed money and to distinguish between borrowed money and non-borrowed money.

The other problem with the current law is that it promotes inequalities and economic inefficiencies. Those who choose to structure an investment in a necessarily complex way to ensure interest is deductible incur significant and wasteful costs in doing so. Others avoid these costs, but may be denied interest deductions in relation to an investment which is economically identical, but structured differently.

While the conceptual basis for restricting interest deductions may be sound, whether or not to do so rests on practical considerations. The government has concluded that, at least in the case of larger companies, the benefits of trying to restrict interest deductions are outweighed by the practical problems with devising and applying rules to do so.

New rules limited to certain companies

The proposed amendments are limited, as discussed above. Interest deductibility rules for individuals, trusts and qualifying companies are not being relaxed, primarily because of tax avoidance concerns. Given the difficulties with tracing the use of borrowed money, the government considers that there is too great a risk that private interest expenditure will be re-characterised as deductible business expenditure by such taxpayers. Companies (other than qualifying companies) are not seen to pose the same risk, because the dividend rules ensure that almost any distribution by a company to a shareholder, including a natural person shareholder who may use the distributed amount for non-business or family purposes, is taxable to the shareholder.

Deductions for interest incurred by companies which derive exempt income are not available under the new provision – even if the interest is actually incurred in deriving gross income (although in such a case the existing provisions may still apply to allow deduction). The targets of this restriction, as noted in the Discussion Document, are entities which are treated as companies for tax purposes, such as incorporated societies and local authorities, but whose income is substantially exempt income. The restriction will also prevent the new provision from applying to any company which sells treasury stock – presumably only in the year of sale, although this is not entirely clear.

The restriction will not, however, operate when the exempt income is dividends (ie dividends paid between members of a wholly owned group and by foreign companies) as a subsequent distribution by the company receiving them will generally be taxable to the shareholder.

Thin capitalisation and conduit tax rules

Avoidance concerns in relation to large company structures revolve not around re-characterisation of private expenditure but international structuring. The Discussion Document concluded that, in relation to inbound investment, existing interest apportionment and allocation rules which restrict interest deductions should be maintained and enhanced, namely:

- the thin capitalisation rules, which aim to prevent non-resident controlled groups allocating excessive debt (and therefore excessive interest deductions) to their New Zealand operations; and
- conduit interest allocation rules, which, again based on debt/equity ratios, can limit relief to foreign owned New Zealand companies in respect of income derived from foreign companies.

Despite the recommendations in the Discussion Document that the thin capitalisation and conduit interest allocation rules be maintained *and enhanced*, the Bill proposes no changes to either regime as it exists at present. Nonetheless, the existing regimes will continue to prevail over the amended interest deductibility provisions. ❑

FRUIT OF THE POISONED TREE

Steven Zindel, Zindels, Nelson

charts the American road

If evidence in a criminal case is directly connected to state illegality or unfairness, the evidence may be excluded. Breach by the state of the New Zealand Bill of Rights Act 1990 will result in the evidence being prima facie excluded unless it is fair and right to admit the evidence.

Whether it is "fair and right" is a matter of judgment for the Court and is not affected by questions of onus of proof: *R v Te Kira* [1993] 3 NZLR 257, 274. The Court of Appeal has signalled its willingness to re-examine the prima facie exclusionary rule at least in the case of real evidence, in the case of *R v Grayson and Taylor* [1997] 1 NZLR 399, 411-412 but later cases have applied such a rule, nevertheless see *R v Anderson* (1997) 4 HRNZ 165; *Lord v Police* (1998) 5 HRNZ 92; *R v Bainbridge* (1999) 5 HRNZ 317; *R v Ratima* (1999) 17 CRNZ 227.

Difficult issues arise in respect of derivative evidence ie evidence obtained typically later and often separately to the state illegality. Sometimes such evidence is sufficiently remote from the breach of an individual's rights or does not throw up the same questions of deterrence of illegal state conduct, to be admissible. Other factors are relevant too such as the objective in hand, the significance of the breach and the reliability of the evidence.

In the United States, the "fruit of the poisoned tree" doctrine goes back to the decision in *Silverthorne Lumber Co v United States*, 251 US 385 (1920) where not only the original evidence seized illegally was found to be inadmissible but also any evidence obtained as a result of the illegal seizure.

However, as indicated above, certain derivative evidence may be too remote from the breach or as Wright J said in *Killough v United States*, 315 F.2d 241, 252 (DC Circuit 1962) where "the causal connection between the original wrongdoing and ultimate evidence become(s) so attenuated as to dissipate the taint".

CAUSATION

The Courts do not apply a rigid causation approach (such as on a "but for" basis). They do not concern themselves with the technicalities of causation rules "that at times have bedevilled inquiries in tort". (Per Richardson J in *R v Te Kira* at p 272.) The test in New Zealand, on a necessary and sufficient basis according to Richardson J in *R v Te Kira* at p 272, "is that there be a real and substantial connection between the violation and the obtaining of the evidence". This was recently approved by the Court of Appeal in *R v Whareumu* [2001] 1 NZLR 655. That a violation predates the later obtaining of evidence is by itself not enough; the breach must affect the obtaining of the evidence. The onus is on the Crown to establish that there was no real and substantial connection between the violation and the obtaining of the evidence (at p 273) and then the judgment issue arises as to whether nevertheless it would be fair and right to admit the evidence.

In the United States, there is the so-called independent source doctrine where "information which is received through an illegal source is still considered to be cleanly obtained when it arrives through an independent source". *United States v Silvestri* 787 F.2d 736, 739 (1986). An extrapolation of the independent source doctrine is the inevitable discovery doctrine (albeit that it has distinct requirements): *Murray v United States* 487 US 533 (1988). The rationale is that since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.

However, it is difficult to speculate whether particular evidence would have been discovered anyway. As Dickson CJC said in the Canadian case of *R v Strachan* (1988) 46 CCC(3d) 479, 495: "Speculation on what might have happened is a highly artificial task. Isolating the events that cause the evidence to be discovered from those that did not is an exercise in sophistry. Events are complex and dynamic. It will never be possible to state with certainty what would have taken place had a Charter violation not occurred."

To Dickson CJC, it is necessary to focus on the entire chain of events. A temporal link figures prominently in the assessment, particularly where there is a single transaction involved, but situations should be dealt with on a case by case basis as to whether particular derivative evidence is sufficiently remote.

Real evidence is arguably "out there" and more waiting to be discovered than the evidence of witnesses. Reliability is also an aspect of the rationale for admitting evidence in some situations and real evidence is inherently more reliable. Other factors exist as well, of course, such as the vindication of rights and deterrence of improper state action. Nevertheless, in *Collins* (1987) 33 CCC(3d) 1, Lamer J indicated that real evidence will rarely be excluded, contrary to the situation where self-incriminating evidence is obtained. But Vancise J A in *R v Baylis* (1988) 43 CCC(3d) 514 could see no logical distinction between the two types of evidence (see also to the same effect the United States Supreme Court decision of *Wong Sun v United States* 371 US 471 (1963) below).

The issue of derivative evidence must be approached in a realistic way. For example, in *R v Greenaway* (1994) 12 CRNZ 103, the appellant had not been brought to Court

when he should have been. He made voluntary admissions following this while in police custody. It was common ground that he would either have been given bail or placed in the care of the Justice Department and would not have been in police custody. Obviously, "but for" the breach of the Bill of Rights, he would not have made his statement but the statement to the police was seen as entirely voluntary during the course of watching rugby on television in the day room and the obtaining of the evidence was not seen to have been affected by the breach of the appellant's rights.

A REALISTIC APPROACH

Such a realistic approach may be seen in two American Supreme Court decisions concerning new lines of police inquiry. In *Michigan v Tucker* 417 US 433 (1974) the respondent named an alibi witness during the course of an interview and that witness was subsequently interviewed. The alibi witness provided evidence corroborative of the prosecution case. The evidence from the interview was later excluded as a result of a fairly minor breach of the respondent's right to be informed that legal representation could be provided for free as a result of *Miranda v Arizona* 384 US 436. This decision had actually come after the interview but was held to apply to the situation as a result of *Johnson v New Jersey* 384 US 719 (1966). The police had therefore behaved properly, in accordance with the governing precedent at the time being *Escobedo v Illinois* 378 US 478 (1964). The evidence of the witness who was located as a result of the respondent's statement was admitted. The police were seen to have acted in good faith. Deterrence was not an issue. There was no concern as to reliability.

In the *United States v Ceccolini* 435 US 268 (1978) the actions of the state were also seen to be good faith in nature. A police officer had taken a break in the respondent's flower shop and conversed with an employee of the shop. The police officer noticed an envelope with money sticking out, lying on the cash register. On examination, he found it contained not only money but policy slips in relation to an illicit gambling operation. The opportunistic search was held to be illegal. The police officer's finding was reported to local detectives and to the FBI. This resulted in an interview with the employee of the shop some four months later. The detective who conducted the interview had not been fully informed of the manner in which the police officer had obtained the information earlier. The employee was not informed about the incident involving the police officer. The evidence of the employee was held (6-2) not to be tainted in respect of the perjury prosecution against the respondent who had testified that he had never taken policy bets at his shop. The employee was studying "police science" in college and had indicated she would be willing to help anyway.

The Supreme Court indicated that causation in the logical sense alone was not what was involved. The Supreme Court reaffirmed its previous holding in *Wong Sun v United States* 371 US 471 (1963) that "verbal evidence" can be just as much fruit of the poisonous tree as real evidence. The Court was influenced by the witness in issue not being a putative defendant and disagreed with the United States Court of Appeals for the Second Circuit that for the connection between illegality and fruits, "if the road were uninterrupted, its length was immaterial". Its length could be material as well as could be a number of other factors. The Court considered that the degree of free will exercised by the witness was not irrelevant, with the greater the willingness of the witness to testify freely, the greater the likelihood of he or she being an independent source or being inevitably discovered. It was said that "the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness."

New Zealand Courts have not had to grapple with these issues as yet in a principled way and nor has there been a coherent framework developed, at least for dealing with evidence obtained following breaches of the New Zealand Bill of Rights Act

There was a concern that otherwise a witness would be perpetually disabled from testifying and also as to a balancing of the public interests involved including the legitimate interest of the prosecution case. It was seen that the witness was "in no way coerced or even induced by official authority". While the particular knowledge of the witness could be logically traced back to the police officer's illegal discovery, both her identity and her relationship with the respondent were well known to those investigating the case. No deterrence arguments were seen to be involved because the police officer was seen to have acted entirely in good faith and without any agenda. Issue was taken by the two Justices dissenting, however, as to whether the employee's evidence would have inevitably been discovered and they noted that there were no intervening circumstances. She did not come to the authorities and ask to testify.

CONCLUSION

In short, the exercise as to exclusion of derivative evidence is one of careful judgment with issues to weigh up such as the magnitude of the breach of the suspect's rights, the vindication of those rights, the purpose of the state investigation, the time period between the breach and the later obtaining of the derivative evidence, the existence or otherwise of any intervening circumstances, the inevitability of such evidence being discovered (whether real or witness evidence) and whether the breach led the particular witness to feel compelled or induced to cooperate (relating to the free will of the witness). Also relevant is the reliability of the evidence and the need for deterrence of illegal state action. Good faith and the legitimate interests of the state in, for example, prosecuting crime are aspects of the above factors. New Zealand Courts have not had to grapple with these issues as yet in a principled way and nor has there been a coherent framework developed, at least for dealing with evidence obtained following breaches of the New Zealand Bill of Rights Act. So far, the general test applied in *R v Te Kira* provides the necessary guidance but no doubt there will be a number of hard cases down the track which may require finer distinctions to be evolved, notwithstanding Cooke P's comments in *R v Te Kira* at p 261 of the need for New Zealand Courts to avoid the danger of becoming verbose and evolving fine distinctions; and to interpret the Bill of Rights generously and simply. ❑

CONSUMER GOODS

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considers the implications of Nesbit v Porter *[2000] 2 NZLR 465*

The Consumer Guarantees Act 1993 (CGA) defines a "consumer" as a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption unless one of three exceptions applies (use in a business for resale, manufacture or production, or repair). "Supplier" means a person in trade but, again, there are exceptions not relevant for present purposes.

Thus the crucial question is not so much the type of purchaser but rather the type of goods (or services) being acquired. Are they of a type ordinarily acquired for personal domestic or household use?

This may be contrasted with the definition of "consumer goods" in s 16 of the Personal Property Securities Act 1999 (PPSA) as goods that are used or acquired primarily for personal, domestic, or household purposes. In this Act it is the purpose of acquisition, and not the type of goods, that is in issue. Consistency of approach is normally desirable and it might be argued that the CGA might benefit by adopting the approach taken in the PPSA.

The definition of consumer goods in the PPSA is for a different purpose. It is to provide for an exception to the rules as to when a registered security interest prevails over the rights of a purchaser of goods. For consumer goods below $2000 in value, a statutory exception to the nemo dat rule can apply to give a purchaser title clear of any security interests (even registered ones) of which she/he was unaware. That is not related to the issue of whether statutory guarantees should be implied on the sale of goods or not.

For the purposes of the CGA, when are goods of a kind ordinarily acquired for personal, domestic, or household use or consumption? In many cases, it will not be difficult to decide whether particular kinds of goods are within or without that definition. Some items are clearly ordinarily purchased for personal use. Others would rarely, if ever, be bought for other than business purposes. What if goods are of a type that are used frequently in businesses, but which are also used for personal use? Are the categories mutually exclusive or can there be some overlap? In other words, if goods are of a type that are most often purchased for business purposes, does that preclude them from being goods that are ordinarily acquired for personal, domestic, or household use or consumption? Is that the case even if a significant number of goods of that type are regularly purchased for personal use?

PERSONAL AND BUSINESS USE

The CGA was passed to amend the law relating to guarantees to consumers upon the supply of goods and services and to amend the law relating to consumers' remedies against suppliers and manufacturers. The supplier must be in trade and not be one of the excepted suppliers in s 41 (eg a seller at auction). Apart from the exceptions mentioned above where goods are acquired for resale in trade, use in production or manufacture, or for repair in trade, there is provided an ability to contract out of the Act but only if the purchaser is buying for business purposes or so represents to the vendor. If the buyer is not buying for business purposes (or so representing himself), contracting out is void and illegal [s 43].

This approach suggests that Parliament intended the statutory guarantees to apply unless either:

- the goods or services were not of a kind ordinarily acquired for personal use; or
- one of the exceptions applied; or
- in a business contract, the parties expressly contracted out of the Act's provisions.

So, a bulldozer acquired by an eccentric millionaire for recreational use would never be the right type of good to come within the Act's ambit. By contrast, a television set of a kind ordinarily purchased for use in the home would attract the statutory guarantees even if being purchased for business purposes eg for use in hotel rooms. The business purchaser would get the benefit of the statutory guarantees unless excluded by the contract of purchase in terms of s 43.

Why did Parliament want businesses to have the benefit of the statutory guarantees unless expressly excluded by contract? Would it not have been simpler to have followed an approach similar to that of the PPSA?

What of items ordinarily acquired for personal use but also ordinarily acquired for business use? Should these be mutually exclusive categories? Should it depend upon a tally of whether more are sold to businesses or private purchasers? The alternative is to say that they are not mutually exclusive categories. An item may be ordinarily acquired for personal, domestic, or household use or consumption even if a significant number are also sold for business purposes. It should make no difference whether most are sold to private purchasers or to businesses. What should be the issue is whether a significant number are purchased for private purposes.

It does seem to me that the latter approach is to be preferred. Section 5 of the Interpretation Act 1999 requires that a statutory provision be interpreted from its text and in the light of its purpose. Parliament clearly adopted the approach of applying the statutory guarantees to types of goods (and services) subject to the exclusions mentioned above. The general scheme of the Act seems to me to be consistent with an approach of including goods within the ambit of the Act unless they are clearly not of the right type or unless one of the exclusions applies. If that is correct, it makes no sense to treat business and private purposes of acquisition as mutually exclusive.

NESBIT v PORTER

In *Nesbit v Porter* the issue was whether the purchaser of a double-cab Nissan Navara 720 four wheel drive utility was a consumer under the CGA. There was evidence that 60 to 80 per cent of sales in question were to business purchasers. Nevertheless, a significant number of the vehicles were sold to purchasers who intended them for personal use.

The purchasers, the Nesbits, won the first round before a Disputes Tribunal only to find that the Tribunal had exceeded its jurisdiction.

In the District Court, Judge Thomas held that the vehicle was of a kind ordinarily acquired for commercial purposes. On that basis, it could not be said to be a good of a type ordinarily acquired for personal, domestic, or household use or consumption so the CGA did not apply. In other words he adopted the mutually exclusive category approach.

In the High Court, Anderson J accepted that an item could be ordinarily acquired for more than one purpose but nevertheless declined to reverse the decision of the District Court. He considered the evidence sufficient to support a finding that the vehicle was not of a kind ordinarily acquired for personal use. He held that the Nesbits had not discharged the onus of proving that the District Court Judge was wrong in law in reaching such a conclusion.

In the Court of Appeal, counsel for the respondent conceded that the mutually exclusive category approach adopted in the District Court was incorrect, but sought to defend the High Court finding. Blanchard J, delivering the judgment of the Court, stated:

> [the supplier] accepted that whether a person is a consumer is not simply a matter of determining a majority or dominant purpose of acquisition of the particular kind of goods. If more purchases are for a commercial use it does not follow that the goods in question cannot also be said to be ordinarily acquired for private use by the minority of buyers. Take the example of ballpoint pens. They are frequently acquired for private use but it seems probable that far greater numbers are bought by businesses. It is a matter of fact and degree whether goods can be said to be ordinarily acquired for private use when only a proportionally small number of sales is for that purpose. (para [27].)
>
> We consider that "ordinarily" is used in the Act's definition of "consumer" in the sense of "as a matter of regular practice or occurrence" or "in the ordinary or usual course of events or state of things". According to Mr Farmer's evidence, about 20 per cent of buyers of Navaras acquire them exclusively for private use. There were 189 instances in the buyer profile. There is therefore a regular practice or occurrence of such vehicles being purchased for private use. (para [29].)

The Court accepted the Nesbit's submission that this rejection of the mutually exclusive category approach would not seriously disadvantage motor vehicle dealers who were free to contract out of the Act under s 43 where the buyers held themselves out as purchasing for business purposes.

The Court of Appeal thus firmly rejected the mutually exclusive category approach. The test suggested is whether the purchase for private purposes could be said to be usual or common or whether it could be said to be "an idiosyncratic choice", buying for private use a vehicle like a Mack truck, where it would presumably be unusual to devote to that purpose. I respectfully agree with that approach.

A PYRRHIC VICTORY

Sadly for the Nesbits, they won the battle but lost the war so far as their attempt to reject the goods was concerned. The Court of Appeal held that the Courts below had been wrong to hold that the Nesbits were not at law a "consumer" and that they were not entitled to a guarantee of acceptable quality under s 6 of the CGA. They lost the appeal on other grounds. The Court of Appeal agreed with the High Court finding that the right to reject the goods had not been exercised within a reasonable time so that, under s 20, the right of rejection was lost.

Loss of right of rejection

Section 20 of CGA provides that a right to reject goods, arising from a breach of one of the statutory guarantees, may be lost if it is not exercised within a reasonable time, defined as a period from the date of supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to the type of goods, their likely use, the expected life of the goods, and the amount of use which is reasonable before the defect at issue might be expected to have become apparent. Blanchard J comments at para [35] that s 20(2):

> speaks of the defect, meaning the defect actually encountered by the consumer whose right of rejection is under consideration. The period must be reasonable in relation to the particular defect or combination of defects causing the buyer to reject the goods. Within what time would it be reasonable to expect such defect(s) to become apparent? The actual experience of the particular consumer is obviously relevant but the section requires that reasonableness is to be tested against certain objective criteria. Paragraph (a) refers not to the particular article which was supplied but to the type of goods. Paragraph (b) requires consideration of the use to which a consumer (not the actual buyer) is likely to put them, that is that type of goods, and paras (c) and (d) require regard respectively to the length of time for which it is reasonable for that type of goods to be used and the amount of use to which it is reasonable for that type of goods to be put before the defect becomes apparent. So the Nesbits' actual use of the Navara has for this purpose to be considered against the use to be expected from a notional consumer of that type of vehicle.

The Nesbits argued that in assessing what was a reasonable time, allowance should be made for the time spent in discussion between the supplier and the consumer in an effort to resolve disputes over the goods. An extension of time ought to be allowed to the consumer matching the period of such discussions. The Court of Appeal firmly rejected this approach (para [38]) because under s 18(2)(b)(ii), the right to reject goods under s 18(2)(b) has been made expressly subject to s 20. If under s 20 the right to reject the goods had been lost, there was no power to extend the time in the circumstances contemplated by s 18(2)(b) viz. where a supplier fails to remedy defects within a reasonable time of being required to do so by the consumer.

It is possible to accept the logic of the Court's reasoning yet deplore the result. According to the Court, a consumer ought to exercise any right of rejection at the earliest opportunity. Is it not more reasonable to see whether matters can be resolved satisfactorily between supplier and consumer first? Why should a consumer lose a right to reject goods because of a genuine attempt to have the supplier remedy all defects as contemplated by the Act?

This view of the law places an onus on legal advisers to make consumer clients aware of the position at an early stage in any dispute. It is an unfortunate result and one that ought to lead to amendment to s 20(2). This could be done by adding to subs (2) the words:

> (e) The period of any discussions between the supplier and the consumer in an effort to have any defects remedied under s 18 (which period shall be added on to the period that would have constituted a "reasonable time" but for the occurrence of such discussions).

In fairness, Blanchard J did add (para [39]):

> It is nonetheless to be noted that s 21(a), in prescribing the test of whether a failure to comply with a guarantee is of a substantial character for the purposes of s 18(3), says that the test is whether the goods "would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure". A reasonable time under s 20 must accordingly be one which suffices to enable the consumer to become fully acquainted with the nature of the defect, which, where the cause of a breakage or malfunction is not apparent, the consumer can be expected to do by taking the goods to someone, usually and preferably the supplier, for inspection. In this context, therefore, a defect is not "apparent" until its cause has been identified and the buyer knows what has to be done to fix it, and what it will cost; in other words, until the buyer is in a position to determine whether the defect is substantial.

While this helps, it does not solve the problem referred to above or obviate the need for amendment to s 20(2).

While the Court of Appeal was prepared to have allowed the Nesbits a longer period than would have the High Court, it found that on the facts they had taken too long and had lost their right to reject the goods.

The case was remitted to the District Court to decide whether there had been a breach of the statutory guarantee of acceptable quality in s 6 and to rule on the damages if such a breach was found to have occurred.

Acceptable quality

The Court expressed the firm view that there was a significant difference between the tests of "merchantable quality" in s 16(b) of the Sale of Goods Act 1908 and "acceptable quality" in s 7 of the CGA.

Goods are of merchantable quality if they are fit for any purpose for which goods that complied with the description under which they were sold might normally be used. In other words, they do not necessarily have to be fit for every purpose to which goods of such description might be put.

Under s 7 of CGA, by contrast, goods are of acceptable quality only if fit for all purposes for which goods of that type are commonly used and if they meet the other standards referred to in s 7 including being free from minor defects. It relates to the likely view of a notional reasonable consumer fully acquainted with the nature and state of the goods including any hidden defects. The test takes into account the nature and price for the goods, statements on packaging and/or labels, representations made by the supplier, and all other relevant circumstances.

It follows that case law about tests for acceptable merchantable quality provide little assistance in deciding whether there has been a breach of the guarantee of quality for the purposes of CGA.

CONCLUSIONS

The main interest of this case lies in the rejection by the Court of Appeal of the mutually exclusive category approach when considering whether goods are of a type ordinarily acquired for personal use.

The approach of the Court of Appeal is preferable to those of the lower Courts. There is no reason of principle why an item bought for private purposes should not have the benefit of the statutory guarantees in the CGA merely because numerically more of that item are purchased for business than for private purposes. The Court is correct in presuming that Parliament intended to exclude only the idiosyncratic purchase of unusual items. There is adequate provision for contracting out in business purchase trans-actions plus the three categories of exceptions where the Act does not apply. The Act does not apply, in any event, if the supplier is not in trade nor in the exclusions under s 41.

A case for reform?

Is the definition of "consumer" in the CGA appropriate? Might it be better to adopt a similar approach to that in the PPSA, always acknowledging that the respective statutory provisions have very different purposes? Is not some consistency of statutory provisions desirable?

To adopt the PPSA approach would mean that whether a person was or was not a consumer for the purposes of the CGA would depend on the purpose of the purchase and not on the type of goods involved. What differences would follow? There appear to be two in particular:

- the idiosyncratic purchase for personal use of an item such as a bulldozer or a Mack truck would come within the Act and attract the statutory guarantees. It would not be difficult to draft exclusions for some types of items if it was thought necessary to do so;
- business purchases would be excluded from the ambit of the Act even where the items purchased were presently covered such as ballpoint pens (except for resale in trade) or television sets in hotel rooms. Of course some business purchases are excluded anyway and contracting out is permitted when business purchases are involved. The CGA is consumer legislation of the social engineering kind. Why should it apply to business transactions at all? If it is intended to apply to some business transactions, then why not to all business transactions?

Would it not be more consistent with the intent of the CGA to confine its provisions to purchases for a private or domestic purpose?

I am not suggesting that there should be any monetary limit in the definition of consumer for the purposes of the CGA. I am suggesting that if it is appropriate for the Act to imply statutory guarantees in commercial transactions then it may as well be for all such. If its true purpose is social engineering consumer legislation, why not confine it to purchases for personal, domestic, or household purposes of all kinds when the supplier is in trade with no contracting out and only limited exclusions?

The other desirable law reform is to amend s 20(2) of CGA as suggested above so that consumers who try to resolve disputes by giving suppliers the opportunity to remedy defects in goods are not thereby penalised by losing the right to reject the goods. ❑

HEALTH PROFESSIONALS AND MANDATORY REPORTING

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balance preventing danger and fighting crime

In general, citizens are not obliged to warn of danger or prevent crime. There is no legal duty to stop a crime from occurring nor to report it. There are obvious exceptions – parents must prevent the death of their children by providing the necessaries of life. Specific exceptions are numerous – every person who finds a body must report it to police – s 5 Coroners Act 1988; doctors and optometrists must report unfit drivers to the director of Land Transport Safety – s 18 Land Transport Act 1998.

Health professionals (providers) come into contact with potential danger or crime in various ways. They may see and treat the person who poses a risk, or the victim or the perpetrator. If they see the person in a professional capacity, such that professional privilege exists, that duty of confidence could provide a further barrier to any action by them. The increasing scrutiny on the health sector and the desire to prevent tragedy have led to pressure to oblige providers to assist in the reporting and prevention of crime – most notably in the area of child abuse.

This article looks at the conflict between professional confidence and the discretion or duty to warn in the health sector. It looks at some of the issues arising out of provisions for mandatory reporting.

DISCRETION/DUTY TO WARN

Information supplied by a patient to a health professional for the purpose of obtaining clinical assistance is confidential. The confidence is invaluable but not absolute. In certain circumstances a provider can disclose the information. The most obvious situations are where the patient consents to the disclosure or the disclosure is one of the purposes for which the information was obtained, and the patient was informed of this. Disclosure of health information is governed by numerous statutes, rules, codes of ethics and the common law. Acts requiring disclosure of health information are too numerous to list here – see Butterworths *Privacy Law and Practice Vol 2* para 8000.13.

> ... under current New Zealand law professionals involved in confidential health relationships have a discretion to disclose, to certain people, confidences they have received, when this is necessary to warn or to protect identifiable individuals against whom credible threats have been made. Dawson "The Discretion to Warn Potential Victims" [1994] *Mental Health and the Law* 9.

Health Information Privacy Code

The Health Information Privacy Code 1994 (the Code) is the "primary vehicle" for making a disclosure that anticipates a patient's violence towards an identifiable individual. (Brookbanks W *ANZAPPL Conference 1999*.)

Rule 11(2)(d) governs health information that *may* be disclosed by a health agency. To be able to disclose an agency needs to believe on reasonable grounds that it is not practicable or desirable to obtain individual authorisation and that:

- there is a serious threat to public health, public safety or the life or health of an individual;
- the threat is imminent;
- the disclosure of the information would prevent or lessen that threat; and
- the disclosure of the information is necessary to prevent or lessen the threat.

The disclosure must be made to a person who can act to prevent or lessen the threat. A number of people could be in such a position. The potential victim, a police officer, a social worker or a Medical Officer of Health (in the case of an infectious disease) are examples.

The ability to disclose without consent is a discretion to warn rather than a duty. The provider also needs to consider their professional code of ethics, in addition to the Code.

In a recent case, the Privacy Commissioner dismissed a complaint by a patient against a doctor's disclosure to the police that the patient had acquired a gun. The patient had spoken of committing suicide on earlier occasions, and was presently unwell. See the Report of the Privacy Commissioner for the year ended 30 June 2000, p 28.

Health Act 1956

Sections 22C and 22F allow disclosure of health information to listed authorities (including a social worker or police officer) upon request. The interaction with the Code and the Privacy Act is confusing. See Peart N "Access to, and Disclosure of, Health Information" (1996) HRL&P 95. In short the ability to disclose in those sections is only permissive and still requires compliance with the relevant ethics. Immunity is given for good faith disclosure, done with reasonable care, by s 129 of the Health Act 1956.

A breach of confidence is statutorily required in the case of infectious diseases. Different notice requirements apply depending if the disease is a notifiable infectious disease or simply a notifiable disease. See s 74 Health Act 1956 and

First and Second Schedules. The requirements are similar for TB – Tuberculosis Act 1948, s 3.

The question of whether the provider can or is obliged to notify any other person (such as the partner of the patient) is a vexed one. Authorities in UK, NSW and Canada relating to HIV/AIDS suggest the issue is complex in those jurisdictions. *X v Y* [1988] 2 All ER 648; Caswell D "Disclosure by a physician of Aids-related patient information: an ethical and legal dilemma" (1989) 68 Can Bar Rev 225; Lynch and Ranson "Medical Issues – Doctors' Duties and Third Parties" (2000) 7 Jo of Law and Med 244.

HIV is not a notifiable disease but AIDS is. A medical officer of health has power under s 79 of the Health Act to isolate a person who is likely to spread an infectious disease. It is on those grounds that persons likely to spread HIV (which in turn is likely to spread AIDS) can be detained. Accordingly, the solution may be (where the situation fits into R 11(2)(d) of the Code) to notify a MOH and leave them to exercise their powers under the Health Act. The Ministry of Health sees detention under s 79 as an exceptional measure, after MOHs have exhausted an escalating scale of options, including notifying the partner. Another option, adopted by the doctor in *Kilpatrick v Police* (HC Christchurch, 17 September 1999, Chisholm J), is to tell the patient that disclosure will be made unless that patient informs the partner. This is in accordance with the NZMA Policy on HIV Status and Patient Confidentiality – 19 April 1991 (after earlier steps involving educating and counselling the patient to disclose, seeking advice etc).

Professional ethics

Any non-consensual disclosure of health information must pay regard to the ethics of the profession. The discussion below relates to the medical profession, but the principles will be similar for other providers.

The Hippocratic Oath is clear as to the duty of confidence. Article 10 of the code of ethics issued by the NZMA requires doctors to "keep in confidence information derived from a patient, or from a colleague regarding a patient, and divulge it only with the permission of the patient except when the law requires otherwise". As can be seen, it is only in specific circumstances that the law requires otherwise, as opposed to permits.

Cases involving breaches of this confidence emphasise the strict nature of the duty. Disclosure must only be made in extreme circumstances, after advice from senior colleagues (where practicable) and to the appropriate authority. Butterworths *Privacy Law and Practice* Vol II para 8000.2.

If relating to Court proceedings, the provider may insist on a summons from the Court and not disclose until ordered by the Court. Section 35 Evidence Amendment Act (No 2) 1980 allows for the provider to make application at or before the hearing to be excused from answering any question or producing any document which would breach a confidence. Section 33 prohibits doctors and clinical psychologists from disclosing protected communications with the defendant in criminal proceedings.

The Medical Council has recently published *Good Medical Practice: A Guide for Doctors* in which it details the importance of maintaining trust in the professional relationship of doctor/patient. The Guide encourages doctors to be familiar with the Code. In the exceptional circumstances where doctors feel that they must pass on information without prior consent from the patient, the Guide suggests doctors should follow the council's guidelines in *Statement on Confidentiality and the Public Safety* (April 1998). This summarises the circumstances under which the council sees non-consensual disclosure may be made. In essence this is where there is a serious and imminent threat, which disclosure (including the patient's identity) will prevent or lessen, and the disclosure is made to a person who can act to protect those threatened.

CYPFA – child abuse

Current legislation takes a permissive rather than mandatory approach to the reporting of child abuse. Section 15 of the Children, Young Persons, and Their Families Act 1989 provides a discretion to report child abuse. Section 16 provides immunity from civil, criminal or disciplinary proceedings for those who make such disclosure.

Other Acts

As discussed above, there are a whole range of Acts which permit or require disclosure in specific circumstances – for example the Acts regulating the various professions have provisions requiring notification where there are grounds to believe the professional is not fit to practice.

The Protected Disclosures Act 2000, which came into force on 1 January 2001, protects those disclosing "serious wrongdoing" in certain circumstances. Serious wrongdoing includes an act, omission or course of conduct that constitutes a serious risk to public health or public safety. The purpose of the Act is to facilitate disclosure of serious wrongdoing in or by an organisation and to protect those employees who disclose in accordance with the Act. Whilst the Act is not directed to the circumstances discussed in this article, there could be circumstances where providers can make disclosure of confidential health information and be protected by the Act. For example where an organisation neglects to ensure an infectious disease is appropriately dealt with. The immunity given to those who disclose is stronger than that in similar sections (see s 18(2)) and the identity of the discloser is protected (s 19).

Common Law

A more difficult question is "whether this discretion to disclose information to prevent possible violence can be elevated to a legal duty to warn in some situations, with the result that a failure to warn a potential victim could give rise to successful civil proceedings for damages against the treating clinician"? (Dawson at 12.)

There is such a legal duty to warn in California, as established in *Tarasoff v Regents of the University of California* (1976) 551 P 2d 334. The Supreme Court of California held that when a therapist determines that his patient presents a serious danger of violence to another, the therapist is obliged to use reasonable care to protect the intended victim. In Dawson's opinion New Zealand case law may create a similar legal duty.

In *Furniss v Fitchett* [1958] NZLR 396, 405-406 Barrowclough CJ said that disclosure is justified when a doctor:

> discovers that his patient entertains delusions in respect of another, and in his disordered state of mind is liable at any moment to cause death or grievous bodily harm to that other. Can it be doubted for one moment that the public interest requires him to report that finding to someone?

In *Duncan v Medical Practitioners Disciplinary Tribunal* [1986] 1 NZLR 513, 521 Jeffries J commented:

> There may be occasions, they are fortunately rare, when a doctor receives information involving a patient that another's life is immediately endangered and urgent

action is required. The doctor must then exercise his professional judgment based upon the circumstances, and if he fairly and reasonably believes such a danger exists he must act unhesitatingly to prevent injury or loss of life even if there is a breach of confidentiality.

In the English case of *Egdell* [1990] 1 All ER 835, 848 (CA), Bingham LJ approved the view that the law treats duties of confidentiality "not as absolute but as liable to be overridden where there is held to be a stronger public interest".

In Canada, *Smith v Jones* (1999) 132 CCC (3d) 225 is significant as it goes further than *Tarasoff* in that there need not be harm directed against a specific victim for confidentiality to be overridden – it will be enough if a class of victims is identified. The test in *Smith v Jones* considers three factors that must be weighed when setting aside the solicitor-client privilege in the interest of public safety:

- is there a clear risk to an identifiable person or group of persons?
- is there a risk of serious bodily harm or death?
- is the danger imminent? [para 77 Cory J.]

The majority of the Supreme Court of Canada affirmed the order of the Court of Appeal that had permitted Dr Smith to disclose the information to the Crown and the police.

In the course of his judgment Cory J said:

> "In rare circumstances, these public interests may be so compelling that the privilege must be displaced" [para 74] ... 3 "If after considering all appropriate factors it is determined that the threat to public safety outweighs the need to preserve solicitor-client privilege, then the privilege must be set aside". [para 85.]

This suggests a mandatory requirement, although the Court affirmed the permissive order of the Court below.

One author raises the issue of whether Australia and New Zealand will follow decisions which suggest there is a duty to disclose in certain circumstances: McSherry B "Confidentiality and the Duty to Warn" (2000) 7 J Law & Med 239. We suggest that the case law is consistent with R 11(2)(d), and it will only be in the clearest of cases that there could be a duty. In any event, the kind of injury most likely to result, will be personal injury covered by the accident compensation scheme. Hence the development of the duty is unlikely to result from civil proceedings as it has elsewhere, such as in *Tarasoff* or the *Oei* decision discussed by McSherry at 244. See also Dawson at 13.

One area where a duty could be implied would be a situation of malicious or grossly negligent failure to exercise the discretion to disclose, in an area of damage not covered by the accident compensation scheme – such as a recognised psychiatric injury.

MANDATORY REPORTING

A system of mandatory reporting would require a designated set of professionals, inevitably including health professionals, to report to appropriate government agencies, where they see evidence of abuse. In the main such a system is invoked in respect of child abuse, but similar systems have been put in place with respect to elder abuse.

In 1993, following the Mason Report 1992, a mandatory reporting provision was drafted and inserted into the CYPF Bill. The amendment would have created a system of mandatory reporting whereby every person to whom the section applied "shall report" suspected or confirmed child abuse. The mandatory reporting provision was removed at select committee stage.

New Zealand is out of step with Australia, Canada and the United States in this area. Most, if not all, jurisdictions within those countries have mandatory reporting legislation.

Common features of such legislation are (i) an obligation to report to child protection agencies or the police where there is reasonable grounds to suspect child abuse (ii) criminal and civil liability for failure to report (iii) complete immunity for good faith reporting (iv) reporter anonymity, and (v) a requirement on a broader group than just health professionals (including child care workers, teachers, law enforcement officers and others). Jurisdictions vary as to whether solicitor-client privilege is overridden by the duty or preserved. Canada – see eg Loo, Bala, Clarke and Hornick *Child Abuse: Reporting and Classification in Health Care Settings* August 1998 Health Canada; USA – see eg Smith S *Mandatory Reporting of Child Abuse and Neglect* www.smith-lawfirm.com/mandatory_reporting.htm; Australia – see eg Tomison A *A summary of mandatory reporting across Australia, June 1996* National Child Protection Clearinghouse Newsletter vol 4 no 2.

There is much debate at present as to whether we should follow these jurisdictions. The medical profession is not united in its view, see the *NZMA Newsletter* 22 September 2000 "Child Abuse – the case for a considered policy"; Dr P Kelly "Mandatory Reporting: A Paediatrician's Perspective" 13 November 2000 – Stop the Hurt Conference, Auckland. One consistent theme emerges in all authorities – the implementation of duties to report abuse is only a small part of any solution. It must be combined with the training and resources to assist the accurate identification and investigation of such abuse.

In terms of the disclosure requirement, the real change would be in the mandatory nature of it. There currently exists the ability to disclose with immunity under the CYPF Act and arguably under the Code. If we are prepared to have mandatory reporting for infectious diseases and unfit drivers, then that small part of the solution is not a major step. Objection has been raised on the grounds that mandatory reporting breaches s 14 NZ Bill of Rights Act 1990 – freedom of expression. Of greater concern is that patients may not provide accurate or full information to the provider when seeking assistance, or alternatively do not seek assistance at all, because of mandatory reporting. Despite these and other criticisms (too reactive and interventionist) voiced of mandatory reporting in each jurisdiction, the mandatory reporting regimes have not been repealed.

If mandatory reporting is to be implemented, however, it will make significant inroads into the professional confidence required of providers. Other mandated reporters may not have the same obligations, and therefore less conflict. In the current climate of intense scrutiny on the health sector, the implementation of mandatory reporting on health professionals without further assistance and resources would be unfair and likely to be counter-productive.

CONCLUSION

The populist thought that health professionals should be required to prevent risks posed by patients or report crimes is fraught with difficulty. Whilst some may be better able to detect crimes such as child abuse or prevent danger such as infectious diseases, all will be faced with ethical and legal dilemmas. It is little wonder that providers err on the side of caution unless required to disclose by statute. If we expect their assistance, then clear requirements are needed, rather than a maze of discretion. ❑

MORE PPSA CONTROVERSY

Mike Gedye, University of Auckland

responds to commentary on the PPSA in February and March NZLJ

At [2001] NZLJ 32, Stuart Anderson reviewed *Personal Property Securities Act: a conceptual approach* by Widdup and Mayne and added his own thoughts on what might be an appropriate stance for the New Zealand Courts to adopt when called upon to interpret the Act. The March edition carried a reply at [2001] NZLJ 51 by Widdup and Mayne to articles carried by *The Independent* that had been critical of the drafting of the New Zealand Act. Although these two pieces were unrelated, both contain comments that warrant further debate.

INTERPRETATION OF THE NZ ACT

Anderson concludes by suggesting that New Zealand should ignore North American jurisprudence and take a fresh approach to interpretation of the PPSA. Anderson may have been playing Devil's advocate, but this author believes such an approach would be extremely unwise and indeed nigh on impossible. The New Zealand PPSA is based not only on the wording of the North American legislation but also on the North American understanding of how the legislation works. The two cannot be successfully separated. Taken in a vacuum, the PPSA would be a very difficult piece of legislation. Many sections, if read without regard to their North American pedigree, could yield interpretations quite different from that intended by the Legislature. Some sections would be hard to understand at all. Mr Anderson may be right in saying this is undesirable from the point of view of making the law accessible, but it is inevitable.

From the time of the Law Commission's original PP 6 recommending that New Zealand adopt legislation based on art 9 of the American Uniform Commercial Code, through the Law Commission's final *Report No 8* (1989), to its eventual enactment, the New Zealand Act has been firmly grounded in the North American jurisprudence on personal property securities legislation. At least three members of the New Zealand judiciary are well aware of the North American concepts and interpretations. O'Regan J was co-author of the Law Commission's preliminary report, Blanchard J was a member of the Law Commission's advisory committee on personal property securities and Keith J was a Law Commissioner at the time. The many seminars already conducted on the Act have all given interpretations largely based on North American precedents. North American learning has already taken root here and is known far more widely than just by the "well schooled" that Mr Anderson refers to. He in fact draws on the North American interpretation of the legislation in his analysis when he says "the priorities regime for competing security interests operates irrespective of knowledge" (at 33). The Act does not say this and it has not always been so held in North America (*529167 Ontario Ltd v Concord Inn Motel Inc* (1988) 8 PPSAC 265). It is also contrary to English law's long held reliance on the doctrine of actual notice. But in North America it is now the accepted interpretation (*BMP & Daughters Investment Corp v 941242 Ontario Ltd* (1992) 4 PPSAC (2d) 220; *Frankel v Canadian Imperial Bank of Commerce* (1997) 12 PPSAC (2d) 306) and we can confidently predict that the same approach will be followed in New Zealand. Surely we would not want years of uncertainty over such a basic issue when we can settle the point by borrowing from North American experience?

The PPSA is intended to make the law more certain, and this will not be achieved if we strike out on our own when interpreting the legislation. Two further examples, from the many available, suffice to illustrate the point. For nearly 20 years the Canadian Courts struggled to understand what the consequences might be when a secured party chose to adopt floating charge terminology under a regime that renders the floating charge and the related concept of crystallisation obsolete (see eg the confusing judgment of Saunders J in *Access Advertising Management Inc v Servex Computers Inc* (1993) 15 OR (3d) 635). The Canadian Courts could not look to the US for assistance – the floating charge had never been recognised in American law. The answer happens to be that adoption of floating charge language, without more, has no special consequence under the Act. Furthermore, in the words of Hunter J: "To continue to use the language of floating charges and crystallisation which do not exist in the PPSA causes confusion in the interpretation of the unambiguous provisions of the PPSA. This confusion has been contributed to by the use of this archaic language in the cases cited ...". *(Rehm v DSG Communications Inc* (1995) 9 PPSAC (2d) 114 at 124.) Without recourse to Canadian precedents, we will run the risk of creating our own prolonged confusion. Although this may line the pockets of litigators, it will not serve commerce.

In the second example, New Zealand is perhaps even more likely to head down the wrong path if the principles underpinning PPS legislation are not well understood. Insolvency lawyers will be well aware that the phrase "ordinary course of business" in s 292 Companies Act 1993, is the most litigated term in that Act. The same phrase, or the phrase "course of business", has also long been part of floating charge jurisprudence. These words have now been adopted in the important s 53 PPSA, despite submissions that, given the unfortunate baggage that accompanies them, alternative wording would be preferable. It is clear that neither the meaning given to these words for the purposes s 292 Companies Act, nor the meaning given in floating charge cases, is appropriate in the context of the PPSA. Instead, it is highly desirable that our Courts look to North American cases where the words have been interpreted in their proper context. If our Courts fail to do so, there could be some unpleasant surprises either for secured creditors, if our Courts follow the floating charge cases, or for buyers,

if our Courts follow the restrictive definition appropriate for voidable preference law.

This author's fear is not that New Zealand Courts will follow North American precedents too closely, it is that this jurisprudence will be given insufficient consideration. As Anderson pointed out, the New Zealand Act deliberately departs from the substantive approach taken in Canada in a number of respects. In such cases, and in other situations where New Zealand circumstances warrant a different approach, North American precedents should not be slavishly followed. However, there are numerous instances where the wording of a New Zealand section departs from the wording of the Canadian equivalent, not with the intent of departing from the Canadian interpretation, but presumably due to the stylistic preferences of the New Zealand draftsperson. The draftsperson may have unwittingly rendered the Canadian precedents less relevant in the Courts' eyes. One hopes that the Courts will guard against this conclusion. New Zealand Courts should look to the North American analysis, both judicial and academic, for guidance, along with indigenous aids to interpretation such as the Law Commission and Select Committee reports and the views in works such as Widdup and Mayne. In this way, PPS jurisprudence with a New Zealand flavour will develop without having to reinvent the wheel.

MEDIA CRITICISM

"Chalkie" criticised the PPSA in *The Independent* (25 October and 1 November 2000). The conclusion reached was that the Act, although based on sound concepts, was deficient in a number of respects. The author called for properly considered remedial legislation. Widdup and Mayne replied to that criticism and more or less endorsed the PPSA in its current form. This author prefers Chalkie's view.

Chalkie's criticism concentrated on two aspects of the Act. One was the adverse effect the Act will have on the factoring industry. In response, Widdup and Mayne offer a number of detailed points that require analysis. In answer to the concern that factors, in a departure from prior law, will lose priority to preferential creditors, Widdup and Mayne point out that something is to be done about this (the PPS Amendment Bill restores the priority of factors). In my view, both the original concern and the attempted fix ignore deeper problems. The preferential creditor provisions are so convoluted that the extent to which factors would have lost priority to preferential creditors was by no means clear.

First, no secured creditors, including factors, concede priority to the preferential creditors of unincorporated debtors. This is because the effect of the PPSA on s 104 Insolvency Act seems to have been overlooked. Section 104, in the case of personal insolvency, replicates the scheme of distribution applicable to corporate insolvency under the Seventh Schedule to the Companies Act. Because under prior law unincorporated debtors did not give security interests over circulating assets (except as provided in the rarely used s 26(1)(d) Chattels Transfer Act 1924), any inventory and accounts receivable of an unincorporated debtor would generally fall to be distributed under s 104. Now that the PPSA permits unincorporated debtors to give security over all present and future assets, inventory and accounts over which a security interest has been given will no longer be subject to s 104 because the section only applies to assets not given as collateral. Ironically, in what would be a complete reversal of existing practice, this anomaly might lead secured creditors to prefer to lend to unincorporated debtors so as to evade subordination to preferential creditors.

Second, factors would not be subject to the preferential creditor provisions of the Property Law Act 1952 because they only apply to a "mortgagee in possession" (PLA s 104BB). A factor is not a mortgagee in possession. This anomaly arises because no attempt has been made to bring the PLA into line with PPS concepts. Ignoring less significant corporate forms, s 312 Companies Act is the only provision that potentially subordinated factors to preferential creditors. This section only applies to a company in liquidation. Subject to some concern that factors may in some circumstances be called on to disgorge accounts already collected (in this author's view, an unlikely scenario), factors who enforced their security interests prior to liquidation would not have been at risk from s 312. Furthermore, s 312 binds the liquidator, not the secured creditor. The mechanism by which a liquidator, presumably relying on cl 9(b) of the Seventh Schedule, could have forced a factor who was collecting debts to give effect to s 312 was nowhere spelt out. This all left considerable uncertainty as to the extent to which factors needed to be troubled by the preferential creditor provisions. If the PPS Amendment Bill provisions "fixing" the problem are implemented, further anomalies will be introduced. With respect to accounts receivable, factors will be given priority over preferential creditors, preferential creditors have priority over general secured creditors and general secured creditors can take priority over factors. A cautious receiver or liquidator will seek the Courts' directions to sort out that conundrum. The preferential creditor provisions remain fundamentally flawed.

In any event, subordination to preferential creditors has always been the lesser of factors' concerns. Factors' primary concern is subordination to prior inventory suppliers. If the supplier of inventory that a debtor on-sold on credit, thereby generating accounts receivable, had a purchase money security interest over the inventory, the inventory supplier's priority will extend to the accounts receivable. Chalkie pointed out that this risk may cause factors to shut up shop. Widdup and Mayne seek to show that this is an over-reaction. In doing so, they make some debatable points:

- that a half paid inventory supplier only has priority over half the account generated from on-sale of inventory. It may be better to say that the inventory supplier has priority over the entire account but cannot recover more than the amount owing. Well advised inventory suppliers will insist on payment allocation provisions that allow them to apply payments first to any unsecured debts so as to maintain their security interests in the inventory and accounts while any debt is outstanding;
- that it is questionable whether suppliers will be able to prove their purchase money security interests extend to the accounts receivable. The Act automatically extends their claim to the accounts receivable. Suppliers have to identify which particular accounts receivable of the debtor have been generated from inventory provided by themselves. This should not be unduly difficult where the debtor has kept reasonable records;
- the valid point that a purchaser of chattel paper can take priority over the inventory supplier by taking possession of the chattel paper. There may be scope for factors to exploit this concept – if they could be certain what chattel paper was. In their book, the authors, in the course of a useful 25 paragraph analysis of the meaning of chattel

paper, state that the statutory definition "does not adequately separate monetary obligations that should be part of chattel paper from those that should not". (at para 26.40.) Perhaps chattel paper does not bring the comfort factors seek after all;

- that the rules are not formidable and factors can work with them. This might be taken to suggest there are rules in the Act that factors can utilise to protect their position. There is no way under the Act that factors can prevent inventory suppliers from taking priority to the accounts receivable generated from the on-sale of the inventory.

Chalkie's second main premise was that by not invalidating unperfected security interests in insolvency, the PPSA is something of a "crooks charter". Under prior law, certain charges given by a company, for example, were void against the company's liquidator if not registered. Under the PPSA, unperfected (ie non-possessory and unregistered) security interests will be effective against the liquidator. This raises a number of concerns, not least that in the absence of mandatory registration fraudsters will more easily be able to allege the existence of fictitious security interests. Registration required within a certain time of execution also serves as an objective point that assists in determining the date of creation of a security interest. Liquidators empowered under s 293 Companies Act to set aside security interests created within a year of liquidation will have to determine the date of creation of a security interest without the assistance of a known date of registration. On the other hand, even if registration were mandatory under the PPSA, the system of notice registration introduced by the Act is of less assistance in determining the approximate date of creation of a security interest than the existing registration regime. Under the PPSA, the security agreement is not filed. Instead, a financing statement that can relate to more than one security agreement can be filed at any time before or after the security agreement is executed. Nevertheless, there will be greater potential for dishonest, or even innocent, back dating of security interests. Apart from the greater potential for fraud created by the PPSA's voluntary registration regime, it will also make the register a less useful and reliable source of information. A potential creditor contemplating providing unsecured credit may be reluctant to do so if the prospective debtor has given security to related parties. Under the new regime, an assurance from the debtor that this is not the case can no longer be checked against the register with any confidence. Negative pledge lending will become even riskier than at present as lenders will lose one way of monitoring a borrower's compliance with its negative pledge obligations. Mandatory registration assisted creditors in assessing not only the credit worthiness of a debtor but also its integrity. Although arguments can be made against mandatory registration, and in particular that unsecured creditors should not rely on searches of the register in assessing whether to advance credit, the fact remains that creditors do rely on register searches and voluntary registration undermines the integrity of the register. To put it another way, there will be less information available and therefore less informed decision making. Widdup and Mayne state: "Obviously, the register provides an effective notice system for potential lenders to rely on to learn the extent to which a borrower's assets are encumbered." This is clearly not so. Nor would supporters of voluntary registration argue that this was even an objective of the PPSA regime. The regime does, however, allow potential *secured* creditors to determine the priority their interest will take. Widdup and Mayne also argue that it is not unusual for secured creditors to have priority over unsecured creditors. This ignores the fact that it is very unusual, in the absence of registration, for creditors secured over future assets to have priority in insolvency over unsecured creditors. The New Zealand approach is contrary to that adopted in all of the PPS jurisdictions on which our Act is based and that in force under the law of most other countries. Widdup and Mayne's comment that "an unregistered security interest is no threat to the prudent lender" is only true if only secured lenders can be considered to be prudent. This novel suggestion takes no account of the vast amount of unsecured credit in existence.

The issues raised by Chalkie and taken up in this journal concentrate on only two anomalies in the PPSA. These are not the only outstanding issues. This author has identified more than 100 items of concern. More will come to light as further commentators question why the New Zealand drafting departs so markedly from the Canadian. Some defects are only minor and obvious drafting errors that a Court should have little trouble ignoring (eg the incorrect cross-reference in s 65 to s 59). Other careless drafting errors will cause more trouble but are still relatively minor (eg the incorrect reference to "personal property" in line 3 of s 177(1)(c) – which should refer to "collateral" – could allow an unscrupulous secured party to argue it is not obliged to indicate which listed items are collateral). Of particular concern are the omissions and drafting practices that cannot be immediately identified as clear errors but that permit more than one plausible interpretation. Just a few examples include:

- does para (b) of the definition of investment security exclude a document evidencing a loan secured over all a debtor's present and future assets only if the debtor owns land at the time the document is executed, or whenever the debtor happens to own land, or not at all?
- does a security interest reattach to assets dealt with by the debtor under a transaction to which s 53 applies where the assets are subsequently returned to, or repossessed by, the debtor?
- does s 109, by inserting the words "with priority over all other parties", outlaw enforcement by anyone other than a first ranking creditor (as apparently intended by officials) or should s 109 be interpreted as giving a first ranking creditor an additional statutory right to enforce over and above the contractual rights that any secured creditor may have? The latter interpretation would be consistent with the equivalent Canadian sections.

None of these issues arise under the Canadian drafting and are the sort of problems that will create ongoing uncertainty. Some involve fundamental issues. Widdup and Mayne make the valid point that any legislation as complex as the PPSA will inevitably require adjustment after it comes into force. New issues will come to light after the Act has been implemented. But this does not justify bringing the Act into force without fixing the numerous errors already identified. There is apparently concern that remedial legislation would delay implementation of the new regime. This is surely a lesser evil than the uncertainty that the PPSA in its present form will create. The existing regime generates virtually no litigation. If the new Act is not amended this will change. Furthermore, there is no reason why, with a concerted effort, the worst errors could not be remedied before the Act comes into force, nearly three years will pass from the time the legislation was enacted. It should have been, and still could be, put right without unduly deferring the new regime. ❑

RELITIGATION: THE HOUSE OF LORDS RULES

LITIGATION

with

Andrew Beck

The point at which a matter is regarded as "litigated out" has always been difficult to establish. The modern approach is based on the discussion by Sir James Wigram V-C in the celebrated case *Henderson v Henderson* (1843) 3 Hare 100. Yet it has been the subject of a spate of recent Court of Appeal decisions in England, eg *Barrow v Bankside Members Agency Ltd* [1996] 1 All ER 981, *Manson v Vooght* [1999] BPIR 376 and *Bradford & Bingley Building Society v Seddon* [1999] 4 All ER 217. In each of these cases, the Court struggled to draw a clear boundary line. In its most recent consideration of the issue, *Bradford & Bingley Building Society*, the Court of Appeal held that, in order to succeed it was necessary for the applicant to show some "additional element" beyond mere relitigation: see [2000] NZLJ 205.

The issue has now been considered for the first time by the House of Lords in *Johnson v Gore Wood & Co* [2001] 1 All ER 481 (HL).

BACKGROUND

Mr Johnson carried on business as a property developer through a company, Westway Homes Ltd (WWH). Mr Johnson, on behalf of WWH, instructed Gore Wood & Co in connection with a property purchase. Complications arose, and litigation against the vendor ensued. Although the proceedings were successful, the judgment was ultimately worthless, and WWH suffered considerable losses as a result of pursuing the litigation. The company therefore brought a claim against Gore Wood & Co.

That trial was in its sixth week of hearing when the claim was compromised for a substantial proportion of the amount claimed, as well as an agreed amount for costs. Before the matter had come to trial, however, Mr Johnson had notified Gore Wood's solicitors that he also had a personal claim against the firm, because they had been advisers to him in his personal capacity as well as to WWH. For various reasons, including the precarious financial position of the company, he decided not to pursue that claim at the same time as WWH's claim.

There were extensive settlement discussions between the parties, during which the possibility was raised of an overall payment to cover both the company's claim and Mr Johnson's personal claim. The representatives for Gore Wood said that a personal claim would have to be negotiated separately, but agreed to a cap on the amount of the claim. This was reflected in the settlement agreement entered into.

Mr Johnson subsequently instituted proceedings for damages against Gore Wood. The firm argued that the proceeding was an abuse of process, and that it properly belonged together with the WWH proceeding: the second claim would involve a duplication of cost and Court time, delay resolution of the matter, subject Gore Wood to avoidable harassment, and constitute a collateral attack on the previous decision.

At first instance, the Judge agreed, holding that the settlement had been based on the common assumption that there would be a further personal claim. The Court of Appeal held, however, that there was a substantial similarity between the two proceedings, and that Mr Johnson's personal claim should have been raised at the same time as the claim by WWH.

DECISION

The principal judgment was delivered by Lord Bingham of Cornhill. On the topic of abuse of process, his judgment was endorsed by Lords Goff, Cooke, and Hutton. It must therefore be seen as carrying considerable authority. Lord Millett delivered a separate judgment on the abuse of process question, but in essence, he too was in agreement with the proper approach to be adopted.

Lord Bingham began by noting the conflicting policy objectives. On the one hand, the rule of law depends on access to the Courts, and litigants should not be prevented from bringing a genuine claim without a scrupulous examination of all the circumstances. On the other hand, the Courts are not required to hear in full any claim a litigant may choose to put forward, and will refuse to allow claims which are manifestly unfair to the other party, or would bring the administration of justice into disrepute (at 81).

Having summarised the law from *Henderson v Henderson* onwards, and observed that there had been objections to its pedigree, Lord Bingham concluded that the rule has a valuable role to play in litigation (p 90): the policy underlying the principle is the same as in res judicata and issue estoppel. There must be finality in litigation, and a party should not be twice vexed in the same matter. He noted the current emphasis on efficiency and economy in the conduct of litigation (p 90).

He restated the principle as follows:

> The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. (p 90.)

He added important qualifications:

- it is not necessary (contrary to the approach in *Bradford & Bingley Building Society*) to identify any "additional element" such as a collateral attack on a previous decision, or dishonesty;

- it will rarely be concluded that there is an abuse unless the later proceeding can be regarded as unjust harassment of a party;
- merely because a matter could have been raised in earlier proceedings does not necessarily make the later proceedings abusive. There has to be a broad, merits-based judgment which takes account of all the public and private interests as well as the facts of the case;
- lack of funds would not generally be sufficient excuse for failure to raise a matter earlier. It might be a relevant factor, however, especially if caused by the other party.

This clarifies that the issue is to be seen as a species of abuse of process, and that, as in all cases, the party alleging abuse must prove it. There is no presumption that a second proceeding – which does not involve res judicata or issue estoppel – will be abusive unless shown otherwise. It is nevertheless clear that, where a second proceeding is substantially similar to a previous proceeding, the party embarking on it will need to have sound justification. There is, in a real sense, an obligation to litigate economically.

APPLICATION

When applying the principle to the particular facts, Lord Bingham rejected an argument that *Henderson v Henderson* could not apply because Mr Johnson had not been a party to the first proceeding. He held that WWH was the corporate embodiment of Mr Johnson, and that Mr Johnson could have included his personal claim had he wished to (p 91).

He also rejected the argument that the principle could not apply because the first proceeding had ended in a compromise. The purpose of the rule is to protect against harassment of the defendant, and that would be entirely defeated if previously compromised claims were excluded (pp 90-91).

The crux of the matter was, however, that the settlement had been entered into on the understanding that Mr Johnson was free to pursue his personal claim, and that the parties had accepted that there were good reasons for his decision to hold it back. While it would have been preferable for the two claims to have been decided at the same time, the course which had been adopted could not be described as abusive. This was borne out by the fact that Gore Wood had delayed considerably before bringing the application to strike out (p 93).

LORD MILLETT

Lord Millett leans further in favour of the rights of plaintiffs to approach the Court. He gives little, if any weight to the public interest in finalising litigation. To that extent, the judgment is out of line with the modern approach to case management and the proper use of scarce resources.

His approach treats *Henderson v Henderson* as prima facie a denial of the citizen's right of access to the Court (p 118). This can only be justified if it can be established that there is an abuse of process. Like Lord Bingham, he rejected the idea of a presumption against the bringing of successive actions, and held that the onus is always on the party alleging abuse.

He held that the rule could not sensibly be extended to the situation where the defendants in the two proceedings are different. That is at odds with the view of the Court of Appeal in *Bradford & Bingley*, and may be regarded as too bland a statement of the law. Where, for example, the defendants are different, but one is part of the other, there may well be abuse in not proceeding against them together.

Even with regard to the situation where the plaintiffs in the two proceedings are privies, Lord Millett had difficulty. He accepted that the principle could apply in theory, but considered that it would be easier for the charge of oppression to be rebutted (p 119). He considered that there would always have had to be separate trials involving Mr Johnson and WWH, and that the area of overlap related only to the standard of care. In such circumstances, the second proceeding could not be abusive.

In any event, he held that it would have been unconscionable for Gore Wood to be allowed to raise the issue after the way in which it had handled the settlement negotiations, and the length of the delay in bringing the striking out application.

CONCLUSION

The House of Lords has established that the rule in *Henderson v Henderson* is a species of abuse of process. The person alleging that relitigation is abusive must prove it.

That said, however, there are good reasons to require plaintiffs to raise their claims in one proceeding. If there is no justification for bringing separately a claim which could properly have been included in a previous claim, it is more than likely that the Court will regard the defendant as subject to unjust harassment. The second claim will have to be struck out.

As always, there is a somewhat uneasy balance between the rights of citizens to approach the Courts, and the rights of citizens not to be harassed. That is reflected in the approach of the House of Lords. The interests of the public in general in having a Court system which is available to them appear to have been relegated to the back seat. All litigators know-how easy it is for a determined litigant to clog up the Court system. Only when the Courts take a firm line on such behaviour will it result in a more considered approach. One of the ways of achieving that is by limiting strictly the rights of litigants to revisit matters. It would be unfortunate if the decision in *Johnson v Gore Wood & Co* were to result in a more relaxed attitude to unjustified relitigation.

STATUTORY APPEAL RIGHTS

In *Bray v NZ Sports Drug Agency* unreported, CA 215/00, 6 December 2000, the Court of Appeal restored to some extent the fortunes of Trent Bray. It overturned a decision of the High Court decision and restored the decision of the District Court, which had quashed a determination of the Board of the NZ Sports Drug Agency. An interesting feature of the case is how it managed to get to the Court of Appeal at all.

Background

The NZ Sports Drug Agency is charged with the oversight of sports drug testing of competitors under the NZ Sports Drug Agency Act 1994. The Board of the Agency determined that Mr Bray had committed a doping infraction, and entered that determination on the register. Under s 20 of the Act, competitors who have received notification of a determination by the Board may appeal to the District Court. Mr Bray followed this course, and the District Court found in his favour on two

points. The Court accordingly quashed the Board's determination.

Section 24 of the Act allows both the competitor or the Agency to appeal to the High Court, but only on a question of law. The Agency pursued an appeal against the District Court decision, and Mr Bray cross-appealed. The High Court reversed the District Court decision on the two points decided in favour of Mr Bray, and dismissed the cross-appeal.

Mr Bray then applied for leave to appeal to the Court of Appeal. The application was based on s 67 of the Judicature Act 1908, which provides that the determination of the High Court on appeals from inferior Courts is final, unless leave to appeal is given. The High Court granted leave in *NZ Sports Drug Agency v Bray* unreported, HC Auckland CP 36-SW00, 25 September 2000, Paterson J.

Leave to appeal

In the course of granting leave, the Court observed that the NZ Sports Drug Agency Act 1994 does not confer any right of appeal to the Court of Appeal. The Court went on to hold, however, that any appeal could only be on a question of law because the appeal to the High Court was limited to questions of law (para 8). The Court therefore treated the matter as a conventional application under s 67, subject to this implied limitation.

Paterson J applied the criteria for second appeals laid down in *Waller v Hider* [1998] 1 NZLR 412 (CA), noting the comments of Tipping J in *Riddell v Porteous* (1996) 10 PRNZ 64 to the effect that leave is more likely where the High Court has disagreed with the District Court.

The points on which there had been disagreement had to some extent been overtaken by an amendment in regulations, and were otherwise fact specific; they were therefore not of great public importance. The Court was ultimately swayed, however, by the fact that the Agency's determination could be seen to reflect on the character and conduct of Mr Bray, and to have special consequences for him. This was seen as sufficient to require that the matter be reconsidered in the interests of justice (para 16).

One of the situations justifying leave mentioned in *Waller v Hider* is where a decision reflects seriously on the character or conduct of the would-be appellant. In that sense, the decision falls into an established category. Examples of such cases are, however, relatively rare. In *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343, the appellant faced potential bankruptcy. Defamation cases, such as *Cranson v NZ Trainers Association* [1999] 3 NZLR 641 (CA), might fall into this category, although the slur on character was not enough to sway the High Court in that case, and the Court of Appeal granted leave on an unrelated basis. (And of course one is always left with an uneasy feeling when an appeal succeeds in these circumstances, as it did: *Cranson v NZ Trainers Association* unreported, CA 225/99, 22 March 2000.)

The situation in *Bray* involved the potential imposition of a substantial fine, and the restriction of business opportunities and sponsorships, which are of considerable significance for a professional sportsperson. In that respect, the exercise of discretion by the High Court may be justifiable. The reversal of the High Court by the Court of Appeal demonstrates how significant the leave decision was.

The jurisdictional issue

Of more interest for present purposes is the question of the jurisdiction to grant leave in the first place. As the High Court noted, the governing statute contains no reference to any right of appeal to the Court of Appeal. By contrast, it contains very detailed provisions relating to appeals to the District Court (ss 20-23), and specific provisions creating the limited right of appeal to the High Court. Had a further right of appeal been intended, one would have expected to find it in the statute.

All appeals are entirely creatures of statute; it is therefore necessary to find a governing provision for every right of appeal. In analogous statutes the rights of appeal are laid out clearly, and in each case, a right of appeal is specified separately. For example, the Children, Young Persons, and Their Families Act 1989 establishes appeal rights from the Family Court to the High Court, and on questions of law to the Court of Appeal (s 347). The Accident Insurance Act 1998 provides for appeal rights to the District Court, and further rights of appeal (with leave) on errors of law, to the High Court (s 165) and the Court of Appeal (s 166). The Civil Aviation Act 1990 provides a right of appeal to the District Court, and appeals on questions of law to the High Court (s 69) and, with leave, to the Court of Appeal (s 70).

The most obvious inference from these types of provisions is that, where further appeals are contemplated, a right of appeal is included in the statute. The corollary is that, if no right of appeal is mentioned – as in the NZ Sports Drug Agency Act – there is no right of appeal. A similar situation is found in the Transport Services Licensing Act 1989, but the appeal rights under these Acts do not appear to have been considered by the Courts.

The most notable instance in which there is no specific statutory right to appeal is in respect of second appeals from matters within the general jurisdiction of the District Courts. The District Courts Act 1947 confers a right of appeal to the High Court (s 71A). The only reference to a further right of appeal is in s 66 of the Judicature Act, which is subject to the leave requirement of s 67 in the case of appeals from inferior Courts. The question then arises as to whether it is appropriate to rely on this section to create a right of appeal where a statute is otherwise silent.

There are a number of pointers against any such interpretation. The first is found in the fact that the typical statutory pattern is to provide specific appeal rights. The various Acts mentioned above do not rely on the general appeal rights in the District Courts Act; they each contain a separate statement of the applicable rights. Secondly, the jurisdiction which is being exercised in such matters is not the general jurisdiction of the District Courts created by the District Courts Act; it is a statutory jurisdiction conferred on the District Courts by some other statute. Section 67 is a leave provision: it assumes that there is an appeal right in existence. Finally, in the case of the NZ Sports Drug Agency, an appeal to the Court of Appeal would be a third tier of appeal. One could legitimately expect such an appeal to be specifically regulated.

Interpreting the Act in this way also avoids the very awkward implication exercise which was pursued by the High Court. The appeal right created by s 66 is a general right of appeal on matters of both fact and law. However, in order to make sense of an appeal from an already restricted appeal, the Court effectively had to infer a limitation on s 66.

While the matter would have been put beyond doubt by providing in the NZ Sports Drug Agency Act that the decision of the High Court is final, the true meaning of such provisions has to be determined by proper statutory

construction, as evidenced by the Privy Council decision in *De Morgan v Director-General of Social Welfare* [1992] 3 NZLR 385 (PC). Overall, the most sensible approach to the statute seems to be one which draws the matter to a close at the High Court.

Consequences

In hindsight it is hard to claim that Mr Bray should have been denied his appeal, and been forced to live with the consequences of an unfortunate system. That is, however, inherent in the nature of any appeal system. If a line is drawn somewhere, there will always be cases which would have been reversed further up. The case illustrates how important the role of final decision maker is, something which will become increasingly relevant once appeal to the Privy Council is abolished.

COSTS AGAINST PRACTITIONERS: *HARLEY v MCDONALD* IN THE PRIVY COUNCIL

On 10 April 2001, the Privy Council delivered its decision in the appeal from *Harley v McDonald* [1999] 3 NZLR 545 (CA). The decision was handed down by Lord Hope of Craighead, and the Privy Council (including Dame Sian Elias) unanimously allowed the appeal.

The Court of Appeal had upheld a decision of Giles J, awarding costs personally against Mrs Harley as counsel, and Glasgow Harley, the solicitors on the record. The basis of the award was the pursuit of a hopeless case, which was held to amount to a serious dereliction of the legal practitioners' duty to the Court.

The case for Mrs Harley was advanced on three grounds:

- breach of natural justice by the trial Judge;
- no jurisdiction to order a barrister to pay a client's costs personally; and
- no serious dereliction of duty to the Court.

The jurisdictional issues

The Privy Council began by stressing the distinction between barristerial immunity and the jurisdiction to make a personal costs award against a practitioner. Their Lordships did not find it necessary to make a decision on the general issue of barristerial immunity. They held that the question as to whether the immunity rule can still be justified on public policy grounds in New Zealand has yet to be tested, and expressed a reluctance to pronounce on the issue without judgments of the New Zealand Courts.

That did not, however, resolve the question of personal costs orders. Lord Hope held that, as the jurisdiction to make a costs order against a solicitor rests on the solicitor's duty to the Court, there does not seem to be any reason why the same jurisdiction should not be exercised over a barrister. The public interest in both cases is the same: a serious dereliction of duty to the Court should be dealt with by the Court.

Their Lordships agreed with the Court of Appeal that serious dereliction of duty was the appropriate threshold test to invoke the jurisdiction to award costs against a practitioner, and noted that the purpose of the award is essentially a punishment for failure to fulfil the duty. There is a compensatory aspect to it, in that the award relates to costs which would not have been incurred but for the failure in duty.

What amounts to serious dereliction of duty

Taking an essentially pragmatic approach, Lord Hope emphasised the summary nature of the jurisdiction to award personal costs. He held that the jurisdiction should be confined to breaches of duty capable of summary disposal by the Court, such as failure to appear, or causing an avoidable step to be taken. In situations of professional misconduct, the disciplinary provisions of the Law Practitioners Act 1982 are brought into play, and the procedures there ought to be followed. Those matters should not be taken into account in making a summary costs award. The sole concern in the summary jurisdiction is the public interest in the administration of justice.

While not ruling out the jurisdiction to make an award against a practitioner in favour of the client, Lord Hope considered that the Courts should be wary of encroaching on the disciplinary jurisdiction, and making orders which would require them to go beyond the facts immediately before them. Fairness requires notice to the barrister or solicitor to challenge breaches of duty, and the opportunity to test evidence. Such procedures would not generally be appropriate in the exercise of the summary jurisdiction.

As to the level of conduct justifying an award, the Court held that a simple mistake or error of judgment would not suffice. Negligence of a serious type might be enough, but this would depend on the particular context.

Ultimately, the Privy Council concluded that it is not correct to say that a barrister who pursues a hopeless case not appreciating it to be hopeless is guilty of a serious dereliction of duty to the Court. As that was the only charge laid against Mrs Harley and Glasgow Harley, the award had been inappropriate. The Privy Council was also not satisfied on the facts that Mrs Harley had pursued a hopeless case without instructions. On that basis, too, the Court of Appeal decision could not stand.

Natural justice

The Privy Council decision also relied heavily on the absence of natural justice. This was based essentially on the fact that Giles J had made a decision without being in possession of all the necessary information, and taking impermissible matters into account without providing any opportunity for challenge or comment. The Court held that the High Court decision had been fundamentally flawed.

The Court of Appeal had not recognised the extent to which Giles J had been influenced by matters not properly before him. The Court had also failed to recognise that the entire substratum for Giles J's decision had disappeared.

CONCLUSION

The decision of the Privy Council has resolved the issue of jurisdiction to award personal costs against barristers. To that extent, it is a helpful landmark. It has also stressed that importance of following a proper process before making decisions adverse to the persons concerned.

One cannot help being left with the feeling, however, that the summary jurisdiction to award costs – which may be a very valuable remedy in litigation – has been reduced to something of a dead letter. It is hard to imagine that it will be of much use in future. ❑

CRIMINAL PROCEDURE LEGISLATION

CRIMINAL PRACTICE

with

Robert Lithgow

The Law Commission has published a Study Paper *Simplification of Criminal Procedure Legislation* (7 January 2001) prompted by repeated calls from the Courts to simplify criminal procedure.

The Commission proposes a Criminal Proceedings Act to replace most existing criminal procedure and jurisdiction provisions found in various Acts, principally the Summary Proceedings Act, the Crimes Act and the District Courts Act. The new Act would sweep away the summary/indictable distinction, remove limitations on the sentencing jurisdiction of non-jury warranted District Court Judges and reclassify offences into five categories. Consequential amendments would remove all remnants of the summary/indictable distinction (eg different penalties, definitions in other Acts etc).

The five categories of offences the Commission proposes to retain are: infringement and minor offences; three months' imprisonment offences, electable offences, middle band offences and High Court only offences.

Infringement offences and other minor offences

The paper does not deal comprehensively with this category. It is noted that there may need to be a separate legislative move to make infringement notices uniform and that it may in fact be possible to subsume them within the minor offences category.

Three months' imprisonment

Currently purely summary matters, these offences would be heard in the District Court or before Community Magistrates or JPs. Appeal would lie to the High Court if determined by the District Court but to the District Court if heard before CMs or JPs.

Electable offences

Offences with a penalty greater than three months but less than 14 years would be tried in the District Court before Judge alone unless the defendant elected trial by jury. This would comprise all summary offences currently carrying an election, and indictable offences listed in Part I of Schedule 1A of the DCA and the First Schedule of the SPA. A defendant who pleaded guilty before election would be sentenced in the District Court; appeal would lie to High Court with further appeal on question of law to the Court of Appeal. If a not guilty plea was entered and no election made, the matter would be heard before a District Court Judge alone. If the defendant was found guilty, he would be sentenced in the District Court with a right of appeal to the High Court and a further appeal on question of law to the Court of Appeal. It is not clear whether that further appeal would be with leave (as the current s 144 SPA). If trial by jury were elected, the preliminary hearing would be held in the District Court. Once committed for trial, the defendant would not be able to apply to have the matter heard before a Judge alone (as at present). It is not clear whether the defendant could change his or her mind after election but before committal. The defendant would be tried by a jury-warranted District Court Judge and a jury and, if found guilty, would be sentenced in the District Court. Appeal would lie to the Court of Appeal.

Middle band offences

The offences currently contained in Part II of the Schedule 1A of the DCA (most have a maximum penalty greater than 14 years) would be tried before a jury unless the defendant or the prosecution applied for trial before Judge alone. It is not clear on what grounds that application could be made or whether the ruling could be appealed but there is some indication that public interest would be the touchstone. If a not guilty plea was entered, the preliminary hearing would be heard in the District Court and the defendant committed to the High Court for trial. If the High Court transferred it down and the matter was tried in the District Court, then the District Court Judge could try and sentence the defendant. Appeals would lie to the Court of Appeal. Once a defendant was committed for trial in the District Court (ie once it has been middle banded), the indictment could be amended in the District Court and the trial continued – putting an end to the current circus whereby only the High Court can amend the indictment and, once there, the matter cannot be returned to the District Court. The right to apply to the High Court to have the matter heard in the High Court would remain. If a guilty plea was entered prior to committal, the District Court would have power to sentence to the maximum provided by law. Appeal would lie to the High Court with a further appeal on question of law to the Court of Appeal. Again, one assumes that that further appeal will be by leave. The paper notes that the Commission was specifically instructed to retain middle band offences, but the possibility of further simplification by removing middle banding by merging them with electable offences is briefly discussed.

High Court only offences

This category has all sorts of historical oddments. For example, false statements under s 29 Life Insurance Act, which has no maximum period of imprisonment and pledging another person's property under s 32 Pawnbrokers Act. The report attempts to rationalise it all so that, essentially, the High Court would be reserved for the most serious offences, currently classified as purely indictable and not available for middle banding. These offences would be tried in the High Court before a jury unless the defendant or the prosecution ap-

plied for trial before a Judge alone. Again, it is not clear what grounds application could be made upon or whether the ruling could be appealed. The preliminary hearing would be heard in the District Court but, if the defendant pleaded guilty prior to committal, he or she would be committed to the High Court for sentence. Appeal would be to the Court of Appeal and, with leave, to the Privy Council.

Additional proposals

Where a defendant is charged with offences from more than one jurisdiction but arising out of the same incident or series of incidents, then all matters would be dealt with in the High Court unless they were middle banded. The new Act would need a provision to allow the District Court offences to be heard in the High Court.

Further, the new Act would empower the District Court to order that an election on one electable offence applies to all offences arising out of the same incident or series of incidents. That would prevent a defendant effectively requiring two separate trials to adjudicate on the same events. Similarly, but arguably more fundamentally, the Court can order that an election by one defendant binds all co-defendants. (Both of these problems are currently managed by laying all of the relevant informations indictably.)

The Commission also recommends that the requirement to swear an information be removed. It is not immediately clear how a prosecution would be commenced, whose responsibility it would be or what form it would take.

All the changes, although dull in appearance, are overdue. It remains to be seen whether Parliament can give then the hasty progress it gave the Criminal Appeals Amendment (re ex parte appeals in the Court of Appeal).

DRUG SENTENCING

R v Hoe CA 453/00, 2 April 2001, Thomas, Blanchard and McGrath JJ, is an example of the difficulties that inadequate and confusing criminal procedure provisions currently cause.

Section 9 of the Misuse of Drugs Act provides that it is an offence to cultivate cannabis. The maximum penalty is seven years' imprisonment if convicted on indictment but only two years' or $2000 if summarily convicted. Section 9 is also listed in the Second Schedule to the SPA as an indictable crime, triable summarily. Mr Hoe was charged, by way of an information laid indictably, with cultivating cannabis. He pleaded guilty in accordance with s 153A SPA pre-depositions, ie before being committed into the indictable jurisdiction for trial and, therefore, before any indictment was presented. The question of jurisdiction was then raised with the District Court Judge and, although not clear, it appears that the Judge declined jurisdiction and committed Mr Hoe to the High Court for sentence on the basis that the offending warranted a sentence longer than the maximum of two years available to him. It is unclear where and when Mr Hoe was sentenced or what the ultimate sentence was.

The District Court Judge also stated a question for the High Court asking whether he was correct to rule that, if he had accepted jurisdiction, then Mr Hoe would have been summarily convicted and the lower maximum penalty would apply. Robertson J, in the High Court, answered in the affirmative and refused leave to appeal to the Court of Appeal. Mr Hoe sought special leave from the Court of Appeal.

In *R v McLeod* [1988] 2 NZLR 65 the Court of Appeal held that when a District Court Judge accepts jurisdiction (under s 28F DCA) following a pre-committal guilty plea then the offender has been convicted summarily, not convicted on indictment, irrespective of whether the information was laid summarily or indictably. If the Judge feels that the lesser penalties available are insufficient, the correct course is to decline jurisdiction and commit the offender to the High Court for sentence; the offender is deemed to have been convicted on indictment by s 3 Crimes Act and the higher penalties apply. Again, in *R v Webber* [1999] 1 NZLR 656 the Court followed the same reasoning when considering similar penalty provisions in s 6 Misuse of Drugs Act for selling cannabis.

The Court in *Webber* recorded concern with the "unnecessarily complex and confusing procedural provisions" in criminal law and recommended early legislative intervention. In *Hoe* the Court quoted that paragraph from *Webber*, noted the Law Commission's study paper and renewed the plea for legislative intervention.

GUILT BY THE COMPANY YOU KEPT

R v Spencer CA 353/00, 5 April 2001, Thomas, Keith and Blanchard JJ

David Spencer and David Spencer Ltd, the individual and the company: Mr Spencer was the sole director and major shareholder. This is one of the most popular choices of legal vehicle for separating business and private lives.

A man employed by the company was killed when working in a trench. Mr Spencer was in the trench when it happened. Five months later, the company was charged under the Health and Safety in Employment Act 1998. The company pleaded guilty and about five months later, was fined $25,000 – $17,000 of it to go to the widow.

One week after the company was sentenced, police laid an information charging Mr Spencer personally with manslaughter. There were various attempts to stop the prosecution but, in the end, Mr Spencer was convicted and ordered to do 80 hours community work and make reparation of $20,000-$10,000 to go to the widow and $10,000 to the parents of the deceased.

Mr Spencer appealed on the basis of alleged shortcomings in the summing up and on the basis that the prosecution was an abuse of process. The Court of Appeal allowed the appeal because, in summing up the evidence, the trial Judge did not refer to the fact that OSH inspectors had visited the site and saw nothing to attract their attention, the inference being that the negligence could not be a major departure from the standard of care required if they had not even noticed.

The abuse of process argument centred on the timing and interrelationship between the prosecution of the company and the person behind that company. This was a difficult issue but one that arose squarely on the facts of this case. It is hard to imagine a neater case getting to the Court of Appeal. The appellant was well-represented and fully argued the issues with full response from the Crown. However, the Court makes the most general references to the issues raised and recites a few high minded phrases such as: "there will always be a residual discretion to prevent anything which savours of abuse of process"; and "the power does not extend to allowing a Court simply to substitute its view for that of a prosecutor about whether a prosecution should continue or not". But, at the end of the day, the analysis of three permanent Court of Appeal Judges is reduced to this:

> [27] The members of the Court consider that the arguments on both

sides of the abuse of process issue are strong. Given the conclusion we have reached on the ground relating to the directions to the jury, we take the matter no further.

This seems a proper question that deserved a proper answer. But we did not get an answer so the matter remains as muddled now as it has been for decades. It was not a hypothetical question and it does not become so just because the case is resolved in Mr Spencer's favour by another route. The fact that the issue was no longer bound up with Mr Spencer's personal jeopardy should have presented an ideal opportunity to answer the hard questions raised by prosecuting both the company and the director.

WITNESSES

Cross-examination – "off the record" statements

R v Wyllie CA 470/00 and 75/01, 5 April 2001, McGrath, Ellis and McGechan JJ: a master class assignment on criminal trial practice.

K was stabbed in prison. Wyllie, Wamoana and Wickliffe were charged. Wickliffe made an "off the record" statement to police, which implicated Wyllie and Wamoana as well as himself. The Crown did not lead evidence of that statement but their case followed the general content. At the end of the Crown case, Wickliffe stood up and insisted on giving evidence. This was clearly unexpected. He then attempted to take the blame and to exonerate the other two.

Counsel for Wyllie then cross-examined about the existence of a statement made by Wickliffe but he denied it. Counsel for Wamoana also cross-examined and received answers that would have exonerated both other accused. The Crown then cross-examined on the "off the record" statement but Wickliffe denied that any discussion had occurred and maintained that the record of that conversation was untrue. The Crown then applied to lead the detective concerned on the statement by way of rebuttal. That application was granted. The detective said that there was a statement and gave evidence as to its content.

The statement was not evidence against Wamoana and Wyllie because it was an out of Court statement not adopted by the accused. In order to undermine Wickliffe's evidence that Wyllie and Wamoana were not guilty, the Crown attempted to prove that he told the truth to the detective and lied in the witness box.

The Judge told the jury that the content of the statement was not evidence against Wamoana and Wyllie but, unsurprisingly, all three accused were convicted.

Wyllie and Wamoana appealed. McGechan J, giving the decision of the Court of Appeal, attempted to give each of the manifold considerations their correct heading. The Court dismissed the appeals despite finding:

- the reason the Judge admitted the statement (attack on the detective's evidence) did not seem right because the detective had not referred to the statement in his evidence and was not questioned about it;
- the Judge's direction was inadequate because "it is likely there would be a significant residual prejudicial effect even after appropriate directions" (para 46).
- But: (para 47)

> Put more broadly, given the way the question of allowing in the "off the record" statement had developed, not least the prior knowledge by counsel for Wyllie and Wamoana of the off the record statement, its possible risks, and their adoption of Wickliffe's evidence, it was not unfair of the Crown to act as it did.

Ambush of alibi witnesses

R v Shaqlane CA 341/00, 5 March 2001, Blanchard, Anderson and Paterson JJ

S was charged with rape. His defence was alibi. In the first trial, the jury failed to agree. He was convicted on retrial and appealed on the ground, inter alia, that the defence was prejudiced by the Crown's refusal to disclose statements taken by the police from defence alibi witnesses – the defence having formally requested those statements. In the first trial, one of the alibi witnesses gave evidence and had his statement put to him in cross-examination as a prior inconsistent statement. He was nevertheless called at the second trial and was again cross-examined at length on inconsistencies between his evidence and his earlier statement. The Court of Appeal referred, at para 19, to the House of Lords decision *R v Brown* [1997] 3 All ER 769:

> We accept on the authority of *R v Brown* that there was no obligation on the Crown to disclose these statements. *Brown* was a case where the defence contended that the Crown was under a duty to disclose to it information which tended to reflect on the credibility of two alibi witnesses whom the defence called and the failure to do so was a material irregularity which rendered the conviction unsafe and unsatisfactory. Lord Craighead in giving the principal judgment of the House of Lords said at p 277: "A defendant is entitled to a fair trial, but fairness does not require that his witnesses should be immune from challenge as to their credibility. Nor does it require that he be provided with assistance from the Crown in the investigation of the defence case or the selection, on grounds of credibility, of the defence witnesses. The legal representation to which he is entitled, usually with the benefit of legal aid, has the responsibility of performing these functions on his behalf ... The prosecutor's duty is to prosecute the case fairly and openly in the public interest. It is not part of his duty to conduct the case for the defence". The judgment also noted that cross-examination which is directed only to credibility may lose much of its force if the line is exposed in advance. To insist on disclosure of the alibi statements would, sooner or later, undermine the process of trial itself. It would protect from challenge those who were disposed to give false evidence in support of the defence which had been fabricated. This would be to tip the scales too far. We agree. In our view, there was no obligation on the Crown to produce the statements in this case.

I would have thought that the adoption of *Brown* by our Court of Appeal would be accompanied by a little more analysis. The case is a departure from the strong New Zealand emphasis on fairness as a disclosure principle.

This decision supports the concept of the criminal trial as a game with sides and rules made by tit-for-tat logic. The role of the Crown is to place evidence before the Court that supports a conviction. A successful attack on a alibi witness demonstrates no more or less than that a witness is lying. As such it is a side issue to the central question of guilt or innocence. It is said that disclosure of alibi witness interviews would "sooner or later undermine the process of trial itself". The reality is this: the defence have to give notice of any alibi;

police (usually with Crown oversight) interview those witnesses to see if they can throw doubt on the veracity of that alibi. What then is the appropriate conduct for the Crown?

View #1 (now supported by the Court of Appeal) is say nothing. Let the witness give evidence, ambush the defence. This is a tacit acceptance that the Crown wants the witness to come and tell untruths so that they can demolish that witness in front of the jury. View #2 is that a trial is all the better if only witnesses that try to tell the truth according to their own lights are called to give evidence. That is both respectful to the jury and the system and avoids trial by side show where the battle centres on the defendant's bad attitude, sleazy mates or "he's done it before".

Lord Hope's remark "it is not part of [the prosecutor's] duty to conduct the case for the defence" is flippant and reinforces the concept of the criminal trial as a game – and a game of equal players at that.

If a prosecutor has material that will destroy or damage a defence witness they know is to be called, then the fairer course is to provide that material to defence counsel so that they can decide whether to call that witness.

"DOCUMENTS" IN THE ELECTRONIC AGE

R v Misic CA 454/00, 11 April 2001, Blanchard, Anderson and Paterson JJ

Misic was convicted of two offences under s 229A Crimes Act – obtaining a document capable of being used to obtain a benefit or pecuniary advantage and using that document to obtain a pecuniary advantage. He was also convicted of using a document with intent to defraud, knowing that the document had been made with intent to defraud pursuant to s 266B.

The charges related to what is commonly called "blueboxing": a computer sends signals to a telephone network to fool it into thinking that no call is being made when, in fact, an international call or calls is under way. Because the network does not register the toll calls, no one gets billed. Misic set up five telephone lines into his house and ran a form of telephone exchange whereby up to five persons could be making international calls at a time. Using his computer program, he accessed a Spanish international call service to make international toll calls whilst fooling it into not registering the call. The computer program was the "document" he obtained and the "document" was the computer disk on which the program was stored. The s 266B charge related to downloading the program from the internet.

Misic was convicted in June 1999 and, in July he was sentenced to 12 months' imprisonment suspended for two years. In November 2000 – some 16 months after the appeal period expired and well into his sentence – Misic sought leave to appeal against both conviction and sentence; the Crown abided on the question of leave. The question raised on the conviction appeal was whether a computer program is a "document" for the purposes of s 229A Crimes Act.

Section 229A makes it an offence to:

- obtain any document that is capable of being used to obtain any privilege, benefit, pecuniary advantage, or valuable consideration; or
- use or attempt to use any such document for the purpose of obtaining for oneself or another any privilege, benefit, pecuniary advantage or valuable consideration.

Section 263 defines "document" for the purposes of ss 264 to 279 and it seems accepted that that definition embraces a computer program but there is no definition of "document" s 229A.

The Court of Appeal had no difficulty in accepting that the computer program and computer disk are "documents" for the purposes of s 229A. The Court held that "a document is a thing which provides evidence or information or serves as a record". Whilst technological developments may improve the way that is achieved, it does not change the fundamental purpose of that technology nor the conceptual appreciation of that function and legislation must be interpreted with that in mind. Every material record of information is a document; the medium is not definitive and legislation must be interpreted with that in mind.

Section 229A has suffered from the lack of a definition for "document". Over time we, the people in the street, have come to understand that electronic information is stored somehow or other, that it is held or contained and is not just passing through. We can access it in a limited way but the true extent of that data base is only conceived by a few. On the other hand, we now know that even a scrape of skin contains or stores all kinds of material which, to the scientist, is more readable than a magnetic strip is to others. Is a DNA sample a document? A definition from Parliament would still assist.

POLICE BAIL

R v Bryant CA 434/00, 13 February 2001, Richardson P, Tipping and McGrath JJ

Bryant was picked up by police for questioning at 5.20 pm one evening after a complaint that someone matching his description was seen masturbating in a public place. Once at the station, he denied any offence and was put in the cells whilst he was processed (charge sheet, check details, referral to prosecution). Meantime, another constable arrived and interviewed Bryant in respect of other similar complaints. At about 6.30 pm, that constable took a written statement from Bryant. He was retained in cells overnight (rather than being released on police bail) and the first constable then prepared an opposition to bail form to go with the prosecution file. The next morning, a third constable interviewed Bryant in relation to a further complaint. In the event, he faced six charges when he appeared in Court later that morning.

Defence counsel challenged the statements taken at 6.30 pm and the following morning on the basis that Mr Bryant was held unlawfully. The District Court ruled the detention lawful and the statements admissible. Mr Bryant applied to the Court of Appeal for leave to appeal.

Bryant's submission was that because he had a right to Court bail, he also had a right to police bail. All the offences charged had a maximum penalty of two years' imprisonment and, therefore, by virtue of s 319 Crimes Act, he was bailable as of right. It was not possible to bring Bryant before the Court any sooner because of the time that he was picked up. Section 51 Police Act provided that, where any person was charged with an offence triable summarily and who has not been arrested on warrant cannot be brought immediately before a Court, police can if they think prudent grant bail.

The Court of Appeal granted leave but dismissed the appeal, holding that the two provisions were not supposed to be read together – s 319 applied only to Court bail and police bail was a separate matter within the discretion of the constable concerned, albeit that discretion had to be exercised properly. ❑

UNAUTHORISED PRACTICE OF LAW IN ARIZONA

Jonathan Rose, Arizona State University

describes a state with no statutory regulation of the profession

The modern history of unauthorised practice in Arizona is a distinctive and relatively active story. This history centres primarily around two events and their aftermath. Those central events are the 1961 decision of the Arizona Supreme Court in *State Bar of Arizona v Arizona Land Title & Trust Co* 90 Ariz 76, 366 P 2d 1 (1961), modified on other grounds, 91 Ariz 293, 371 P 2d 1020 (1962) and the 1985 repeal of the Arizona statute prohibiting the unauthorised practice of law. Both of these events have had significant ripple effects. Although both events initially seemed to be unrelated, recent developments have demonstrated that they are in fact interrelated as the subsequent discussion will show. In addition to these two central events, an important element of this story is the allocation of law-making power between the Arizona Supreme Court and the Arizona Legislature.

The current story begins almost a half century ago. Traditionally, title companies have played a large role in the purchase and sale of real property in Arizona. The employees of these companies and real estate brokers were drafting documents for use in these transactions and were handling the effectuation of the sale. The Arizona Bar was concerned about protecting the public from incompetent individuals, ie non-lawyers, and was unhappy with this intrusion on the practice of the only individuals competent to handle these transactions, ie lawyers. See Ryan Talamante, "We Can't All Be Lawyers ... or Can We? Regulating the Unauthorised Practice of Law in Arizona" (1992) 34 Ariz L Rev 873, 890-91. Thus, the State Bar instituted a complaint in the form of a declaratory judgment, contending that certain real estate brokers were engaged in the unauthorised practice of law as a result of their role and activities in the transfer of real property. The Arizona Supreme Court, acting under its plenary and exclusive power over the legal profession and thus to make such determinations, agreed. In holding for the State Bar, the Court defined the practice of law as

> those acts, whether performed in Court or in the law office, which lawyers customarily have carried on from day-to-day through centuries constitute the practice of law. Such acts include, but are not limited to, one person assisting or advising another in the preparation of documents or writings which affect, alter or define legal rights; the direct or indirect giving of advice relative to legal rights or liabilities; the preparation for another of matters for Courts, administrative agencies and other judicial or quasi-judicial bodies and officials as well as the acts of representation of another before such body or officer. 90 Ariz at 95, 366 P 2d at 14.

The Court justified this exclusion of non-lawyers and the creation of an Arizona version of "the conveyancing monopoly" by resorting to antiquity rather than reasoned argument. The Court discussed the history of the legal profession and recounted, inter alia, the customs of Ancient Greece, canon law, medieval English Common Law, the 1292 Ordinance of Edward I, and the activities of the Inns of Court. In defining the practice of law, the Court was following the American tradition as the Ethical Rules have always left the definitional task to the judicial authorities in each jurisdiction. As result numerous tests have been developed over the years by various jurisdictions although none is more broad nor all-encompassing as that articulated in *Arizona Land Title and Trust*. Since that decision, Arizona lawyers have commonly said that "practice of law is what lawyers do".

This decision did not sit well with the non-lawyer real estate community. Those aggrieved by the decision took advantage of the broad initiative provisions in Arizona law, one manifestation of Arizona's populist tradition which existed when it was admitted as a state in 1912. They gathered 107,420 signatures on an initiative petition and took their case to the voters. Although the Court in *Arizona Land Title and Trust* had noted the puritan hostility to lawyers, perhaps they did not anticipate that the Arizona's populist tradition persisted and that anti-lawyer sentiments were strong in Arizona. Despite or perhaps because of the strong opposition of the Arizona Bar, the Arizona voters approved the proposition by an overwhelming 4-1 margin. Since that time, Arizona licensed real estate brokers have had a constitutional right to draft and complete contracts and other documents in real estate transactions. (Arizona Constitution, Art XXVI.) The notoriety of these events was not locally confined as the Arizona experience caught the attention of legal commentators. (Countryman "The Scope of Lawyers' Professional Responsibility" (1965) 26 Ohio St LJ 66, 83; Riggs "Unauthorised Practice – The Public Interest: Arizona's Recent Constitutional Amendment" (1964) 37 S Cal L Rev 1, 20; Marks The Lawyers and the Realtors: The Arizona Experience (1963) 49 ABA J 139. On several occasions since the *Arizona Land Title and Trust* case, the Arizona Courts have applied the definition in that case and in 1997 clarified that it embraced negotiating a contract on behalf of a client. (*In re Fleischman* 188 Ariz 106; 933 P 2d 563 (1997).)

Perhaps emboldened by the vox populi in the aftermath of *Arizona Land Title and Trust* or responding to pressure from the Arizona business community, over the years the Arizona legislature passed several statutes authorising non-lawyers to practice before selected administrative agencies,

as is permitted at the federal level and by several states. However, the Arizona Supreme Court protecting both its turf and that of the legal profession struck down these enactments as unconstitutional, relying on its exclusive and plenary power to regulate the practice of law. The Arizona Supreme Court stated that:

> [W]e have no hesitancy in stating that the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this Court .... In fact, the great weight of authority is in accord with the proposition that the ultimate authority for defining, regulating and controlling the practice of law is vested in the Judiciary. (Citations omitted.) *Hunt v Maricopa Co Employee Merit System Comm'n* 619 P 2d 1036, 103839 (1980).

In *Hunt*, the Supreme Court was asked to consider the constitutionality of a statute authorising lay representation in personnel matters as long as no fee was charged. In reliance on the broad, exclusive authority principle articulated in *Hunt*, the Arizona Court of Appeals has subsequently held that the legislature lacks the power to authorise representation by non-lawyers in other administrative proceedings. *Anamax Mining Co v Ariz Dept of Economic Security* 711 P 2d 621 (1985) (statutes authorising non-lawyer representation before Unemployment Insurance Appeals Board of the Department of Economic Security ineffective); *State v Kennedy* 693 P 2d 996 (1985) (lay representation before State Personnel Board impermissible). The upshot is that the Arizona Supreme Court has the exclusive control of practice of law in general and before administrative agencies in particular. Rule 31(a)(3) Arizona Supreme Court Rules governs these matters. Realising that non-lawyers may some role to play, particularly in administrative agencies, the Arizona Supreme Court has created some very narrow exceptions permitting non-lawyer practice: R 31(a)(4). After its decision in *Hunt*, the Supreme Court resolved the matter that had prompted the Arizona Legislature to act by adopting the legislative enactment as a judicial rule, permitting lay representation if no fee was charged and adding the requirement that subject matter value be insufficient to warrant hiring an attorney and in no event in excess of $1000. Since that time, the rule has been amended and the current rules are less restrictive, permitting corporate employees to practice before the Department of Economic Security or to hire an agent as long as he or she is under the supervision of a licensed attorney and permitting individuals to use non-lawyers in personnel matters as long as the latter do not charge a fee: R 31(a)(4)(A) and (B). The State Supreme Court has granted these exceptions through those portions of its Rules that are not part of the *Arizona Rules of Professional Conduct*. Like those in most American jurisdictions, the *Rules of Professional Conduct* do prohibit licensed attorneys from assisting the unauthorised practice of law. (Arizona Supreme Court Rules, R 42, ER 5.5(b).) Moreover, from time to time, the Arizona Ethics Committee has issued opinions dealing with the unauthorised practice of law albeit resolving issues on the margin of this problem and not in the core of the historical controversy in this area. (See, eg Arizona Ethics Opinions No 99-06, 98-08, 96-08, 93-01, 87-27, 85-09.)

Understanding the second primary event, the repeal of the statutory prohibition on the unauthorised practice of law, requires a little explanatory background. During the 1970s and 80s, Arizona, like many other states and the Federal Government, was concerned about undue and excessive government regulation and its negative impact on the business community and society generally. As result of these free market and anti-government attitudes, governments adopted a variety of regulatory reform measures. Arizona joined in this deregulatory fervour and adopted several mechanisms, including a sunset law in 1978. Sunset Laws were intended to function as a legislative tool for auditing the performance of all agencies and passing judgment on their efficacy. These laws created a statutory process under which all agencies' authorising statutes would be automatically repealed unless continued by legislature following the performance audit and any necessary statutory revisions. The State Bar of Arizona and all the relevant statutes including the prohibition on unauthorised practice of law were scheduled for review during the 1984 sunset cycle. Citing its plenary and exclusive jurisdiction over the practice of law in Arizona, the Arizona Supreme Court stated that the Arizona Legislature lacked the constitutional authority to subject the State Bar of Arizona to sunset review, and therefore, the Court refused to cooperate with the relevant legislative committees in the sunset process. As a result, the unauthorised practice of law statute was repealed on July 1, 1985 and since then there has been no criminal prohibition in Arizona, probably making it unique among the states.

The Arizona Bar was quite upset about these events, but the "sky didn't fall" as some had predicted. Although some Bar officials and lawyers wanted to immediately ask the legislature to re-enact the unauthorised practice statutes, their political advisers, recalling the reaction to the *Arizona Land Title and Trust* decision and having a sense of the likely unsympathetic legislative reaction advised "laying low" for a while. Instead, other alternatives were pursued. First, some Justices of the Arizona Supreme Court and Bar members raised the possibility that the Court not only had the power to determine who could appear in Court, but also had "authority over such people [those without a licence to practice law] who do not step into a courtroom". Although the latter issue was sent to a committee for study and still remains unresolved as will be discussed, a number of people expressed doubt regarding the Supreme Court's power to prohibit non-lawyers' activities outside the courtroom. (See eg, Sallen "A Question of Authority" *Maricopa Lawyer* Nov 1990, 1.) Thus, in 1991, a State Bar Task Force was appointed "to investigate the unauthorised practice of law in Arizona and propose recommendations". (Special Bulletin to State Bar Members from the Board of Governors, January 31, 1994.)

The Task Force's existence produced both action and controversy. First, the Task Force conducted a three year investigation, including numerous public hearings and open meetings, and "thousands of hours" of testimony. (Lynda Shely "Non-Lawyer Legal Practice in Arizona: Where We are Today", *Arizona Attorney*, February 1994, 11.) As a result, the Task Force issued a long report that recommended a regulatory scheme for the licensing of legal assistants and non-lawyer legal technicians by the Arizona Supreme Court. (Sallen, "Bar Task Force Proposes Licensing 'Non-Lawyer Legal Technicians'" *Maricopa Lawyer*, November 1993, 1.) The members of the Arizona Bar Board of Governors did not react uniformly to this recommendation, which focused primarily on preparers of legal documents. Some members thought that it went too far and that no non-lawyers should be licensed; others thought that it did not go far enough and

that more freedom ought to be given to non-lawyers. After long debate and the urging of the Chief Justice "to do something on the issue of the unauthorised practice of law", the Board of Governors approved the recommendation 14-6. (Sallen, "State Bar Board Okays Concept of Non-lawyer Practitioners" *Maricopa Lawyer*, December 1993, pp 1, 12, 22.) The Board of Governors felt that Bar action on this subject was preferable to leaving the matter to legislative action, heeding the "eloquent" comments of the Chief Justice that "the legislature would more than happy to do something that the Board 'probably wouldn't like' during the next session, if the Board didn't do something first": see *Where We Are Today*. Bar officials felt that this action "fill[ed] the void in Arizona's regulation on UPL matters that was created by the sunsetting of the UPL statute in 1985". (*Where We Are Today*.)

Neither the action nor the controversy ended with Board of Governors' adoption of the Task Force recommendation. The Board of Governors publicised its action and the details of the new licensing proposals widely to the members of the Arizona Bar and also asked all members to provide information to the State Bar of "actual harm to the public caused by non-lawyers", providing a form to all members for collecting this information: see *Special Bulletin*. In addition, the *Arizona Attorney*, the official magazine of the State Bar devoted an entire issue to unauthorised practice and the proposed non-lawyers rules, with numerous articles and varying viewpoints. See *Arizona Attorney*, Volume 30, No 7 (March 1994). All this publicity did not generate a warm reception for the Board of Governors' action with the general membership. Polls showed that two-thirds of the practising Bar opposed licensing non-lawyer technicians: Murphy, "Separate Polls Show Two-Thirds of Bar Opposes Licensing NLITs" *Maricopa Lawyer*, April 1994, 1. Although the Board of Governors had requested that the Arizona Supreme Court commence a rule-making proceeding on its proposal, the Supreme Court decided not to circulate the Bar's petition. Instead, the Court resolved to work with the Arizona Legislature to establish an "interim study committee to review the entire UPL matter prior to the next legislative session" ("From The Board" *Arizona Attorney* 38 (June 1994)).

As a result of all this activity and the failure to resolve the problem, the Arizona Bar President termed the unauthorised practice of law situation as "the problem that refuses to die". ("President's Message" *Arizona Attorney*, December 1994, 9.) After recounting the history of the sunsetting of the statute, the President indicated that the Arizona Supreme Court was reluctant to act because of the division of opinion within the membership of the Bar and that the Bar was turning to the legislature again for resolution with increased hopes for success. He said that, although in the past "non-lawyer legislators simply saw a UPL Bill as a form of turf protection, many of the legislators have now heard from their constituents regarding the harm caused by want-to-be-lawyers". ("President's Message".) The President based his hope on these stories of harm and urge[d] you all [the members] to keep your eyes and ears open; and he also noted that Senate President would try "to push an unauthorised practice statute through the Legislature this year" and that "other lawyers legislators [stood] by ready to help".

As result of these developments, the Bar looked forward to 1995 legislative session. In 1993, a lawyer legislator had introduced a Bill that would have restored the criminal unauthorised practice statute: SB 1414, as introduced, 39th Leg, 1st Reg Sess (Ariz 1993). The Bill never made it to House and died in the Senate Commerce Committee, which had significantly diluted its provisions: Van Wyck & Shely "Unauthorised Practice of Law: Should We Just Give Up?" *Arizona Attorney* January 1999, 22. Pursuant to this carefully planned strategy, the Senate President, a lawyer, introduced another Bill that would have restored criminal penalties for unauthorised practice of law: SB 1055, as introduced, 41th Leg, 1st Reg Sess (Ariz 1995). Unlike the 1993 Bill, this proposal would have permitted non-lawyers to prepare certain types of documents. Both the legal profession and non-lawyer champions lobbied vigorously and aggressively. Although the Arizona Senate reacted positively to the Bill, it ran into considerable problems in the House Judiciary Committee. As a result, the State Bar President sent out an urgent request to all members of the Arizona Bar, stating that the Bill was "*in serious trouble*", that "*we desperately need your help in this effort*", and that "TIME IS OF THE ESSENCE!" He stated that the opponents' calls to legislators outnumbered those of the supporters by 10-1 even though there were only 100 "independent paralegals" and 14,000 Bar members. He urged members, who knew of the past "horror stories involving inept, incompetent or dishonest document preparers" to write and call members of the House Judiciary Committee and to have their support staff, family members, and friends as well as victims do so as well. (Letter from Michael Murphy to State Bar Members, March 15, 1995.) But the State Bar's hopes again were dashed. The Bill died in the House Judiciary Committee as a result of the lobbying efforts of both the Bar and non-lawyer advocates. (Van Wyck and Shely at 24.) Again, as had been the case in 1960s Arizona's populist anti-lawyer sentiment had prevailed in the political area.

As this chapter of Arizona's unauthorised practice saga came to an end, the next Bar President seemed reluctant to give up as indicated in his message to members, "UPL – The Fight Goes On". ("President's Message" *Arizona Attorney* December 1995, 8.) His message was a combination of realism, resignation, and determination. For example, he said that the failure to get a Bill passed was "one of the most frustrating issues that has confronted the State Bar Board of Governors". After recounting the history of the controversy, he acknowledged that the proposal to license non-lawyer technicians was "revolutionary, comprehensive, and controversial". He noted that in the failed legislative efforts, the Bar had "learned important lessons" and that lawyers were "novices in the political process" and "could not escape the perception that we were simply trying to 'protect our turf'". Since the Bar's "sponsorship was a significant reason for [the Bill's] defeat", he said that it was time to determine "if a meaningful UPL statute can be passed, and what our role should be in the process". He also suggested that the political process was likely to produce a Bill that "does more harm than good" and, if so, "we are probably better off without any UPL statute". But he thought maybe the Bar would be better off helping consumer organisations get a Bill passed. At more practical level, he noted the Board of Governors' hiring of a full-time legislative staff person, and, like a good president, appointed "another committee" to study the matter. Moreover, he concluded with determination that "the UPL fight is not over .... The fight *must* go on. The question is how, where, and when?"

Although the new Committee did not produce a resolution of the problem, it led to more talk and a new plan of action. In 1997, the Board of Governors was briefed on the

Bar's efforts over the prior 35 years. The Board of Governors then reviewed the efforts of the current committee regarding unauthorised practice of law and indicated that it was one of the "key issues" raised in member surveys. While the members were still divided on the appropriate course of action, "at least 80 per cent wants the Bar to do something". But a voter survey also indicated that the public wanted the option of non-lawyer document preparers. As a result the Board established a one-year project for computerised tracking of UPL, to publicise the Bar's efforts to members, to communicate with Legislature on the harms of unauthorised practice, and to continue providing "public service programs to alert the public to both benefits of hiring a lawyer and the harms associated with UPL". (State Bar of Arizona, *In Brief* 1 (November 19, 1997.) Although this project did not result in legislative action, its efforts again ran afoul the public sentiment adverse to lawyers. When the Bar announced in 1999 that it had hired a full time lawyer "to warn the public that paralegals are bad news", it was accused of ignoring the "sloppy work" of lawyers. More fundamentally, in attacking paralegals, the Bar was said to be "yanking red herrings out of the water to kill" the paralegal industry and to be cloaking their economic self-interest in the guise of consumer protection. The newspaper editorial concluded,

> We are deeply, deeply touched by the lawyer's professed concern for the Arizona consumer. But it wouldn't ring quite so hollow if the lawyers weren't attacking an industry that seems to be serving that consumer very well, thank you.

In Arizona, at least, in the public and political areas, the Bar's concern with unauthorised practice has fallen at best on deaf ears and at worst on hostile and unbelieving ones. Given that political reality, the Bar's best hope lay with the Courts, who have provided the next and most recent chapter of this story.

In October 1970, the Supreme Court of Arizona revisited the unauthorised practice of law issue. It was faced with an issue involving its continuing jurisdiction over a previous disbarred lawyer, who had acted on behalf of a party in a private arbitration proceeding that was unconnected to any judicial proceeding. Subsequent to disbarment, the lawyer had been licensed as a "public adjuster" by the Arizona Department of Insurance. Relying on the definition of the practice of law articulated in *Arizona Land Title and Trust*, the Arizona Supreme Court held that the disbarred lawyer's activities in the arbitration proceeding constituted the "practice of law" and the lawyer was found guilty of contempt for violating his order of disbarment: *In re Creasy*, 333 Ariz Adv Rep 36, 12 P 3d 214 (2000). In its holding, the Court said that "Creasy's representation of Smith [one of the parties] by examining a witness in an adversary proceeding involving a disputed matter certainly falls within [the *Arizona Land Title and Trust*] definition as well, particularly in light of the nature of the examination, which was no less exhaustive or rigorous than one would ordinarily see during a formal deposition in a judicial proceeding". Although the Court was "quite aware of the social, technological, and economic changes that have taken place since our decision in *Arizona Land Title* ... may require us to reexamine our broad definition of the practice of law[, t]his is not the case in which to do so".

What is of greatest interest to the more general question of unauthorised practice of law is the Court's very broad assertion of authority over non-lawyers. Creasy had argued that the Court lacked jurisdiction over him because he was a non-lawyer. But the Court rejected the argument, asserting that its broad constitutional power over the practice of law "extend[ed] to non-lawyers as well as attorneys admitted to Bar membership". The Court made these comments after acknowledging the repeal of the unauthorised practice statute in the 1985 sunset process. Because the case only presented the issue in the context of a disbarred lawyer, the Court said that "the facts of this case do not require us to determine the extent of our power to regulate 'practitioners' who are not and have never been lawyers". Despite this disclaimer, its otherwise broad language prompted one Justice to write a separate opinion because he felt the Court's comments "contain[ed] dicta suggestive of an answer to this troublesome question". Nor is this question likely to disappear. In another publicised event, a disbarred lawyer had a website providing legal information for a fee; and other non-lawyers were actively providing assistance in divorce and other disputes. Despite the cautionary remarks in both the majority and separate opinion in *Creasy*, some have viewed that decision as giving the Bar "the signal it needed to move forward with a plan to quash the state's reputation as a haven for disbarred lawyers and unauthorised practitioners". Not surprisingly, another Bar committee is hard at work drafting more rule changes: "State Bar Takes Aim At 'Illegal' Law Practices" *Business Journal* 1, 57 (November 10, 2000).

The Court's opinion in *Creasy*, although the last but certainly not the final chapter in this story, links the two central events in this story, the 1961 *Arizona Land Title and Trust* decision and its definition of the "practice of law" and the 1985 repeal of the criminal unauthorised statute. As well as defining the current state of affairs on this issue in Arizona, it recognises the existing legal dilemma regarding the unauthorised practice of law. The concurring Justice put the matter succinctly and accurately

> The question of jurisdiction over non-lawyers for activities outside of Art VI institutions is the direct result of the absence of an unauthorised practice of law statute. That absence creates a potential incongruity between the breadth of the definition of the practice of law, on one hand, and the limited scope of the Judicial Department's authority under Art VI of the Constitution, on the other. Because this Court does not possess the broader police power of the state (the legislature does), the question of non-lawyers engaged in activities within the definition of the practice of law, yet unconnected to Judicial Department institutions is complex and its answer must await another day.

This statement suggests that it overstates the *Creasy* case to read it as a "green light" to proceed full speed ahead in filling the statutory void by judicial rules or decisions. Of course, further attempts to seek a legislative solution will pit the Arizona Bar against the sceptical and hostile political forces that have successfully thwarted Arizona lawyers for almost half a century. Thus, Arizona remains positioned as ever on the horns of a political and legal dilemma. A final and somewhat ironic postscript to this story is the Arizona's Bar position in the most significant national controversy in this area, multi-disciplinary practice. Although the American Bar Association has so far rejected any relaxation its rules in this area, the Arizona Bar has decided to move forward in this area and has taken a generally positive attitude toward authorising multi-disciplinary practice. See Bivona, "Bar May Allow MDPs, Despite ABA's Rejection" *Arizona Journal* 14 August 2000, 1-2. ❑

THE SOLDIER, THE ORDER AND THE CONTRACT

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analyse two aspects of Salmon J's judgment in the SAS case

The action brought by the UK government in the High Court, seeking to prevent publication of a book describing certain events during the Gulf War, written by a New Zealander (referred to as "R") who was a member of the British SAS and who took part in the events, captured the attention of the media in both Britain and New Zealand. The judgment of Salmon J, in *A-G for England and Wales v R*, HC Auckland, CP 641/98, 6 December 2000, has in turn captured our attention.

The UK government relied principally on a confidentiality contract signed by R, but Salmon J found that the contract could not be relied upon for a number of reasons. Confidentiality contracts were introduced in 1996, and were required by virtue of a Defence Council Instruction (DCI) to be signed by all members of the SAS who wished to continue to serve in the UK Special Forces. Salmon J characterised the contract thus (para 30): "It creates a life long prohibition on the disclosure without express prior written authority of any information, no matter how innocuous or lacking in sensitivity or confidentiality, relating to the work of or in support of the United Kingdom Special Forces ...".

This article examines two aspects of Salmon J's lengthy judgment, wherein he upheld several defences argued by R that went to the effectiveness of the confidentiality contract which the UK government had entered into with him. First, Salmon J held that the Ministry of Defence's order to R to sign the confidentiality contract was unlawful. On this point, His Honour's analysis is problematic in terms of private international law doctrine, and it is important to assess why this is so. Second, R presented a group of arguments, centred on duress, undue influence and unconscionable bargain, which His Honour regarded as raising the essential issue, "whether or not the consensual element required of a valid contract has been vitiated by the circumstances surrounding the execution of the document" (para 43). Unfortunately, the manner in which His Honour dealt with R's arguments reveals somewhat muddled thinking. It is worth suggesting what the confusion is, with a view to avoiding its being compounded in future decisions.

THE ORDER

Salmon J held (at paras 58-81) that DCI 107/96 and consequent regimental orders requiring SAS soldiers to enter into confidentiality contracts exceeded the limits of the prerogative powers to command and administer the United Kingdom's armed forces. After canvassing English authorities on whether prerogative powers were susceptible to judicial review, His Honour held that the Court could review the lawfulness of the Ministry's order to sign the confidentiality contract. On Salmon J's analysis, the Ministry acted unconstitutionally because the contract affected R's civil rights after leaving the armed forces. Having held that the Ministry's order to sign the contract was unlawful, His Honour considered whether it might be justified by considerations of national security, but concluded that national security could not be invoked as a justification in the case of an unlawful (as opposed to a procedurally improper) exercise of prerogative powers.

With respect, Salmon J's inquiry into the validity of the Ministry's order, and his finding that it was unlawful, seems at odds with the fundamental principle of private international law that Courts have no jurisdiction to entertain a claim founded upon an act of state (see Collins (ed), *Dicey & Morris on the Conflict of Laws*, 13 ed, 2000, Sweet & Maxwell, 100-103).

The term "act of state" has historically been applied to different categories of cases, and the exact ambit of the doctrine has been controversial. In *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 931-938, however, the House of Lords placed its imprimatur on a broad, classical formulation of the doctrine. Echoing Fuller CJ's famous dictum in *Underhill v Hernandez* (1897) 168 US 250, the House of Lords held that the recognised categories of act of state represented instances of a broader principle that local Courts "will not adjudicate upon the transactions of foreign sovereign states". Lord Wilberforce noted that this principle is not merely a matter of judicial discretion. Rather, it is inherent in the very nature of the judicial process that such issues should be non-justiciable. If the validity of foreign acts of state were to be challenged, controlled or condemned by local Courts, this could embarrass the local executive, "imperil the amicable relations between governments and vex the peace of nations": *Oetjen v Central Leather Co* (1918) 246 US 297, 304. Moreover, there are generally "no judicial or manageable standards" by which local Courts can measure issues relating to foreign acts of state. Courts which attempt to do so are likely to find themselves "in a judicial no man's land".

The general principle of non-justiciability enunciated by the House of Lords in *Buttes* is not absolute. There are circumstances in which foreign acts of state may be disregarded by local Courts. For example, as will be discussed below, local Courts may refuse to enforce foreign acts of state on public policy grounds. They may similarly refuse to give effect to foreign acts of state committed in violation of public international law: *Kuwait Airways Corp v Iraq Airways Co* [2001] 1 Lloyd's Rep 161 (CA). Moreover, there is some authority which suggests that Courts may consider

the constitutionality of foreign legislative acts of state where the question arises incidentally in the course of a commercial dispute between private parties: see eg *A/S Tallinna Laevauhisus v Estonian State SS Line* (1947) 80 Ll L Rep 99 (CA). However, it is not permissible for a Court to impugn the constitutionality of a foreign act of state directly: *Buck v Attorney-General* [1965] Ch 745 (CA).

An act of state may be defined as an act performed by a state by virtue of its sovereign authority in the course of its relationship with other states or with its own subjects: *Halsbury's Laws of England*, 4 ed, vol 8, para 1413; *Peters v Davison* [1999] 3 NZLR 744. As Salmon J recognised (at paras 60 and 68), members of the armed forces like R are appointed under the royal prerogative. The relationship between the Crown and members of its armed forces is founded in status rather than in contract. The DCI, regimental orders to sign the confidentiality contract, and the Ministry of Defence's sanctions in the case of a refusal to sign all involve an "exercise of the prerogative powers relating to army personnel", and fall squarely within the above definition. Indeed, it is difficult to think of more self-evident examples of acts of state.

From a reading of the judgment alone, it appears that the plaintiff did not protest the Court's lack of jurisdiction to determine the lawfulness of the Ministry's order on this ground. However, it cannot be argued that the Court therefore enjoyed jurisdiction by virtue of the plaintiff's implied submission. Whilst submission can cure a lack of *personal* jurisdiction (for example, where a foreign sovereign waives its immunity), litigants cannot, by their submission, confer *subject-matter* jurisdiction on a Court in respect of foreign acts of state which would otherwise be non-justiciable: see eg *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, (1848) 2 HL Cas 1; *Buttes* at 932; *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278, 314 (CA). Regardless of how the case was argued, the Court of its own accord should have exercised appropriate "judicial restraint or abstention" and declined to challenge the lawfulness of the Ministry's order.

Salmon J's key finding (at paras 71-74, citing *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *R v Ministry of Defence, ex parte Smith* [1995] All ER 427) that he was entitled to review the Ministry of Defence's exercise of its prerogative powers, is misconceived. The authorities cited by His Honour address the issue of whether an exercise of prerogative powers may be reviewed by Courts of competent jurisdiction (ie in respect of acts of the Crown in right of England and Wales, English Courts). They cannot be read as authority for the proposition that such matters are subject to judicial review by foreign Courts which lack subject-matter jurisdiction.

Although a proper application of the act of state doctrine should have precluded the Court from ruling on the lawfulness of the Ministry's order, it does not follow that the Court was therefore obliged to enforce or otherwise give effect to that order in New Zealand. It might have declined to do so on two grounds, neither of which was canvassed in Salmon J's judgment.

First, the Court might have refused to enforce the plaintiff's claim on public policy grounds. Whilst the Court was not competent to challenge the Ministry's order, it was entitled to decline to give effect to it in New Zealand if this would violate some aspect of fundamental New Zealand public policy or international law: see eg *Re Helbert Wagg & Co Ltd* [1956] Ch 323; *Oppenheimer v Cattermole* [1976] AC 249; *Kuwait Airways Corp*. The public policy exclusionary rule is interpreted narrowly. Courts hearing conflict of laws cases "are not free to refuse to enforce a foreign right at the pleasure of the Judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal". (*Loucks v Standard Oil Co*, (1918) 120 NE 198, 202 (NYCA).)

It could perhaps be argued that the high-handed procurement of R's signature, the overly broad terms of the confidentiality contract, and the threat that he would be "returned to unit" if he did not sign the agreement, viewed as a whole, constituted an unconscionable violation of R's rights of speech and freedom of expression. If the Court accepted this argument, it might have been entitled to refuse to enforce the plaintiff's claim in New Zealand on the ground that it contravened fundamental New Zealand public policy (see eg *Cheshire and North's Private International Law*, 13 ed, 1999, Butterworths, at 126 (coercion), 128 (freedom of speech)).

Secondly, and more compellingly, the Court might have refused to entertain the plaintiff's claim on the ground that it involved the indirect enforcement of a foreign public law. New Zealand Courts do not have jurisdiction to enforce directly or indirectly the revenue, penal or other public laws of a foreign country: see *Attorney-General for the UK v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA) ("*Spycatcher*"); Barnard [1996] NZLJ 227, 228-229.

In *Spycatcher*, the Court of Appeal acknowledged the existence and effect of the foreign public law exclusionary rule. The Court, however, preferred to characterise the Crown's cause of action as being founded on an independent private law relationship of confidence rather than the relevant foreign public law, as this would allow the New Zealand Courts to assist friendly foreign sovereigns to safeguard their security. The Court in *Spycatcher* therefore held that the plaintiff's claim was not barred by the foreign public law exclusionary rule.

The *R* case, however, is distinguishable from *Spycatcher*. Although the plaintiff's claim is framed in breach of contract and might therefore seem susceptible to characterisation as a private law obligation, this characterisation cannot be sustained when the context of the confidentiality contracts is taken into account. The DCI and regimental orders, as discussed above, clearly amount to public acts of state. They prescribe in detail who is required to sign the confidentiality contracts, the standard terms of the contracts, and the sanction for non-compliance (see paras 28-29). The confidentiality contracts themselves add nothing substantive to the Ministry's order, and are no more than an enforcement mechanism, the private law form of which may well have been strategically crafted with the foreign public law exclusionary rule and the *Spycatcher* litigation in mind.

Taking into account the nature of the legal relationship between the Crown and R, and more importantly the Ministry of Defence's powers to terminate summarily and unilaterally R's service in the Special Forces, the better view is that the plaintiff's claim necessarily involves an assertion of sovereign rights, rather than merely "acts that may be done not only by the King but also by anyone else" (*Spycatcher* at 174). As such, the plaintiff's claim should have been barred by the foreign public law exclusionary rule.

R's CONSENT TO THE CONTRACT

Salmon J applied English law in holding that R's consent to the confidentiality contract was defective, having been obtained by both duress and actual undue influence. There was, however, no presumed undue influence, nor was the contract an unconscionable bargain.

Salmon J's broad-brush application of English law as the proper law of the contract to "all matters to do with the contract and its validity" (para 98), including undue influence and unconscionable bargain, is interesting. The conflicts authorities on point suggest that, express trusts aside, equitable issues are governed by the lex fori: see *Paramasivam v Flynn* (1998) 160 ALR 203 (FCA). The lex fori approach has been criticised by academic commentators and Salmon J's approach of determining all issues directly connected to the contractual claim by reference to the proper law of the contract is to be preferred in terms of logic, simplicity and consistency of result. Given that this issue is controversial, however, it is surprising that it was not discussed in any detail.

Salmon J's application of English law was, of course, constrained by the rules regarding proof of foreign law. As the Court of Appeal recently reiterated in *Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd* [2000] 3 NZLR 169, 176, proof of foreign law is a question of fact to be determined by reliance on expert evidence, rather than on authorities proffered by counsel. Section 40 of the Evidence Act 1908, allowing reference to foreign statutory material, law reports and textbooks, "does not appear to permit a Judge to decide a question of foreign law from his or her own studies or research, nor to engage in the development of existing and established law of another state". These rules do not, however, preclude the Court from exercising its skills of logical analysis and construction in matters relating to foreign law, or from forming an independent assessment of written material on which the expert evidence is based. The analysis herein is based on a reading of Salmon J's judgment alone, as the expert evidence and counsels' submissions were not available to us. We nonetheless believe that it is important to analyse the consideration of English law in this judgment because of its potential influence on future developments.

Duress

R alleged duress to the person, and/or economic duress, founded upon the (unlawful) order to sign the contract, the threat (if he did not sign) of exclusion from the SAS and return to his unit, and the circumstances of the signing a "tight framework"; "emotive circumstances"; refusal to allow R to read the contract in advance, or to obtain legal advice, or to retain a copy after signing – see paras 99-100.

The pleadings confused the issue of duress. Duress is a coherent and single doctrine. It is limited neither to historical categories (eg duress to the person), nor to the protection of certain interests (eg a person's economic interests). Its coherence is found, as will be shown, in the fact that it concerns the effect of pressure on the legitimacy of a person's consent to a transaction. Here, the issue was thus simply whether R's apparent consent to the confidentiality contract (because he signed it) was given voluntarily.

The pleadings caused Salmon J to make a separate finding that there was no duress to the person (because R did not sign the contract on account of threats of violence or imprisonment: para 108). The pleading of economic duress appears to have suggested to Salmon J that this was a separate doctrine of duress (see para 111), requiring threats to "economic interests". His Honour concluded that the pressure allegedly applied to R was economic pressure "because it is directed at [R's] income and his professional status as an elite as opposed to ordinary soldier" (para 113). A separate finding of this type is unnecessary, because the matter is one only of the existence of pressure, which is properly taken up by the notion of "illegitimate pressure".

At paras 109 and 112, Salmon J set out the basis upon which he later proceeded to find in favour of R that he had been economically pressured: "It is now accepted that duress rests not upon an absence of consent, but on the application of pressure so as to bring about an absence of practical choice. ... The test for duress, of whatever type, involves two questions: [a] Did the pressure bring about an absence of practical choice? [b] Is the pressure illegitimate?" The authority His Honour cited to support this "test" was *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, 400. However, this was a re-interpretation of what Lord Scarman actually said (at 400) that there needed to be "pressure amounting to compulsion of the will of the victim". His Lordship continued: "There must be pressure, the practical effect of which is compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him".

In *Universe Tankships* Lord Diplock said (at 384) that the rationale of duress was that a person's "apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate". Thus, while Salmon J might be correct to suggest that duress is not about an absence of consent if by that he means that it is not based upon an overbearing of a party's will, his statement is fundamentally misleading if he means to exclude reference to consent altogether. The core of the coherent and single doctrine of duress is the effect which the pressure exerted brings to bear on the quality of the consent of the party pressured. It is a doctrine about a defect in a party's actual consent; therefore, it is about the absence of (legitimate) consent! It is essential to keep this core justification for providing relief to the forefront, in assessing whether in any case relief will actually be granted.

The first matter therefore is to identify the extent to which a party's consent must be affected by the pressure before the pressure constitutes duress. Some pressure is to be expected, as part of daily life. Consent is often affected by pressure. But pressure becomes unacceptable when it is "illegitimate". What does this mean? Early cases toyed with simply equating legitimacy with lawfulness, but as Salmon J correctly recognised (para 115), lawfulness cannot be a definitive criterion, merely a helpful one.

Examination of recent cases indicates that the factor most often relied upon to identify illegitimate pressure is the effect of the pressure in depriving one party of any reasonable alternative but to submit to the other's demands. Salmon J articulated this not as a potential factor for determining illegitimacy, but as a separate stand alone requirement, which he did not however directly address thereafter (although R's lack of choice was noted at para 106). It is both dangerous and unprecedented to promote "absence of practical choice" as a separate requirement. It is not clear what it means, or how it relates to the more established expression "no reasonable alternative" (see, eg *B & S Con-*

tracts and Design Ltd v Victor Green Publications Ltd [1984] ICR 419 and Grantham and Rickett, *Enrichment and Restitution in New Zealand*, 2000, Hart, 193-196). Further, it may work to constrain the reach of duress. A party may still have a practical choice available, but be pressured in such a way that the quality of consent can be said to have been affected by duress. This is exactly the point Lord Scarman made in *Universe Tankships*.

In deciding whether the pressure applied to R – which Salmon J said consisted of "a military order accompanied by threats" (para 114) – was illegitimate, His Honour adopted the approach advocated by Steyn LJ in *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, 717, which was "to focus on the distinctive features of [the] case" (para 116). Somewhat surprisingly, however, Salmon J then simply applied the distinctive features identified in *CTN* as if they comprised a check list, without any assessment whether they were appropriate to the case of *R* itself, or whether there were other distinctive features of *R*.

First, Salmon J held that the relationship between R and his superiors pointed "toward the pressure being illegitimate" (para 117), because a soldier was subject to the coercive nature of the orders of a superior. This is, with respect, an extraordinary statement. By its very nature, the soldier-superior relationship is one where a high degree of pressure is to be expected. The assumption should be that the pressure identified (an order backed by threats of consequences for failure to obey) is prima facie legitimate!

Second, "the illegality of the order is another factor which points towards the illegitimacy of the pressure" (para 118). As discussed above, Salmon J's finding that the order was unlawful is problematic in terms of the act of state doctrine. This must throw this finding into question.

Third, Salmon J held that the UK government was not exercising pressure in good faith, in that it "used a combination of lawful and unlawful pressure to get that which it should have known it had no legal entitlement to" (para 119). Again, this finding seems to be based on the incorrect assumption that the Court was entitled to challenge the lawfulness of the Ministry's order.

As to causation, Salmon J determined that the order given to R "was an effective cause of the signing of the contract" (para 124), in that R "would not have signed had he not been ordered to do so" (para 122). At face value, this appears to be a factual causation requirement. However, given Salmon J's earlier emphasis on "absence of practical choice", it is worth noting that there is a potential link between that requirement, if such it be, and causation. If there is a practical choice, it may be thought that the party ought to have taken the other path, and that his or her failure to do so means that causation will not be established (being a normative rather than factual criterion). This is deeply problematic (see Grantham and Rickett, p 202), which is another reason for avoiding Salmon J's promotion of "absence of practical choice" to the status of a separate requirement.

Undue influence

In analysing R's undue influence claim, Salmon J adopted the classical distinction between actual and presumed undue influence. That is understandable, but it is not clear that that distinction is the best way to expose the various dimensions of the cases on undue influence. The core notion of the concept of undue influence is the impact which the existence of certain types of relationship have, or a particular relationship has, upon the legitimacy of a transaction between the parties to that relationship. It is thus a "relational" concept. Within that relational concept are the vast majority of cases where a presumption is supplied by the law that the transaction between parties to the relationship is caused by the influence which that relationship gives rise to. In some cases the law says that once a relationship of this or that type exists (eg solicitor and client), the presumption is applied immediately. This class of relationships is probably closed off today. In other cases, the law provides the presumption once the relationship in existence is shown to be one in which one party places trust and confidence in the other. So a wife must prove such a relationship with her husband, before she can avail herself of the presumption. She cannot say simply "I am a wife", as a solicitor's client can say "I am a client". She must say, "I am a wife in a relationship of trust and confidence", and establish the truth of that on the evidence, and only then can she avail herself of the presumption. That is the manner in which presumptive relational undue influence works. All presumptive undue influence must be relational. But not all relational undue influence is necessarily presumptive. There can be relational actual undue influence. This is shown by the legitimate claim made in *Bank of Commerce and Credit International SA v Aboody* [1990] 1 QB 923, 967-969, that the wife was subject to actual undue influence by her husband (even though the husband's activities did not amount to improper pressure). Cases of relational actual undue influence will likely be very rare (although, as will be seen below, R's case seems to have been interpreted thus by Salmon J). But in such a case, the plaintiff must prove not only that the relationship in question is one of trust and confidence but also that the transaction was caused by the exercise of the influence in the relationship. There is no recourse to a presumption of causation.

Thus, the division between actual and presumed undue influence is problematic. This is magnified when it is appreciated that most "actual undue influence" cases have nothing to do with a relationship. Their focus is the transaction in question. The charge is that that transaction was procured by the exercise of pressure by one party on the other. They are cases of transactional pressure. The application of pressure by one party to the other, which pressure was a cause of entering into of the transaction, must be established. Presumptions are irrelevant, precisely because the "relationship" between the parties is not relevant.

Having thus shown that there is no one coherent doctrine of undue influence, but rather two very different doctrines, one relational, the other transactional, it does not follow, however, that both doctrines are not fundamentally concerned with the matter of vitiation of consensual capacity of the unduly influenced party. Indeed, the better view is that they are (see Grantham and Rickett, Chs 7 and 9).

This analysis throws into sharp relief the conceptual view articulated by Salmon J (para 128): "The doctrine of undue influence may be seen as the equitable counterpart of the common law of duress. The basis of the doctrine is that no person should be allowed to retain the benefit of his own fraud or wrongful act. Equity acts upon the conscience of the donee, rather than on the want of true consent on the part of the donor. For this reason cases of undue influence will not always correspond with duress". Several comments are called for. First, if pressure characterises duress, then *only* transactional actual undue influence exists as a counterpart of duress. Second, most cases of undue influence are relational, and depend upon a presumption of causation. It is quite misleading to regard them as cases of fraud or wrongdoing by the presumptively influencing party (see Rickett

and McLauchlan [1995] NZ Law Rev 328, 349-350). Third, equity's concern in relational cases is with a loss of autonomy by the donor, brought about by an excessive or exceptional degree of dependence within the relevant relationship. Its concern is not with the conscience of the donee. Even in transactional actual undue influence, where pressure is of the essence, it is the effect of that pressure – the loss of autonomy by the exercise of pressure beyond that which is generally acceptable – which is the proper focus.

Salmon J went on to make several further misleading suggestions. In examining whether there was a relationship in which undue influence would be presumed, his earlier reference to the donee as a wrongdoer caused him to suggest, first, that in order for a presumption of undue influence to arise there had to be both a relationship of "special character" and "victimisation of one party by the other" (para 130). The proffered "victimisation" requirement is simply heresy. The authority relied on, a comment by Nourse LJ in *Goldsworthy v Brickell* [1987] Ch 378, 401, makes no reference to the donee's activity! Further, His Honour's linking of the manifest disadvantage requirement with victimisation is illegitimate, given the role of the former, to which we return.

A second point is Salmon J's finding that the relationship between R and his military superiors, while (correctly) not an established category of relationship of undue influence, was nonetheless "a relationship of trust and confidence on the facts" (para 131). His Honour's statement, in para 132, of the basis for this finding reads as anything but a decision on the facts. It reads as if a new established category of relationship is being set up: "... the nature of the command structure within the armed forces makes it essential that orders fall within the ambit of the issuer's authority. Soldiers are trained to follow orders, not to question them. Therefore, a soldier will normally repose trust and confidence in his superior officers ... [T]he effective functioning of an army ... depends upon soldiers trusting their superiors to command them properly and lawfully. In my view, the relationship between enlisted soldier and superior officers is such that the latter necessarily occupies a position of ascendancy, power and domination over the former who in turn takes a position of dependence and subjection." This is not about R and his superiors. This is about soldiers and their superiors in general. It is suspect reasoning.

R failed in his presumed undue influence argument because Salmon J held that he did not establish that the contract was to his "manifest disadvantage", which His Honour took as a separate and necessary requirement. Given that English law was being applied, His Honour unfortunately appears not to have had his attention drawn to recent English authorities on "manifest disadvantage" in presumed undue influence. These authorities appear to distance its status as a necessary requirement, or to minimise severely its content. In *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705, 713-714, the role of manifest disadvantage was interpreted as being "a powerful evidential factor". Stuart-Smith LJ stated: "The fact that a transaction is manifestly disadvantageous to one of the parties ... it assists the complainant in establishing her claim against the wrongdoer [the influencer] in a case of presumed undue influence". In *Barclays Bank plc v Coleman* [2001] QB 20 (first reported well before the hearing in *R*) the Court of Appeal seriously questioned the future existence of a requirement of manifest disadvantage even in cases of presumed undue influence. Nourse LJ re-examined Lord Scarman's speech in *National Westminster Bank plc v Morgan* [1985] AC 686, and suggested that the requirement was an original creation of the House, otherwise unsupported by English authority, and in large part caused by Lord Scarman's reliance on Indian authority. Nourse LJ went on in any event to minimise the requirement (at 33): "So there must be a disadvantage and it must be clear and obvious. But that does not mean that it must be large or even medium-sized. Provided it is clear and obvious and more than de minimis, the disadvantage may be small". Indeed, recent authority seems to be returning to the real purpose of arguing manifest disadvantage, which is to establish a link between the influence and the impugned transaction by ruling out other (innocent) explanations for the transaction. That of course raises a question about its role in presumed undue influence cases at all, where the presumption is one of causation, whence the onus of proof shifts to the donee to show why the transaction in question was not caused by undue influence. The lack of manifest disadvantage may be a relevant factor in rebutting the presumption: see *Re Brocklehurst* [1978] Ch 14. Thus, were R legitimately, on the facts, to be held to be entitled to the presumption of undue influence as against the UK government, R's not having suffered manifest disadvantage in signing the contract would aid the government in rebutting the presumption.

In fact, if the role of manifest disadvantage is to establish a link between the influence and the impugned transaction by ruling out other (innocent) explanations for the transaction, it may make more sense as a "requirement" in an *Aboody*-type case, where relational actual undue influence is pleaded, and there is no presumption of causation. Manifest disadvantage provides the causative link.

Salmon J found that actual undue influence was exerted on R. Here, the analysis appears to be founded in essence on relational actual undue influence. His Honour applied the "test" laid down in *Aboody*, a case of relational actual undue influence, where the requirement of one party's having the "capacity to influence" the other was understood as relationally focused; hence, he suggested that capacity to influence was established by the same features, enlisted soldier and superior officers, as established a relationship of presumed undue influence. The influence was the issuing of an order, which influence was undue because the order was, in effect, beyond the realm of legitimate orders which could be issued in the context of the relationship. The order, Salmon J stated, caused the execution of the contract, and, further, manifest disadvantage was not required. Thus, "the critical question ... is whether or not [R] was allowed to exercise an independent and informed judgment" (para 139), and Salmon J's finding that R was not given the opportunity to exercise such a judgment is entirely coherent in the context of a claim that the contract was brought about by the influence arising out of the parties' relationship.

Two comments can be made. First, the exclusion of manifest disadvantage resulted from the failure to distinguish two types of actual undue influence. As suggested above, a complete coverage of recent English authorities might have suggested to Salmon J that manifest disadvantage has been rejected only in cases of direct pressure actual undue influence, where the focus on the effect of pressure (or "fraud") means that the nature of the transaction is irrelevant to establishing a defect in the pressured party's consent. But in a case of influence, rather than pressure, manifest disadvantage helps to show that a particular transaction within a relationship where many transactions might occur was caused by "undue" influence. Salmon J's earlier finding that no manifest disadvantage existed for R ought

to have been weighed here in the UK government's favour. Second, the issue of causation ought not to have been decided simply by appeal to the factors establishing causation for a claim in duress, which is a claim founded on pressure. The complaint in relational actual undue influence is not that the source of the influence is pressure. It is that the source of the influence is the relationship. This is very difficult to understand, and to sustain, but having started down a relational line it behoves the analyst to maintain conceptual purity.

Salmon J did in fact fall back on the concept of direct pressure actual undue influence. Indeed, it was difficult to see, having found duress, that he could have avoided such a conclusion. In direct pressure (or transactional) actual undue influence, the issue is simply whether threats of a physical, psychological or emotional nature, going beyond the degree of pressure which is acceptable (not gauged from the standpoint of a particular relationship of influence, but in general terms, as part and parcel of life in a modern society), caused R's execution of the contract. Salmon J concluded that R was "subjected to impermissible pressure to sign" (para 139). Once such pressure is found to have been applied, the next step (not expressly confronted) is not "whether or not [R] was allowed to exercise an independent and informed judgment" (para 139), but whether or not R *did* exercise an independent and informed judgment even in the face of the illegitimate pressure.

Unconscionable bargain

R also argued that the confidentiality contract was an unconscionable bargain, but Salmon J did not agree. As His Honour had earlier decided that all contractual issues were governed by English law, he was careful to confine his discussion to English developments, noting that there are potential differences between English and New Zealand law in this area. The modern doctrine of unconscionable bargain stems from equity's readiness to relieve a person of obligations incurred where that person was under a particular disadvantage that meant that he or she could not fend for himself or herself in dealings with others. The first requirement is that a person must suffer from a special disadvantage, and various "lists" have been offered as to what that might require. Salmon J held that R did suffer from a "bargaining weakness", in that he was "refus[ed] ... an opportunity to read the contract at leisure or to obtain independent legal advice" (para 143). This seems to be a finding of special disadvantage which was particularly favourable to R, beyond the type of case which equity originally had in mind. For example, in *Borg Warner Acceptance Corporation (Australia) Ltd v Diprose* [1988] ANZ Conv Rep 59, Cohen J usefully identified three classes of disability: (a) where the party cannot exercise judgment at all; (b) where the party needs assistance to exercise judgment; and (c) where care is needed by the second party to ensure that the first party is able to exercise judgment. Applying Cohen J's categories, Salmon J's finding appears at most to place R's case within class (c), and even here it is by no means clear that that is an appropriate case for the doctrine of unconscionable bargain. Indeed, in the English Court of Appeal's most recent analysis of the doctrine of unconscionable bargain, *Portman Building Society v Dusangh*, 19 April 2000 (decided before the hearing in *R*), Ward LJ said that "[i]t may be that the absence of legal advice is not so much an essential freestanding requirement, but rather a powerful factor confirming the suspicion of nefarious dealing which the presence of advice would serve to dispel". Salmon J's notion of a "refusal" to allow R to obtain advice or read the contract at leisure may not properly go to the matter of special disadvantage, but rather to the behaviour of the UK government. It is also difficult to square this reference to the refusal of an opportunity to read the contract at leisure with the earlier finding dismissing R's claim "that he was given little time to consider and read the document" (para 101).

In any event, Salmon J held that the confidentiality contract was not "oppressive", which he equated with no manifest disadvantage (para 142). This implies a freestanding requirement of substantive disadvantage. This may be putting the matter too strongly. Earlier English cases did suggest a requirement of "oppressiveness" (see *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 (HC); [1985] 1 WLR 173 (CA)), but consistently with the trend in respect of manifest disadvantage discussed above, there may be a change developing in English law in this respect. This would be consistent with a growing awareness that an important dimension of unconscionable bargain is that it is a doctrine concerned as much with the impaired judgmental capacity of one party as with wrongdoing by the other. (See *Portman Building Society*.)

Furthermore, in Australia, where the modern doctrine of unconscionable bargain is at its most sophisticated, substantive disadvantage is recognised as evidentially important in establishing knowledge by one party of the special disadvantage of the other, but not as a separate requirement: see *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 475; *Louth v Diprose* (1992) 175 CLR 621, 637. We are, as indicated above, not in a position to know whether the Australian cases on unconscionable bargain were cited to Salmon J as of relevance in assessing the substance of current English law.

This may cause a re-think of what is perhaps the essential feature of the English law of unconscionable bargain, which Salmon J characterised as: "It must be shown that the [government] engaged in unconscionable conduct or an unconscientious use of power" (para 145). "Unconscionable conduct" is understood as morally reprehensible or wrong behaviour, impropriety, exploitation, or nefarious dealing (see *Portman Building Society*). Salmon J was not satisfied that the UK government met this "high test" (para 147). This is odd, given His Honour's earlier readiness to find duress and impermissible pressure exercised by R's superiors, and his characterisation of R's "bargaining weakness" as related in effect to the conduct of R's superiors.

By this heavy focus on proof of overreaching or active victimisation of one party by the other, English law seems to regard unconscionable bargain as a species of wrongdoing. In general terms, in our view, this behoves caution, as a result of the analyses of the antipodean Courts. The doctrine really embraces two distinct themes – response on the one hand to concerns about impaired judgmental capacity, and on the other to wrongful behaviour. That is why Brennan J's formulation of the doctrine in *Louth v Diprose* at 626, reads as it does: "a relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee; the donee's unconscientious exploitation of the donor's disadvantage; and the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interest". So, exploitation is of a disadvantage which results in lack of worthwhile judgment. Too much focus on exploitation would distort the doctrine, because it is not about exploitation in the round. ❑

WESTCO LAGAN v A-G

The Rt Hon Sir Geoffrey Palmer, Chen, Palmer and Partners

reflects upon the judgment and rights to property

The case, *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC), contains as rich a mixture of constitutional issues as it is possible to assemble in a single case in a country with an unwritten constitution. In these remarks I do not want to range too far into a number of the issues. Instead, I want to concentrate upon the property aspects of the decision.

In considering legal approaches to property and the state, Blackstone's commentaries are always a good place to start (William Blackstone, *Commentaries on the Law of England* Vol 1 (1765). Blackstone was the great explicator of the common law although it is possible his observations have always carried more weight in the United States than they do in his country of origin. Talking of the common law approach to property, he said this (at p 139):

> So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the Judge of this common good, and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

As Professor Michael Taggart has observed, Blackstone admitted that the legislature could authorise the violation of private property, but he does not speak of expropriation or eminent domain (Michael Taggart "Expropriation, Public Purpose and the Constitution" ("Michael Taggart's article") in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* Oxford: Clarendon Press (1998) 91). It is readily apparent that much of the law in this area concerns land and the principles for other varieties of property may not be the same.

THE NEW ZEALAND CONTEXT

In practising public law in New Zealand, the issue of alleged government interference with property rights arises surprisingly frequently in my experience. The issues arise in a number of different contexts involving government regulatory activity. For example, Part II of the Electricity Reform Act 1998 provided for the compulsory separation of lines and supply businesses in a highly prescriptive manner. Submissions were made to the Select Committee that these provisions amounted to an expropriation of private property without just compensation. The Electricity Industry Bill currently before Parliament contains provisions that have been criticised as interfering with the rights of land owners, in respect of electricity transmission lines (Federated Farmers Press Release, "Federated Farmers Urges Select Committee to Throw Out Offensive Clauses of the Electricity Industry Bill", 27 February 2001, PR29/2001).

It is a recognised principle that the state should not appropriate private property for a public purpose without just compensation. That principle receives expression through the Public Works Act. But the rule deals with one very clear form of expropriation. Issues arise on many occasions outside the context of the compulsory taking of land for public purposes, which is the focus of that Act.

The question of compensation was answered positively in respect of the policy of the Crown enacted by the Maori Reserved Land Amendment Acts of 1997 and 1998. The details of the process leading to that policy are instructive. More than one hundred years ago the New Zealand Parliament passed a statute to facilitate development of rugged bushlands and swamps in Taranaki. The statute provided for perpetual leases on payment by the lessees of what amounted to a substantial sum. Settlement of the land followed proclamations which had confiscated large portions of Taranaki land from Maori after the New Zealand Wars.

In 1991 a review team reported to the Crown on inequities facing Maori Reserved Land owners (Marshall, Henare and Lumsden: *Report of the Review into Leases under Maori Reserved Lands Act 1955* (1991)). That Review recommended that the Crown accept the responsibility for appropriate compensation payments, for all provable losses incurred during the transition process which resulted from change to the statutory contract. Various policy proposals were developed in 1993 and a special panel was set up to consult through public meetings on the proposals and to report back to the Crown. This resulted in a series of recommendations to government. The government announced its policy in 1994 (Maori Reserved Lands Government Policy Decision 1994 (Te Puni Kokiri, Wellington 1995)). A Consultative Working Group was set up in 1995.

Throughout these convoluted policy development processes it was evident that the Crown wanted to resolve the

issues at minimal cost. Compensation figures were mentioned, but there had been no analytical evaluation, nor any economic analysis to justify the position taken by the Crown.

Another feature of the West Coast Leases debate was the lack of understanding amongst government's advisers of the principles of private property and inhibitions against its invasion. The complexity of leasehold interests, despite the fact that they were registered under the Land Transfer Act, seemed to cause officials not to notice that the policies involved invasion of property.

Over a long period of time, the West Coast Settlement Reserves Lessees' Association Inc made substantial efforts to argue that the compensation for losses involved in implementing the government's policy, were greater than the government was prepared to admit. This turned into an enormous political and parliamentary struggle. Even after the 1997 Act was passed, it was revisited by way of an Amendment passed under urgency in 1998. There was a case that went to the Court of Appeal interpreting that Act *(West Coast Settlement Reserves Lessees Association v Attorney-General* (1998) 3 NZ ConvC 192,802).

I have simplified what was an extremely complex and difficult story to make a relatively simple point. The transaction costs involved in arguing about property rights and expropriation are quite considerable where there are no plain ascertainable principles. The Crown started off in this matter saying that no compensation would be paid. Over a period of years, as the injustice of that situation became evident, its position shifted considerably. Clear and binding principles may have prevented a lot of anguish.

Would more formal takings jurisprudence help? In New Zealand it usually comes down to the question of what Parliament judges to be appropriate in each case. The New Zealand Parliament clearly has the power to expropriate where it judges that to be desirable and necessary from a policy point of view.

Thus, the resolution of the issues in the New Zealand environment depends upon making arguments that the invasion of property rights is so serious and the consequences so unfortunate that Parliament ought not to use its power to legislate. Essentially that is a political argument, determined through the political processes of democratic representation. And so is the issue of compensation.

The decision of McGechan J

Westco Lagan had its origins in the West Coast Accord, which included a provision for a perpetual supply of rimu for sawmilling on a sustainable basis. In 1994 the Crown, through Timberlands West Coast Ltd (an SOE), called for tenders for available rimu. WCL tendered successfully. A significant business was built on the basis of that supply.

In 1999, with an election looming, there was a second tender round. Labour announced its policy of terminating indigenous logging on the West Coast. A force majeure clause was included in the conditions of tender, under which the parties would be relieved of obligations if political directions made it impossible for Timberlands to supply.

On 15 May, 2000 Cabinet made decisions announced that day, followed by the introduction of a Bill into the House. That Bill was eventually enacted as the Forests (West Coast Accord) Act 2000.

The Act cancelled the West Coast Accord in terms – see s 5. It then explained the effects of cancellation. It enacted that to the extent that the West Coast Accord remained unperformed at the time of the cancellation, no parties were obliged or entitled to perform it further and no party was, merely because of the cancellation, to be divested of any property transferred or money paid under it.

Section 7 is blunt:

> No compensation is payable by the Crown to any person for any loss or damage arising from the enactment or operation of this Part.

The plaintiff brought its proceedings before the enactment of the Bill. It had three causes of action:

- the Accord was a contract creating property rights, the anticipatory breach of which gave rise to compensation and specified remedies;
- seizure without compensation was a breach of *Magna Carta* giving rise to stated remedies;
- the Bill in its provision for expropriation without compensation breached ss 21, 27(1) and 27(3) of the New Zealand Bill of Rights 1990.

The plaintiff sought an injunction against submission to the Bill if passed to the Governor-General for Assent. The Attorney-General was sued as the first defendant and the Clerk of the House of Representatives, the second. The defendants moved to strike the proceedings out on the grounds that they disclosed no cause of action. The application succeeded. Costs were reserved.

The plaintiff faced some difficulties asserting that it was entitled to contractual rights under the West Coast Accord, since it was not a party to it. But the proceedings were not struck out on this ground because the Judge held there was some apparent prospect of WCL establishing derivative contractual rights. These derivative rights could be traced down a line advanced by counsel that, at the time of the signing of the Accord, Carter Holt had owned the WCL operation and Carter Holt was also a member of the West Coast Timber Association, which was a party to the Accord.

The first issue in front of McGechan J was whether the first cause of action made out a tenable case of contract and anticipatory breach. In order to determine that issue the Judge had to assume that the Accord covenants had contractual effect. He reviewed the recent Cabinet decisions.

The government's policy was subject to acceptance by West Coast Mayors of a proposed $120 million economic development package. The Judge did not think that that conditional policy plus the legislative proposal of the Bill in front of the House, amounted to an anticipatory breach of contract. In essence, the Judge said (at [33]):

> In short I take the view WCL's first cause of action cannot, at present, succeed for two reasons. First, I consider the Crown's action in introducing a legislative "proposal" – identified as such – to terminate the Accord without compensation was not and is not to be taken as establishing that definitely will occur. The Bill to that effect may or may not pass in that form. Second, the proposal to promote legislation – and a fortiori the introduction of a Bill – which would terminate the Accord without compensation cannot be a breach of contract when the actual enactment of such legislation would not be such.

McGechan J then turned to the rights under *Magna Carta*. *Magna Carta* is part of New Zealand law (Imperial Laws Application Act 1988). Chapter 29 is as follows:

> **Imprisonment, etc, contrary to law. Administration of justice** – No free man shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him but by

> lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right.

The argument here was that the provision in the Bill denying liability to pay compensation was inconsistent with the terms and principles of *Magna Carta*. It was an expropriation of property rights otherwise than in accordance with the law of the land. The proposal was also in breach of the New Zealand Bill of Rights Act.

The Judge was not prepared "without focused and researched assistance, to rule that 'disseised of his freehold' should be read as encompassing this very different factual situation". He continued (at [42]):

> The phrase refers in terms to an interest in land. That is unsurprising. Land was life under the conditions of the 13th century.

The arguments under the New Zealand Bill of Rights Act fared no better. The Judge held that unreasonable search and seizure did not apply on these facts. The Judge said that the Bill of Rights Act was to be read broadly and purposively so as to promote the rights conferred and, taken in strict isolation, there was room for argument that s 21 may have some application. But he did not think it amounted to a seizure. He stated (at [57]):

> I accept contractual rights are intangible property. Once it is accepted seizure could include annihilation, there is no consequential difficulty in viewing intangible contractual rights as "property".

The Judge went on to say that he thought there was a strong likelihood that the legislature had no intention of dealing in a general way with a notion of seizure of property without compensation. The s 21 argument could not succeed and that the natural justice provisions of s 27(1) did not cover expropriation of property without compensation. That would involve an extension of the concept of natural justice which the Judge felt unable to make.

McGechan J also said of s 27(3) of the Bill of Rights Act that he was "quite unable to read this clearly procedural provision in any manner which creates rights to compensation upon termination of contractual rights" (at p 55).

There is also a most interesting analysis of whether the rights were precluded by parliamentary privilege.

The Judge concluded (at [91]):

> I have no doubt this Court has jurisdiction to determine whether there has been compliance with any "manner and form" requirements imposed by statute law for the enactment of legislation by Parliament.

But he held that "manner and form" goes to legal requirements as to process, not to content. The Parliament could pass any legislation it sees fit. In particular, Parliament can enact laws expropriating property without compensation. In doing so, it can step right through existing laws and rights, obliterating remedies which otherwise would exist. The Courts, providing Parliament proceeds according to law in the way described, cannot stop Parliament making such legislative changes.

The Judge pointed out (at [95]):

> If content of legislation offends, the remedies are political and ultimately electoral. The fact those alternatives seem monumentally difficult, indeed unreal, to particular persons, or to those espousing unpopular causes, is no more than a dark side of democracy.

One last point is that the Judge reserved costs. He then said (at [106]):

> The discretion as to costs is a wide one. If costs are sought by defendants, some explanation why the Crown is taking the extraordinary step of terminating contractual rights without compensation would not be out of order.

In terms of existing New Zealand constitutional law, the decision of the learned Judge is, it is submitted, correct. It may not have been adventuresome but it was in accordance with existing law. Any other decision would have disturbed the orthodox understandings.

Parliamentary debates

But it is worth pointing out that in our constitutional arrangements, the Court case is not the end of the matter. The question is – if it is up to Parliament to give and take away these rights and to provide compensation, what did Parliament do about it or say about it?

The government, of course, has been elected on a clear, widely advertised and contentious policy of ending as soon as practicable indigenous logging on Crown-managed land on the West Coast. It offered a generous readjustment allowance for the region amounting to $120 million and a number of other measures. But that can hardly be regarded as compensation for lost contractual rights. It was for loss of economic opportunity for the region.

There was some spirited opposition to the Bill as recorded in the pages of *Hansard*. But there was little sustained or detailed discussion of the elements of the Bill concerning expropriation of private property. The Hon Dr Nick Smith, leading the debate for the Opposition on the first reading, said that the Bill was an abuse of power (*Hansard*, Vol 583, NZPD, 2383-2407 at 2385).

The Hon Doug Kidd, a former Speaker in the House, did say in the second reading: "The rule of law and the notion that rights should not be taken away without compensation has long come down to us through the Bill of Rights 1688. It is not quite as old as some of the rimu trees, but in this country it will not last as long. We are going to protect the trees, but not our basic rights." (*Weekly Hansard* Vol 27 (3-5 October, 2000) 5802-5821 at 5818).

He went on to discuss the judgment of McGechan J, and he made some good points. But he dealt with this issue in no more than three paragraphs.

Richard Worth, the National member for Epsom, also pointed out in the second reading that the Bill broke open a contract and denied compensation rights, and that that was an incredibly serious event. He developed a number of arguments about the importance of property rights and talked about the 5th Amendment to the Constitution of the United States (at p 5819).

In the third reading debate, Mr Worth also complained that it removed rights of compensation from persons who suffered and will suffer loss. Using the examples in a number of statutes, he pointed out "it is so clearly settled that if the government embarks on a policy that will cause loss there should be the consequence of compensation". (*Weekly Hansard* Vol 29 (17-19 October, 2000) 6243-6261 at 6257).

In the Committee of the Whole, Rodney Hide pointed out that we have a government saying that "there is no such thing as secure property in New Zealand, there is no such thing as a secure legal contract, and there is no such thing as a contract between the state and a group of private citizens that cannot be undone so long as Parliament has the power" (*Weekly Hansard* Vol 29 (17-19 October, 2000) 6156-6181

and 6185-6212 at 6172). Indeed, there was quite a lot of debate on cl 7, the one providing that there would be no compensation.

But it cannot be said that the property rights points were extensively pursued, nor were they pursued with any great detail. They were not centrepieces of debate. They were, at best, side-bars. The measure was hard fought by the Opposition, but a reader of the debates would not quickly arrive at the conclusion that the Parliament was dealing with a Bill that involved some important constitutional principles of the sort that Blackstone outlined.

THE BILL OF RIGHTS ACT

Protection for private property

There has been no real effort in New Zealand to constitutionalise property rights, as has been done in some other countries. But the history of the New Zealand Bill of Rights Act 1990 is instructive.

The original intention was that the legislation should be entrenched. That plan had to be abandoned for lack of political support. The principal argument that prevailed was that it would give too much power of a political character to the Judiciary. Thus, the Bill of Rights Act does not give the Courts the power to strike down statutes that are incompatible with it. Its prime power is as an aid to interpretation. It has been more effective than many had thought that it would be. The requirement of notification by the Attorney-General under s 7 has also proved to be of some deterrent value (G Huscroft "The Attorney-General, the Bill of Rights, and the Public Interest" in G Huscroft and P Rishworth (eds) *Rights and Freedoms* Brooker's (1995) 133 at 148).

It is significant, however, to notice that the Bill of Rights Act in its original conception did not contain any general protection of property rights. It did contain the provision against unreasonable search and seizure now found in s 21. It is true that provision, in common law terms, was designed to protect property and that was no better illustrated than the constitutional case of *Entick v Carrington* (1765) 19 State Tr 1029. In that case, Lord Camden stated:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the Judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principles of common law.

Lord Pratt made the point even more strongly:

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole.

Consideration was given to the question of property rights in formulating the Bill of Rights Act. There were submissions made to the Select Committee that property rights should be included. I recall in particular meeting John Fogarty QC (as he now is), in which he advocated this course. At a seminar in the Legislative Council Chamber held on the White Paper in May 1985, Mr Fogarty said:

> A distinguished English Judge once described the right of private property as an important guarantee of individual liberty. The proposed Bill does not guarantee the right of private property. However, this does not mean that the right of private property is not protected by law.
>
> It has long been one of our unwritten constitutional principles that private property can be taken by the Crown in the public interest, provided the dispossessed owner is compensated fully. This constitutional principle is embodied in the provisions of the Public Works Act. The same principle is shared with the UK, Canada, Australia, and the United States, to name some of our sister countries. It is written into the US Constitution.
>
> Applied to this constitutional principle is a presumption that Judges bring to legislation when they are construing its meaning. The presumption is that Parliament will only take away property rights by using clear language. A few decades ago that presumption was sometimes seen by commentators as being put into effect by the Judges in a negative fashion to frustrate legitimate social policies.
>
> Modern and accepted public interest legislation in Western democracies allowing for town and country planning, government control of the economy, taxation, such as gift and estate duties, and capital gains tax can all be seen by some as an attack on private property. Accordingly, if the right of private property is written into the supreme law as part of a Bill of Rights there may be a fear of scope for some very conservative Judges to hobble the impact of public policy legislation, by striking down the statute. To me, that might have been a risk 50 years ago, and certainly would have been 100 years ago, but it is not now. Such legislation, if reasonable, is consistent with private property. So I think private property should be protected in a Bill of Rights .... If it is not, however, included in a Bill of Rights, we should not be alarmed. I do not think that private property is put at significant risk by not being included in a Bill of Rights. The protection of private property is essentially a political one reinforced by the presumptions of the Court, namely, that the Courts will only recognise that property rights have been taken away if clear language is used.

Common law protection

The absence of an express protection for private property rights in New Zealand's constitutional documents does not in any event preclude the protection of those rights under common law.

The protection of private property can be seen as constitutional in character (Taggart at 112). It is a long-standing maxim of statutory interpretation that statutes depriving citizens of their rights in any respect are to be construed narrowly (T A R Bennion *Statutory Interpretation: A Code* (3 ed) London: Butterworths (1997)). That principle has proven to be of wider application in respect of infringements of property rights.

It is true that the determinations of the Courts may be overturned by statute, as in fact happened in the *Burmah Oil* case (*Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75). The finding by the House of Lords of a right to compensation was followed almost immediately by the enactment of the War Damage Act 1965 (UK), precluding any further recovery on such grounds.

Moreover, such common law policy is necessarily open to change (see, for example, R W Dais *Jurisprudence* (4 ed) London Butterworths, (1976) 260, noting that legal policy was "different from what it was five years ago, and vastly

different from what it was thirty years ago"). The relative weights of the various interests involved clearly change over time. An example is in the assumption by the Courts of a duty in respect of the effective functioning of the tax system, quite at odds with their 19th century role.

The principle of narrowly construing the deprivation of rights has not, however, extended to the implication of compensation requirements in the absence of statutory provision. It is interesting that such implication has occurred in the decisions of the Conseil d'Etat (see Wade and Forsyth *Administrative Law* (8 ed) OUP, (2000) 788).

The limitations established in common law practice in this area, in part parallel the difficulties identified in respect of express constitutional provisions relating to takings. Moreover, they indicate that an unentrenched right to property included in the Bill of Rights Act might well amount to no more than a confirmation of the existing interpretative presumption. It is less clear, if the Act were at some future point to be entrenched, how limiting the right to property might be justified in accordance with s 5 of the Act.

International law

A further consideration in the preparation of the Bill of Rights Act was that it sought to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (NZTS 1978, n.19 ("the Covenant")). That document, however, does not contain an explicit protection of property rights in general.

Article 17 of the Universal Declaration of Human Rights ("the Declaration") provides (G A Resolution 217A(III) December 10, 1948):

1. everyone has the right to own property alone as well as in association with others;
2. no one shall be arbitrarily deprived of his property.

Article 5(2) of the Covenant presumes recognised or existing rights that it does not itself encompass. It is therefore clear that a right to property exists at international law, but that the states party to the Covenant could not determine some means by which that right might be given effect.

The difference between the Declaration and the Covenant may be seen to parallel the position in New Zealand law as it now stands. The presumption against dispossession provides an aspirational or discursive protection similar to that established by art 17 of the Declaration. The reasons for the omission of a substantive right to property from our Bill of Rights Act are at least in part the same as those raised in respect of a similar omission in the Covenant.

Other considerations

But there were further considerations of both a principled and a pragmatic character. First, the bold inclusion of an indeterminate right to property, however defined, may ignore the highly complex character of the institution of property itself. The ideological and cultural controversies are considerable: there was, and is, without doubt, no community consensus in relation to such a right.

Andrew Sharp has noted in respect of a right to property (in "An Historical and Philosophical Perspective on the Proposal for a Bill of Rights for New Zealand" in Legal Research Foundation, *A Bill of Rights for New Zealand* (Auckland: LRF (1985) 140) that:

> ... in any particular society it is a package of complexly unrelated components; and it is a package the contents of which varies hugely from place to place according to the "unfolding" of the practical life of the actors concerned and their ways of thinking.

In New Zealand, that practical life and those ways of thinking are in significant part pervaded by the principles and effect of the Treaty of Waitangi. The Treaty can be argued to bestow property rights in some respects.

The potential cost to the Crown of a general protection of property rights from expropriation may have been considerable. Its effects could be indeterminate. It is hard to resist the conclusion that, were such a measure to be adopted, it would need careful and rigorous analysis across a wide range of government policy areas, to try and determine the effects in advance.

The jurisprudence on the Fifth Amendment to the United States Constitution is in some respects not satisfactory (Alexander "Ten Years of Takings" (1996) 46 *Journal of Legal Education* 586).

The Canadians had not provided a property provision in the 1982 Charter and this fact was significant in the minds of New Zealand policy-makers. We relied heavily on what the Canadians had done.

There is a further political consideration. Bills are made to pass. The prospect of securing agreement to a measure that contained blanket protection of private property rights was not likely to succeed through a Labour Party Caucus that was already less than enthusiastic about the Bill of Rights. Furthermore, such a provision may prevent flexible policy developments of the type that have been discussed earlier in this paper.

Cass Sunstein has written (in *Free Markets and Social Justice* New York: OUP (1997) 203-204):

> Firm constitutional protection of property rights, combined with an independent judiciary, is an excellent way of encouraging international investment in one's nation. Such devices should spur domestic investment and initiative as well. Without constitutional protection, there will be a serious obstacle to the necessary economic activity sought from international and domestic enterprises. Anyone who engages in economic activities in these nations will do so with knowledge that the state may take their property or abrogate their contracts. To say the very least, this will be an obstacle to economic development. Constitutional protection could be part of a set of mechanisms designed to establish a commitment to the protection of private enterprise.

He was writing in the context of Eastern Europe and the developments going on there. In that context, he thought the case for creation of protection of property rights and free markets was very strong.

Balancing interests

The argument made in favour of constitutional protection must be balanced against the competing arguments for the protection of interests other than those of private enterprise. Takings jurisprudence enables the balancing of those interests by way of a requirement of compensation for all expropriations. Such an approach has considerable appeal, not least to the extent that it compels governments to contemplate in a meaningful fashion the consequences of their actions for private interests.

However, and as I have noted, it also represents a significant bar to flexible policy-making and implementation. Such flexibility is greatly prized in the expedient political culture of New Zealand.

CONCLUSION

It was stated at the beginning that it is a recognised principle that the state should not appropriate private property for a public purpose without just compensation. But in New Zealand, absent any statutory obligation such as that contained in the Public Works Act, this is a principle that has to be honoured by the executive and by Parliament. It cannot be implemented by the Courts. It is not part of my argument here that New Zealand should adopt a written constitution with a property clause, thus constitutionalising property. I do support the idea of a written constitution with an entrenched Bill of Rights, but I have concerns about including a property clause as the history of the New Zealand Bill of Rights Act discloses.

On the other hand, the relative indifference of Parliament to what must be regarded as an important principle, is a worry. Parliament can make any law it likes. But if the arguments are not properly and fully canvassed about the effect of the laws it is making when they trench upon an important principle, then it must be a matter of concern.

There is little doubt that the principles in relation to land are well accepted in the community: the Public Works Act is an example. But where it comes to contracts or incorporeal forms of property, there is probably less public understanding of the issues. But as Professor Jeremy Waldron of Columbia University observed (in "The Normative Resilience of Property" in Janet McLean (ed) *Property and the Constitution* Hart Publishing (1999) 170 at 196):

> The normative resilience of property means that an injustice in property arrangements is a bad thing to inflict on a people and a more permanent form of injustice than many others.

It is probably important that we not brush over these possible injustices in the way that the totality of the events in *Westco Lagan* has. But if the parliamentary system will not address the values involved adequately and provide a mechanism for their resolution, how is it to be done?

Perhaps a statute could be contemplated, although its design would not be an easy matter. There would be the undoubted ability for Parliament to pass fresh statutes in derogation of it when attractive occasions arose to do so.

Certainly the drawing of such a statute would not be a simple undertaking. But something better than ordinary political debate is required to draw a line in the sand so the issues are at least properly considered. There is no evidence on the public record that persuades me that these issues were properly considered in this dry coherent framework during the policy-making process.

No doubt it was politically brave to fund a regional development programme on the West Coast to the tune of $120 million. And, in a political sense, that did amount to compensation for loss of economic activity caused by the government's policy on the West Coast Accord. But it is perhaps not an adequate response to those whose contractual rights have been interfered with although, given the nature of the force majeure clause, perhaps they were not contractual rights in any event.

I have not analysed whether it is a constitutional convention in New Zealand not to expropriate private property without just compensation. It is an analysis worth undertaking. But I have doubts whether, on the face of the public record, it can be shown to have been followed in every case.

Neither do I wish to add an undue burden to fiscal policy by opening up an area of compensation where none existed before. But the matters at stake here seem to be worrying and they need to be addressed in some systematic manner.

I want to end with a reference to international law. It is well known that the expropriation of private property of aliens by states raises important issues at international law.

There was a time when the nature of the obligations was hotly contested as between lawyers from the two blocs of the Cold War. But since that time the norm has gained wider acceptance, and has come to mean that an expropriation of an alien's property is unlawful unless it is for a public purpose and prompt and adequate compensation is paid. Neither can the taking be discriminatory. The principle is well stated in the American Law Institute's Restatement (Third) on Foreign Relations Law of the United States, §712:

> **712. State Responsibility for Economic Injury to Nationals of Other States**
>
> A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that
>
> (a) is not for a public purpose; or
>
> (b) is discriminatory; or
>
> (c) is not accompanied by provision for just compensation;
>
> For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national;
>
> (2) a repudiation or breach by the state of a contract with a national of another state
>
> (a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by non-commercial considerations, and compensatory damages are not paid; or
>
> (b) where the foreign national is not given an adequate forum to determine his claim of repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred; or
>
> (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

What constitutes "taking of property" is a subject that is debatable. However, it may include not only outright expropriation but also such unreasonable interference with the use, enjoyment or disposal of the property as to justify an inference that the owner will not be able to use, enjoy or dispose of the property within a reasonable period. As the American Restatement (Third) reflects, contracts are to be dealt with on a somewhat different basis from property.

No matter which international law standard is appropriate, the lesson from *Westco Lagan* is that unless the New Zealand system pays better attention to the taking of property, international law issues could arise that could have serious consequences. Furthermore, the effect on the investment climate is not likely to be favourable. And why should we be obliged to treat aliens in this regard better than our own people? New Zealand needs a better and more principled way of identifying and dealing with these issues. ❑