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COURT STRUCTURE

The Law Commission has a reference to conduct a comprehensive review of the structure of the Courts below the level of the Court of Appeal, including the specialist Courts and tribunals and their relationship with each other and the ordinary Courts.

Such a review must take place against a background of some basic views about the role of Courts and the law. It is no longer clear that there is consensus as to what those roles are and it is certainly not clear that traditional views as to the role of Courts are shared by the current Attorney-General.

Courts are not mere statutory bodies to be organised and reorganised by the government as it sees fit. The Courts are supposed to be guardians of the rule of law and to keep the government, amongst others, within its legal bounds. The Courts in fact play a central role in our constitution since the basic principle of that constitution is that the Courts will recognise Acts of Parliament as valid. It follows from this that Parliament cannot determine what is a Court for the purpose of that constitutional role. Parliament may be fond of creating bodies by Act of Parliament and describing them as 'Courts of record' but they cannot be Courts for the purpose of this foundation of the constitution, otherwise Parliament could constitute the Prime Minister as a Court of record.

It follows from this that there must be a High Court of general jurisdiction. If the High Court, which predates Parliament in both England and New Zealand, were to be abolished and replaced by a series of specialist Courts, then a constitutional revolution would have occurred. The Courts would then be completely under the control of Parliament and recognition of Acts by the Courts would presumably be replaced as the fundamental of the constitution by the recognition of the government by the Army and Police.

So the position of the High Court should not be treated as reviewable by a review appointed by the government.

This leads on to specialist Courts. Already one inroad has been made into the general jurisdiction of the High Court in the area of employment law. The difficulty for the Law Commission is that the role of specialist Courts is largely determined by the substantive law, which is outside the terms of reference of the review.

Thus, specialist Courts are usually to be found in areas where the rule of law is weak and the role of discretion and policy strong. For the last decade there has been no case for an Employment Court, since employment was governed by law and the role of the Court was simply to interpret the law. The review should certainly consider whether it is appropriate for the Employment Court to have the criminal jurisdiction recently awarded it.

The Maori Land Court only has to exist because of the continuation of the Maori Land Act. Several of its roles, such as its discretion to permit transactions, all of which have to be registered with the Court, are incompatible with the role of a Court in any country which defines Courts in a written constitution. They are more appropriate to a bureaucrat and to a colonial bureaucrat at that. But, as long as the Maori Land Act exists, there is not much sensible that any review can say.

Likewise, the major problem for the Environment Court is its workload, which is becoming a serious impediment to development. There is no sign, however, that this government proposes to do anything to reduce the problems, in fact every measure it has taken so far will increase them. It is questionable whether it is worth chasing our own tails by spending more and more money on the Environment Court. On the other hand it is arguable that since the motivation for many objections is to extort money from developers otherwise faced with substantial delays (as has now dawned on the Minister for Corrections), a substantial reduction in the waiting list could lead to a reduction in the number of objections.

In the family law area, there are periodic calls for a separate appeals structure, a sure sign that the rule of law is weak and that the practitioners and Judges wish to expand the role of discretion. At his swearing in, Priestley J set out to defend the Family Court from the proposition that it is not involved in 'real law'. His Honour then listed a number of factors which seemed to prove the point, since they characterised the Family Court as a bureaucratic and policy-oriented body with practical power to govern and direct people's lives, rather than as an allocator of rights in a free society. The Property (Relationships) Act will now add to the problems by transferring to the Family Court (which is already overloaded) from the High Court (which is not) questions of a type and complexity for which Family Court Judges are simply not fitted by virtue of their experience.

The criminal jurisdiction has been commented on in the June editorial of this *Journal* and those comments stand. The civil work of the District Courts also needs examination. An improvement in the handling of civil cases before District Court Judges would flow from the changes to the criminal jurisdiction proposed in June. The Disputes Tribunals must then be considered. For the 85 per cent of New Zealand businesses which employ five or fewer people, disputes involving amounts up to $7,500 can be significant. The review should ensure that there is no confusion in the Referees' minds between simplifying procedure and abolishing law. ❑

TAX UPDATE

Jan James and Raj Singh, Simpson Grierson, Auckland

discuss aspects of the tax review issues paper and taxation of charities

TAX REVIEW – INTERNATIONAL TAX

The controversy raised by certain aspects of the issues paper released by the Tax Review panel (the "Review") (such as the tax on home ownership) should not overshadow the fact that the issues paper is a valuable tool for tax policy development. One key focus of the Review is international taxation.

Non-residents' New Zealand income

The Review recommends reducing the effective tax rate on the New Zealand sourced income of non-residents through a targeted approach. When New Zealand tax on non-residents results in a higher pre-tax return demanded by the non-resident, the non-resident is no worse off. Rather, the economic burden is borne by New Zealand in the form of higher costs of capital and lower foreign investment.

The Review also suggests reducing the effective tax rate on equity to narrow the gap between tax on debt and equity investments by non-residents. Returns to non-residents from debt are currently taxed at a lower rate than those from equity. The Review considers that such a difference distorts the relative costs of the two types of investment and can potentially lead to an over-reliance on debt.

The Review considers a reduction in the tax rate on equity returns to non-residents is desirable, with two significant provisos. First, if a non-resident receives a full credit for New Zealand tax in its home jurisdiction then unless the non-resident can defer the tax imposed by its home country, there is no benefit to New Zealand from giving up its right to tax the non-residents' New Zealand sourced income. Second, if non-residents are earning above normal returns ("economic rents") from New Zealand then a general tax reduction for all non-resident owned companies may simply increase the return to non-residents earning economic rents rather than increasing investment.

The favoured method of reducing the tax rate on equity returns to non-residents is a targeted reduction in the tax rate for companies entirely owned by non-residents to between 15 per cent and 20 per cent. Companies owned entirely by New Zealand residents would continue to be taxed at 33 per cent, and an intermediate rate would apply to companies with mixed New Zealand resident and non-resident ownership. If there is significant economic rent being derived, the tax reduction could apply only to foreign equity investment in areas such as new productive activities in export industries or other selected industries.

Other suggested ways of reducing tax on equity returns for non-resident "portfolio investors" (those with a less than ten per cent equity investment in a New Zealand company), include an increase in foreign investor tax credits ("FITC").

The FITC regime currently removes the effect of non-resident withholding tax ("NRWT") on dividends through payment of a "supplementary dividend" equal to the NRWT imposed on the dividends. Increasing the supplementary dividend could further reduce tax on equity returns to non-residents. A further approach is to introduce an approved issuer levy regime for equity returns, probably set at the same level as for debt – currently two per cent.

Residents' foreign sourced income

The Review sees the current system for taxing offshore income of New Zealanders as unsound because it reflects neither economic analysis nor concerns relating to international competitiveness and compliance costs. The regimes which tax New Zealanders' offshore income can discourage companies or individuals from moving to New Zealand (or those based in New Zealand from considering offshore investment). Two significant issues are discussed, being the availability of foreign tax credits, and the timing of recognition of offshore income.

In relation to foreign tax credits, the Review recognises two possible approaches. The first is broadly the status quo. The second is fundamentally different, the risk free return method ("RFRM") approach. Under this approach the actual income earned from offshore investments is not taxed. Rather, returns on offshore investments are taxed as if the investment were in a in a risk free asset such as government stock. This approach leaves no scope for foreign tax credits nor does it allow deductions for all expenses as the imputed return is intended to proxy a net return after expenses. It does, however, significantly reduce government risk on equity investments (while also minimising potential upside tax take).

Benefits of the RFRM approach are said to be that the tax system will not influence equity investment decisions, particularly decisions as to whether to invest for capital growth or return, and that taxpayers with the same level of start of year wealth will pay the same amount of tax.

In relation to the timing of derivation of offshore income, currently New Zealanders are taxed on their offshore income under the controlled foreign company ("CFC") regime or the foreign investment fund ("FIF") regimes. (Under the CFC and FIF regimes, certain investments by New Zealand residents in foreign companies suffer income tax on an unrealised basis. The CFC regime applies when certain control tests are satisfied.) These regimes do not apply to investment in certain high tax jurisdictions (termed "grey list" countries). The Review considers that this exemption provides incentives to invest in grey list countries which is not in New Zealand's interest, and proposes that this exemption be repealed as long as a suitable regime to tax offshore investment was also implemented.

In this regard, the Review has two proposals. First, the RFRM approach (for offshore investments only or for offshore and some domestic investment) could be adopted. Secondly a modified CFC approach with an "active/passive" distinction for foreign direct investment (except for tax haven countries) is proposed (with the RFRM approach proposed for listed offshore investments). Rather than tax all gains on an unrealised basis, if CFC income falls into the "active" category then it would only be taxed on a realised basis (ie when the income is repatriated to New Zealand).

Comment

The RFRM approach, although having much to recommend it, may create its own problems. One is the valuation of investments in cases where a market value is not available. The Review states as a general proposition that there is then no choice but to use accounting information (despite the difficulties with this approach). In the case of offshore investment by New Zealanders the Review proposes using shareholders' funds as a surrogate for market value. This could create more distortions – for example identical investments could be taxed differently even if the investors were in the same tax bracket.

Further, the approach assumes that accounting information is readily available or that investors can readily access such information. In the cases where the information is not readily available it is possible that independent valuations may be required to be made by professional valuers. This could increase the compliance cost burden on taxpayers.

In terms of the modified CFC approach the Review notes that drawing the active/passive distinction is complex. Adding to the complexity of the CFC regime does little, it would seem, to address the competition and compliance cost concerns discussed above.

REVIEW OF CHARITIES

A recent discussion document that has provoked indignation (from charities) is that reviewing the taxation of charities. The underlying concern of the document is that charitable exemptions are too widely available, and that assistance to charities should be better targeted.

The government is considering two options as part of reviewing the definition of "charitable purpose". One option is to maintain the existing definition but incorporate "safeguards". This would involve requiring all charities to be registered to claim tax exemptions. The government would have the ability to deregister a charity which it deems not charitable. The second option proposes a new (albeit broad) definition of charitable purpose, distinct from the existing body of law. Guidelines (which appear to incorporate the existing categories of charitable purposes) would be established to apply the new definition and specific approval for charitable status would be required. These guidelines could be varied over time.

The government is also considering an "approved registration" process which would involve an assessment of whether the purposes for which the entity is established are charitable. Apart from registration, in order to increase monitoring of charities it is proposed that charities would be subject to increased reporting requirements. This could include mandatory preparation of audited accounts (which possibly may be made public) and tax returns. In addition it is proposed that regular monitoring by a government department or some other body could be carried out to ensure charitable purposes are being pursued.

A further proposal is that charities undertaking business activities be taxed on their income (but with unlimited deductions for distributions for charitable purposes). This means that if a charitable trust were to undertake trading activities in trust for charitable purposes, any retained profits from those activities would not be exempt from tax. Effectively the trust would no longer be able to reinvest tax free profits back into its trading operations. The rationale for this proposal is to remove the competitive advantage of charities over tax paying competitors.

Other proposals include standardising the criteria for donee status and income tax exemptions, liberalising the deduction for donations available to companies and removing the exemption from FBT currently available for fringe benefits provided to employees of charities. In terms of GST, the discussion document proposes that the existing concessionary practice of the IRD to allow input tax credits for taxable and non-taxable supplies (but not exempt supplies) would be formalised through legislation.

Comment

The assumption likely to hit charities the hardest is that any surpluses made by a charity can be immediately used to carry out its charitable purposes. In many cases it is likely that the charity concerned may need to build up a reserve of funds before it can usefully carry out its charitable purposes. Taxing such reserves prior to allowing a deduction for distributions is will have a severe cashflow impact in many cases, which can hardly be commensurate with a desire to continue to subsidise private sector charities. The discussion document expresses concern that accumulation of tax free profits can give a charitable entity a competitive advantage. It seems unlikely that there would be many charities large enough to threaten the industry in which their trading activities were conducted.

The government's reasons for reviewing the definition of charitable purpose is that the exemption is too widely available and that the definition is out of date. These reasons do not appear compelling enough to warrant changing a definition which has a well developed meaning in common law. Increased reporting requirements and monitoring of charities would address any concerns that the exemption is too widely available.

Secondly, the common law has demonstrated flexibility to adapt to modern times. It is ironic that the discussion document acknowledges that government subsides private sector charities rather than increasing state provision because it results in the better targeting of resources, yet an alteration of the definition of charitable purposes leaves the reins of resource allocation firmly in the government's hands.

Given the limited formal monitoring under the current framework for charities, a tightening up in this area would not only provide government with information on charitable activities, it should also reduce the opportunity for any misuse of the exemptions (to the extent this is actually occurring, if at all). It is likely that the IRD will be best suited to administer the approval and monitoring process. The IRD already has a practice of providing charitable confirmation on request and the power to audit and it is expected that little would be required (beyond increasing the resources of the IRD) to implement these proposals. The compliance burden, however, should not be increased to a point where it threatens the viability of charitable entities. ❑

WORLD TRADE BULLETIN

Gavin McFarlane of Dechert and London Guildhall University

reports on a European Union case of direct interest to NZ lawyers this year

ECJ TO RULE AGAINST MULTI-DISCIPLINARY PARTNERSHIPS?

As more and more aspects of the supply of services as well as the supply of goods comes under the supervision of supranational bodies, even the activities of those working at the coal face of tax specialisation have come under scrutiny. The question of multi-disciplinary partnerships between lawyers and accountants has been under discussion for a number of years now. It has come against a background of continuous merger at the top end of both solicitors' and accountants' professions, where recent cross border amalgamations of a kind which would have been unimaginable twenty years ago, have taken place. But it is this cross border element which has attracted the attention of the supranational authorities charged with the regulation of such matters as competition in trade, particularly international trade, in a global environment. The question is currently of particular concern to those solicitors firms which have entered into association relationship with major firms of accountants. Garrets, KLegal and their ilk will be closely analysing the opinion just released by the Advocate General of the European Court of Justice on the subject in the case of *Wouters, Savelbergh, and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* Case C309-99, ie the Dutch firm of PriceWaterhouse v the Council of the Netherlands Bar. The opinion is available through the ECJ website, http://curia.eu.int . These official opinions in ECJ cases enjoy a status which does not have an exact parallel in the domestic legal systems within the United Kingdom. For each major case which comes before the ECJ, an advocate general is assigned to the matter from the panel appointed to the ECJ. He or she then conducts in depth research into the questions at issue, considers the arguments which have been put forward on paper on the subject by all the parties to the case, and eventually comes up with an opinion. This opinion has a curious status. It becomes part of the jurisprudence relating to the matters in issue, but so far as the Judges of the ECJ are concerned, it is purely advisory in nature, and the Judges are in no manner obliged to follow it when they eventually produce their final decision.

> *There is a friction between what are described as the advisory activities of the lawyers, and the supervisory role of the accountancy profession*

So the stage which has currently been reached on the question of multi-disciplinary partnerships in the ECJ is that the opinion of Advocate General Philippe Leger has been released, and the final judgment of the Judges will be presented after they have given this opinion due consideration. It must be stressed that although there is no obligation on the Judges to do so, in the great majority of cases they do follow the opinion of the advocate general; it is unusual for them to depart from it. The matter has come before the ECJ because of the differing attitudes within the member states of the European Union towards closer relationships between the professions. In Holland, France and Belgium stronger stances have been taken up even within the legal professions against mergers with non-national firms. It is in the United Kingdom that attitudes have been most relaxed. The present consideration of the matter by the European Court of Justice has arisen because of a ban imposed by the governing body of the Dutch Bar on multi-disciplinary partnerships. PricewaterhouseCoopers and Arthur Andersen both raised challenges to this embargo in the Dutch Courts, and this challenge has resulted in the matter being referred from the domestic jurisdiction in Holland to the ECJ. The conclusion reached by the Advocate General is that what he described as the very essence of the legal profession may operate against the establishment of a community of financial interests with accountants. His view is that a prohibition on multi-disciplinary partnerships between law firms and accountants is anti-competitive in strict terms of competition law, but can be justified, on the ground that there is a certain incompatibility between the two disciplines. There is a friction between what are described as the advisory activities of the lawyers, and the supervisory role of the accountancy profession. But the Advocate General has suggested that ultimately it should be for the national Courts in each member state to rule on whether the unique professional obligations of the legal profession, involving independence, the respect for professional secrecy, and a need to avoid conflicts of interests justify a prohibition on multi-disciplinary partnerships in their jurisdictions. On this basis the likely scenario is a wide variety of attitudes between the different member states of the EU, which may hamper the activities of the cross border partnerships in the provision of their services internationally. ❑

PRE-NUPTIAL AGREEMENTS: INTERNATIONAL PROBLEMS

David McLay, Bell Gully, Wellington

finds conflicts of laws problems in the Property (Relationships) Act

Radical measures such as the Property (Relationships) Amendment Act 2001 often generate unexpected consequences. This note highlights an unintended consequence of two provisions as they affect pre-nuptial agreements entered into outside New Zealand.

The Act is Parliament's response to the increased extent of de facto relationships. As is well known, the first suggested reform comprised two Bills, one on matrimonial property and the other on de facto relationships. The Labour Government integrated the two reforms, but not without a strident dissent by the National and ACT parties in the Select Committee Report.

The "great OE" is now a standard part of life of young New Zealanders. This enhances the probability that our property law may have effects outside New Zealand. The standard approach of the old 1976 Act and of the Amendment Act to preventing extra-territorial over-reach is to provide that the legislation only applies to immoveables in New Zealand or where one of the spouses (or partners) is domiciled in New Zealand. (s 7(1), Matrimonial Property Act 1976 and s 7(2), Property (Relationships) Act 1976.) It is not appropriate to analyse the concept of domicile in this article. Suffice to say, there are many transient New Zealanders throughout the world who still have New Zealand domicile.

Pre-nuptial agreements are common in a number of countries. They are typically entered into to oust the operation of community property laws of the same type as New Zealand's Matrimonial Property Act 1976. Thus, it was not surprising that the original 1976 Act contained a provision that provided for recognition of pre-nuptial agreements. Section 7(3) provides:

> this Act shall not apply to any matrimonial property if the parties to the marriage have agreed, before or upon their marriage to each other, that the matrimonial property law of some country other than New Zealand shall apply to that property, and the agreement is in writing or is otherwise valid according to the law of that country, unless the Court determines that the application of the law of the other country by virtue of any such agreement would be contrary to justice or public policy.

The general effect of s 7(3) is to permit persons on or before their marriage to agree that the matrimonial property law of another country shall apply to their property. *Fisher on Matrimonial Property* para 1.64 states:

> Such persons may chose as the proper law of their agreement the law of some overseas country.

The stipulation that the pre-nuptial agreement choosing a foreign law is not to apply where it is contrary to justice or public policy was considered in *Pretorius v Pretorius* [2000] NZFLR 72. A pre-nuptial agreement made in South Africa was treated as being valid within s 7(3). It was not upheld because it was "unfair and unreasonable and takes the form of an unjust enrichment" in circumstances where all the assets of the husband and wife had been placed in a "frozen account" in South Africa in the husband's name before their migration to New Zealand.

Section 7(3) has been re-enacted as s 7A of the Property (Relationships) Act 1976 in essentially the same terms as the former s 7(3). Obviously, a reference to de facto partners that has been added. More importantly, s 7A(2)(a) requires the spouses or de facto partners to have agreed "before or at the time their marriage or de facto relationship began" about the application of the property law of another country. The apparent simplicity of the drafting regrettably ignores a couple of factors. The first is that the date at which a de facto relationship begins is a problematic issue involving the consideration of all nine matters listed in s 2D(2). The second aspect is that the drafters of s 7A have ignored s 2B. Section 2B provides:

> For the purposes of this Act, if a marriage was immediately preceded by a de facto relationship between the husband (A) and the wife (B), the de facto relationship must be treated as if it were part of the marriage.

By far the most common occurrence is that a marriage is preceded by a de facto relationship. On that basis, it is necessary to decipher whether the reference to the time of the marriage beginning (in s 7A(2)) can mean the date of the actual marriage. An interpretation that s 7A(2) refers to the date of the actual marriage would be consistent with overseas practices. However it is unlikely that a Court will effectively ignore s 2B when construing s 7A(2). Thus it is likely that the Property (Relationships) Amendment Act has significant deleterious effects for the recognition of pre-nuptial agreements entered into outside New Zealand.

There does not appear to have been any consideration of the intended impact of the new legislation on pre-nuptial agreements. The writer's view is that it is not appropriate for New Zealand's property sharing law to over-reach. Thus an appropriate legislative response would be to amend s 7A(2) so that it explicitly permits entry into foreign pre-nuptial agreements at the time of actual marriage. Such an amendment might detract from the "one size fits all" approach of the Amendment Act, but would ensure an approach of international comity. ❑

REGULATING BUSINESS IN VIETNAM

Dang The Duc, Vision & Associates, Ho Chi Minh City, Vietnam

reviews the proposed new competition law for a country new to competition

After 15 years of the Renovation or "*Doi Moi*" policy of opening its door to foreign investment and private sector, recognising a multi-sectoral economy, Vietnam has made some significant achievements. The centralised economy has been gradually replaced by the market economy with various economic sectors participating in the game, including state-owned enterprises, private companies, foreign owned companies and others. This has created heated competition among businesses. Competition is a driving force for businesses to develop, but, given lack of a legal framework regulating competition and monopoly, has also caused obstacles for the development of the infant market economy.

While the market economy has taken shape in the country, state-owned enterprises (SOEs) are still dominant in many industries such as power, telecommunication, petroleum, aviation, tobacco, cement, etc. There are currently about 5,300 SOEs, of which there are 18 giant corporations (Corporations 91) established by the Prime Minister and 90 big corporations (Corporations 90) established by various ministries and local governments, holding a position of monopoly in major industries. The monopoly or advantageous position of these corporations comes from their administrative origin. They are not established through free and fair competition, like in other developed countries. The participation of foreign companies in Vietnam and comparatively rapid increase of businesses in the private sector, also require that there must be anti-trust or competition laws to establish a level playing field between businesses of various economic sectors.

The Constitution 1992 and the Civil Code have built up the first legal framework governing the competition matter by recognising various economic sectors. The Commercial Law, Ordinance on Protection of Consumer's Rights and Ordinance on Goods Quality have also made some general regulations to encourage competition in commercial activity. However, while such current legal instruments do introduce regulations on trade competition in principle and on protection of consumer rights, they are not strong enough to secure a level playing field for businesses. Many cases have been widely reported by the press of SOEs taking advantage of a monopoly position or using unethical business practices to compete unfairly. In addition, there are no specific penalties or remedies to deter illegal or unfair competition or other acts taken not at arm's length. A very chaotic market has existed for a long time. Being aware of that, and with a view to setting up a business-friendly legal framework, the government has decided to establish a Competition Law Drafting Committee, comprising representatives from various ministries and agencies, and chaired by the Ministry of Trade. However, it is unlikely the competition law would be submitted to the National Assembly for approval in 2001. Enthusiasts would probably have to wait until 2002.

In March 2001, the first draft of the competition law ("Draft Law") was made public for comments. The Draft Law includes nine Chapters with 70 Articles. The following are the major points of the Draft Law.

Restrictions on competition

Agreements on competition restrictions are defined as those made orally or in writing so as to prevent or restrain competition in the market. In particular, the following agreements are prohibited: fixing the price of goods and services directly or indirectly, limiting other producers or service providers' participation in the market, applying different commercial conditions to different partners on the same transaction, reducing or increasing the price of goods and service unreasonably except for special goods such as fresh goods, in stock goods, etc. However, agreements aimed at improving quality of the goods and increasing the sources for goods and agreements reducing the time for distribution of goods and service are considered as exceptional cases.

Monopolies

The Draft Law provides that a monopoly act is an act of an enterprise which is in a position of monopoly and taking advantage of the monopoly in order to limit the fair competition of other enterprises. The Draft Law specifies monopoly acts as: decreasing the price below actual production cost in order to maintain a position of monopoly; limiting the production and the market, illegally preventing other competitors from entering the market; interfering in production activities of other enterprises; and so on. As mentioned above, there are some sectors such as electricity, water, aviation, etc where SOEs hold a position of monopoly. The situation has placed businesses from other sectors, especially private ones in a very disadvantageous position, and especially adversely affected consumers (eg high prices while of low quality services and products). Certain acts are defined to be exceptional, which include those acts aimed at improving the conditions for providing the goods, adding benefits to customers, or enhancing the competition capacity of Vietnamese enterprises in foreign markets, etc.

Unfair competition

The most important content of the Draft Law is the regulation on unfair competition. According to the Draft Law, unfair competition is defined as those acts infringing business morals causing adverse effects to the legitimate interests of other competitors. Unfair competition acts include: illegal use of the trade name or trademark of other

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GST AND THE REVERSE CHARGE

Vicki Ammundsen, Denham Martin & Associates, Auckland

studies one aspect of the GST discussion document

It has become increasingly apparent that the tax laws of New Zealand and Australia are evolving in tandem. The so-called "kiddy tax" recently introduced in New Zealand by s HH 3A of the Income Tax Act 1994 mirrors much of the comparable Australian legislative provisions. Conversely Australia's consolidation regime has been based largely on the New Zealand regime.

Legislation countering the alienation of personal services income introduced into both countries last year (in New Zealand by s GC 14D ITA in Australia and ss 84 to 87 of the Income Tax Assessment Act 1997, is a logical move towards harmony between the two countries.

Another step towards such harmonisation is mooted in the government discussion document on *GST & Imported Services A Challenge in an Electronic Commerce Environment A Government discussion document* to introduce an Australian style reverse charge mechanism (Division 84 of the A New Tax System (Goods and Services Tax) Act 1999 (the Australian GST Act)) into the New Zealand Goods and Services Tax Act 1985 (the NZ GST Act).

REVERSE CHARGE

Unlike imported goods, most services imported into New Zealand are not subject to GST. However, a reverse charge mechanism allows GST to be imposed through recipient self-assessment on services imported into New Zealand.

In the absence of a reverse charge mechanism, if the importer of a service is entitled to an input tax credit, bar timing issues, no "harm" is done. However, where the importer is making exempt supplies, there is the potential for:

- the erosion of the tax base; and
- disadvantaging GST-registered New Zealand service providers in comparison with non-resident service providers, in that New Zealand service providers must charge GST, whereas non-resident service providers are not generally required to do so.

How it works in Australia

Section 9-5 of the Australian GST Act provides that a taxable supply for purposes other than that of Division 84 is a supply where:

(a) you make the supply for consideration; and
(b) the supply is made in the course or furtherance of an enterprise that you carry on; and
(c) the supply is connected with Australia; and
(d) you are registered or required to be registered.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

Division 84 of the Australian GST Act provides that a supply of anything other than goods or real property, that is not connected with Australia, is a taxable supply for the purposes of the Australian GST Act if:

- the recipient of the supply does not have a solely creditable purpose;
- the supply is for consideration; and
- the recipient is registered for GST.

Section 11-15 defines creditable purpose as:

(1) you acquire a thing for a creditable purpose to the extent that you acquire it in carrying on your enterprise;
(2) however, you do not acquire the thing for a creditable purpose to the extent that:
  (a) the acquisition relates to making supplies that would be input taxed; or
  (b) the acquisition is of a private or domestic nature.

However, the supply will not be a taxable supply, ie the reverse charge will not be applied, to the extent that it is GST-free (zero-rated) or input taxed (exempt) ie the supply would not be subject to GST if made in Australia under the basic rules.

Where the requirements of divn 84 of the Australian GST Act are met the reverse charge mechanism also applies to transfers between an offshore entity and an Australian branch of the same entity, subdivn 84-15 deeming that such a supply is not connected with Australia.

The GST on a supply taxable under divn 84 is payable by the recipient, not the supplier. The GST payable is ten per cent, ie the normal rate of GST.

Examples

- GST registered BigBank acquires off-shore legal services. As $40,000 of the fee charged relates to BigBank's exempt supplies, BigBank must return $4000 GST as a reverse charge;
- Stephanie acquires software over the internet. Stephanie is not GST-registered and so the reverse charge mechanism will not apply.

Exclusions

There are limited exclusions from divn 84, for example:

- payments that relate to the supply by an overseas entity to an Australian branch of the services of an expatriate employee, that would be withholding payments if paid to an employee in Australia; and
- specified supplies relating to employee share ownership schemes.

How it will work in New Zealand

The Discussion Document provides that the reverse charge will apply to supplies of imported services that would be taxable, if made in New Zealand, and that are acquired by a registered person other than in the course of making taxable supplies. Therefore, to the extent that a registered person acquires an imported service for the purpose of making exempt supplies, the supply will be taxed under the reverse charge mechanism.

The Discussion Document intends, that for the purposes of the reverse charge, New Zealand branches or subsidiaries with offshore parent companies or head offices will be treated as separate entities. The Discussion Document also proposes that for the purposes of the NZ GST Act supplies between members of GST groups that would otherwise be disregarded, will be subject to the reverse charge.

Supplies to which the reverse charge is applied will be valued in the same way as any other taxable supplies under the GST Act. That is, the value of the supply will be the total consideration unless the supply is between associates, in which case the value will be the open market value.

Digitised products

Although the Discussion Document is unclear on the exact mechanism, it also proposes that digitised products will be treated as services for the purposes of the GST Act.

Differences between New Zealand and Australian provision

Until the final form the legislation takes is presented it is not possible to make a precise comparison of the respective mechanisms. Presently however, it seems likely that if New Zealand retains a broad service based mechanism rather than a mechanism that only applies to specified services, then the two mechanisms will operate in much the same way.

Impact?

The reverse charge will only apply to registered persons in New Zealand, and as identified in the Discussion Document, the major impact will be felt by providers of financial services such as banks and other financial service groups. Financial service providers that have centralised "back room" support services in overseas head offices may need to reconsider the cost effectiveness of such arrangements as the providers of exempt supplies will have to either absorb the increased GST or pass it on to customers.

WHERE TO NEXT?

Considering the current functional similarities between the NZ and Australian GST Acts, and in light of the fact that the reverse charge will have the greatest impact on the financial services industry, it will be interesting to see whether the government will consider adopting the reduced input tax credit (RITC) – a provision unique to the Australian legislation.

The RITC works by providing that specified acquisitions relating to financial supplies can attract a reduced input tax credit even though no input tax credit would arise under the basic rules.

Interestingly, the A New Tax System (Goods and Services Tax Act) Regulations 1999 that provide the acquisitions that can be subject to a RITC were amended this year to address a competitive disadvantage that had arisen due to the imposition of the reverse charge. Specifically, non-resident entities making financial supplies in Australia through say a branch may provide internally generated management services to the Australian enterprise that are subject to a reverse charge.

However, resident financial institutions would not incur any GST liability where the same services were provided within the entity. The competitive disadvantage was ameliorated, at least in part, by an amendment to the regulations providing that specified management and support services acquired by closely related Australian enterprises from non-resident entities or off-shore enterprises are reduced credit acquisitions.

It will remain to be seen whether the financial supplies industry in New Zealand is able to successfully lobby for RITC in the NZ GST Act. ❑

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continued from p 266

traders, package imitation, obstructing, enticing, bribing or threatening the staff or customers of other business entities; illegal use of trade secrets and defamation of other competitors. During the recent years, quite a few cases have been reported as unfair competition acts in the market. A well-known example relates to the bottled mineral water market where brands such as "La Vile" or "La Vise" or "La Vige" all vie to trade off the popularity of the "La Vie" brand name of a French company. The battle of Vietnamese famous mineral water drink "Vital" against "Vilan" is of the same nature. Another example, a giant soft drink company reduced the price from VND26,000 to VND17,000 a box of 24 bottles in 1998. Upon winning a sizable share of the Vietnamese soft drink market, the price was raised to VND46,000 a box.

Enforcement

The most important issue for any law is how it is enforced. The Draft Law reserves a substantial Part for the mechanism for handling violations. In order to enforce the laws in respect of competition restrictions, monopoly and unfair competition acts, one of the following measures shall be applicable: injunction to stop such acts immediately; forced restructure of enterprises currently in a position of monopoly; forced division or separation of enterprises; compulsion to issue public corrections; forcing to stop producing, administrative penalties; and criminal liabilities. The Draft Law provides that in case of damages occurring, the violated organisations and individuals shall have entitlement to such damages.

CONCLUSION

There remain a lot of issues which need to be discussed. However, the Draft Law shows the commitment and efforts of the government of Vietnam to building a more regulated business environment for business, creating a level playing field to encourage fair competition. ❑

"PAY WHEN PAID" IN ENGLAND

Michael Furmston, Barrister, London

reviews English experience with legislation to protect sub-contractors

Pay when paid clauses in English construction law have been the subject of legislation in the Housing Grants, Construction and Regeneration Act 1996 (henceforth the 1996 Act) but it is worth saying a word about the position before 1996. There is no clear case which analyses the legal effect of a pay when paid clause and the basic principle must surely be the that everything turns on the construction of the words actually used. Pay when paid clauses are widely to be found in subcontracts where the main contractor has drawn up his own conditions for his subcontractors (they are not to be found in the industry wide model contracts). The usual legal effect probably is that a contractor does not have to pay the subcontractor until he has been paid in respect of the relevant work by the employer. A pay when paid clause might mean more than this and involve the contractor succeeding in allocating the risk of employer insolvency onto the subcontractor. It is probably reasonable to assume that before 1996 most Courts would have been deeply suspicious of an argument that a clause had this effect and disinclined to accept the argument unless the words were very clear.

SUBCONTRACTORS' COMPLAINTS

It should be said that most subcontractors will tell you that contractors are slow to pay whether there is a pay when paid clause or not. A pay when paid clause will however shift the risk of the employer being late in payment onto the subcontractor and, in practice, it will make it easier for the contractor to make excuses for late payment whether he has been paid or not. The subcontractor will usually not know whether the employer has in fact paid the contractor or not and most subcontractors most of the time will probably be reluctant to ask the employer whether he has paid the contractor.

Subcontractors have complained for years that pay when paid clauses are unfair and as stated above this has been accepted in the sense that the industry wide forms have not contained such provisions. However subcontractors have not on the whole been able to resist the pressure from contractors to accept contractor drafted conditions of subcontract. The change brought about by the 1996 Act has therefore been of great importance. The 1996 Act was the result of a report commissioned by the Conservative government from Sir Michael Latham, a former Conservative MP. *Latham* was one of a long line of reports into the operations of the construction industry which have been produced since the war. All of these have drawn attention to the highly confrontational style of contracting which characterises the industry. Most of the reports suggested that life would be greatly improved if everybody behaved in a more reasonable and civilised manner. This is very likely true but no one has been able to persuade parties to move from the existing practices to more enlightened ones. One of the problems is undoubtedly the shape and size of the industry. In the United Kingdom the construction industry is very large but it is highly fragmented. There are said to be nearly 200,000 firms involved in the industry but at least 75 per cent of these employ ten employees or less. Contracting has always relied heavily on subcontracting but all surveys suggest that subcontracting has greatly increased in the last twenty years. If a contractor employs those who work for him, then the risks of a down turn in the economic cycle fall on him because with modern labour legislation there are substantial costs in shedding staff. If the people who do the work are not employed but subcontractors this risk is moved elsewhere. Subcontracting moves other economic risks as well. Not only is the industry extremely fragmented but it is extremely easy in capital terms to enter. This is because contractors have in general succeeded in persuading employers to pay as the work proceeds. People do not on the whole build aeroplanes or motorcars this way although historically they seem to build ships in much the same way. If a contractor can persuade employers to pay him for work as it is done and if he subcontracts 90 per cent of the work to subcontractors and if he succeeds in not paying the subcontractors promptly even when he has been paid by the employer he will to a large extent abolish cashflow problems. Contractors quite often succeed in doing all of these things.

The scope of the changes proposed by *Latham* was in fact very much wider than the proposals adopted in the Act. Sir Michael proposed for instance an elaborate system by which money paid for work which had been done would be held on trust in ways which would protect subcontractors, and indeed contractors, against the insolvency of contractors or employers respectively. This change was too radical for the government (and in this respect it is worth stating that the attitude of the Conservative government which lost office in 1997 and of its Labour successor are broadly very similar).

THE BRITISH ACT

The 1996 Act represented a major invasion of freedom of contract. Invasions of freedom of contract in order to protect consumers are nowadays commonplace but they are much less common when they are designed to protect one commercial party against another. Both political parties have accepted the proposition that parties in the construction industry cannot be left to negotiate all contractual terms themselves. The Act does not anywhere say so but it must be the case for the most part that the Act is thinking in terms of protecting subcontractors against contractors. Contractors may need protection against employers but this is much less clear. Nevertheless the provisions apply equally between employer and contractor as between contractor and subcontractor or indeed subcontractor and sub-subcontractor. The act might simply have said that certain clauses were mandatory in construction contracts. (There are problems about what is meant by construction contracts but we can leave these problems on one side for the present purposes.) The Act did not however do this. What it did in general was to lay down a set of minimum requirements which must be present in construction contracts and then provide that if these were not present the provisions of the Scheme for Construction Contracts should apply. The provisions of the Scheme are not exactly the same as the minimum requirements of the Act. The obvious result of this was to encourage clever draftsmen to draft construction contracts which met the minimum requirements but were more favourable to their clients than the provisions of the Scheme. In a wicked world this temptation has not been resisted. To take a simple example the Act makes adjudication compulsory in the sense that either party has the right to demand an adjudication at any time and adjudication must then follow normally providing a result within 28 days. The provisions of the Act however say nothing about the costs of the adjudication. Accordingly some contractors, who wish to discourage their subcontractors to resorting to adjudication, put provisions into the contract which put on the party who starts the adjudication the whole of the cost of the adjudication whatever the result. Of course such provisions are not to be found in the Scheme. In the long run or indeed even in the short run there are bound to be cries for some or all of the Scheme to be mandatory.

As far as subcontractors are concerned the risk of employer insolvency is on the face of it a much bigger risk though one less likely to occur than that of late payment

The two topics which are dealt with by the Act are dispute resolution and provisions for payment. As mentioned above the dispute resolution provision enables either party to demand speedy adjudication at any time during the running of the contract. This is superimposed on a system under which most construction contracts provided for arbitration but where arbitration can often not start until the contract was complete where therefore disputes were likely to run on for years and years. Most construction contracts provided for a decision making function for the Architect or the Engineer as the case might be but present practice is to accord less and less respect to such decisions.

The provisions about payment include a right to stage payments unless the work is to be completed within less than 45 days; provision for adequate methods for determining when payments become due under the contract and for providing for a final date for payment and a requirement for someone who intends to withhold payments to give notice of such an intention together with a right to suspend a performance in the event of nonpayment. The pay when paid provisions are part of this payment scheme.

The relevant provision is contained in s 113 subss 1 and 6:

> 113. – (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.
>
> ... (6) Where a provision is rendered ineffective by subs (1), the parties are free to agree other terms for payment.
>
> In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

(Subsections 2-5 are concerned with defining what is meant by insolvent for this purpose and taking into account conditions of space may perhaps be left out for the present purposes.)

THE RIGHT POLICY?

It must be said that the policy behind these provisions does not seem completely clear. Contractors are prevented from providing that they need not pay subcontractors until they have been paid by the employer, subcontractors are prevented equally from similar provisions with their sub-subcontractors but no one is prevented, if the other party will agree, from allocation of the risk of insolvency of someone higher up the chain. As far as subcontractors are concerned the risk of employer insolvency is on the face of it a much bigger risk though one less likely to occur than that of late payment. If one accepts the notion that it is appropriate for Parliament to outlaw certain allocations of risk on the grounds that they are excessively unfair, it is not clear why one form is permitted and the other not.

Surveys of industry practice indicate that straightforward pay when paid clauses have very largely disappeared but that most contractor drafted subcontracts do take advantage of the possibility of transferring the risk of insolvency to the subcontractor. Perhaps more importantly the legislation appears to be widely sidestepped by the replacement of pay when paid clauses by clauses making payment depend on some other event such as the issue of certificates under the main contract. Such clauses have not yet come before the Courts and it is therefore difficult to know exactly how they will react. In respect of the other great innovation in the 1996 Act, the imposition on the parties to construction contracts of mandatory adjudication designed to provide very quick decisions, the Judges of the Technology and Construction Court have taken a very robust view and contrary to what some had feared has made the system workable by scaling back the possibilities of attacking decisions of the adjudicators as wrong. This suggests that Judges will probably take an equally robust view to give effect to legislation which is clearly designed to shift the balance of power between contractors and subcontractors. However it may be that further legislation is needed to provide a really effective starting point for such judicial support. ❑

TAX AND SECRECY

James Coleman, Crown Law Office

with a personal view of challenges posed by tax crimes and media battles

The secrecy provisions of the Tax Administration Act are an important foundation for voluntary compliance. They remain essentially unaltered since 1879. However well they may have served the Inland Revenue Department in the past they now exhibit tensions and struggle to meet the expectations of the community in a more "media savvy" world. This article highlights where tensions exist with respect to tax crimes and media disclosures and concludes that it is time for legislative adjustment.

The principal secrecy provision is s 81(1) of the Tax Administration Act 1994: officers must maintain the secrecy of all matters relating to the Revenue Acts that come into their knowledge and must not communicate any such matter except for the purposes of carrying into effect the Revenue Acts. Little has changed from the wording of ss 8 and 9 of the Property Assessment Act 1879. The fact that the central secrecy provision has survived so long is probably due in large part to the liberalising effect of the Court of Appeal decision *Knight v CIR* [1991] 2 NZLR 30.

Prior to *Knight* the secrecy provisions were interpreted strictly. See *The Queen v St-Merat* [1958] NZLR 1147, *Daemar v Gilliand* [1979] 2 NZLR 7. These cases contain a certain amount of judicial frustration and led to defensive drafting of the legislation whereby more and more exceptions were added to what is now s 81(4). A good example of this is the introduction of what is now s 81(4)(b), which was added for the avoidance of doubt. See *Hansard* vol 493, pp 7189 and 7190 per the Hon Trevor de Cleene, and p 7209 per the Rt Hon Sir Geoffrey Palmer. Ironically it is this defensive drafting style that causes some of the difficulties in interpretation following *Knight*.

The *Knight* decision

Knight involved a situation where IRD officers were involved in a "bugging" operation. Once the subject of the bugging became aware of the incident there was media publicity, a police investigation and an internal inquiry. The Knights sued alleging various breaches of statutory duty, trespass and abuse of power.

A notice requiring discovery was issued in the course of the proceedings. The department claimed that some documents were privileged from disclosure by virtue of the secrecy provisions of the Inland Revenue Department Act 1974. The plaintiffs challenged the claim of privilege.

The plaintiffs' attempt to gain access to those documents was unsuccessful in the High Court. The Court of Appeal, however, adopted a more expansive interpretation of the principal exception to the secrecy provisions than hitherto.

At the time, the principal exception was contained in s 13(1) of the 1974 Act which allowed secret information to be communicated for the purposes of carrying into effect the Revenue Acts. Cooke P held that the phrase included the proper implementation and administration of the Acts. He dismissed the Solicitor-General's argument that the exception was only available in proceedings to recover tax. Richardson J also considered limiting the exception to litigation involving tax collection too narrow. He focused particularly on s 13(3) but did not consider there was a material difference between the ss 13(1) and 13(3) exceptions.

While this broadened the scope of the exception, the secrecy provisions are not free from interpretational and operational difficulties. It is those difficulties that this article focuses on and in particular those difficulties caused by criminal offending and media releases.

THE TENSIONS

The first difficulty arises if a particular circumstance does not fall within one of the express exceptions in s 81(4) allowing for communication to an investigative and prosecuting authority. In such a case should s 81(1) fill the gap? If so, what purpose is s 81(4) serving? The second relates to the new phenomenon of taxpayer-generated media complaints where a taxpayer voluntarily makes his or her own affairs public. Here the tension exists in the stultifying effect of s 81 on the response that the IRD may make to those allegations. Related to this is the issue of waiver by a taxpayer of the effect of the secrecy provisions.

Criminal acts

The list of specific exceptions allowing for release contained in s 81(4) deal with only a number of tax crimes. For example, s 81(4)(a) allows release to prosecuting authorities where there is fraudulent breach of trust suspected. Section 81(4)(b) allows release of material relating to suspected GST fraud to be made to the Police, and s 81(4)(c) allows communication to the Serious Fraud Office.

However there is no express permission to communicate suspected Inland Revenue offences to police, rather than the Serious Fraud Office. This can be important in that the SFO does not usually handle cases involving less than $500,000. Additionally, not all offending is fraudulent in nature or comprises a revenue offence. Only revenue offences can be the subject matter of a referral to the SFO. These are predominately cited in Part IX of the Tax Act.

There are also other sorts of offending. For example, where officers are offered bribes or threatened or intimidated in the course of carrying out their duties reference to the Police is called for. However, there are no express provisions in s 81(4) allowing provision of relevant information to the Police in these circumstances. In practice referral to the Police often necessarily involves provision of some details of a person's tax affairs.

However, following *Knight* the better view is that the release of information not otherwise covered by s 81(4) is often permissible by virtue of the general exception in s 81(1)

– namely, the carrying into effect of the Revenue Acts. The carrying into effect of the Acts includes their proper implementation and administration. With respect to threats of bribery and intimidation the proper implementation and administration of the Acts requires that departmental officers be able to carry out their statutory duties unimpeded by pressures designed to dissuade officers from lawfully discharging their obligations. The same logic would be employed for other frauds not covered by s 81(4). Support generally for this approach can be found in the Committee of Experts' December 1998 report at paras 13-15.

However, this glosses over the fact that these circumstances are not covered by s 81(4). The principal justification for preferring the general exception in s 81(1) over the implication arising from the absence of a specific provision allowing release in s 81(4) is the judgment of Cooke P in *Knight* at p 36. The Judge considered that the list of exclusions (the predecessor of s 81(4)) did not help in determining the true scope of the principal exception. He considered that some of the items added to the list were probably done so for the avoidance of doubt. Indeed, as mentioned above, that was the case with respect to s 81(4)(b) at least. Richardson J, however, took a different approach to the implications of the s 13(4) list of exceptions. He considered that s 13(3) expressly covered the situation so that s 13(4) was irrelevant. He later emphasised the implications arising from the s 13(4) list in *CIR v E R Squibb and Sons (NZ) Ltd* (1992) NZTC 9,146 at p 9,159.

Thus there is a difference as to the primacy of the principal exception in the face of coverage gaps in s 81(4). This adds to the uncertainty as to the interpretation of the secrecy provisions and is one factor militating towards the need for amendment.

Responses to media complaints

Recently there has been public criticism of the IRD by individuals prepared to reveal their own tax affairs publicly to make their point. A response is often called for. Sometimes a taxpayer has mistakenly or deliberately omitted other facts that place departmental actions in context. There is often a public expectation that an explanation will be given if one is available. Whether the IRD may publicly release confidential taxpayer information when replying to public criticism by taxpayers turns on the scope of the exception in s 81(1)(a). It depends on whether releasing that information is for the purpose of carrying into effect the Revenue Acts. In *Knight* at p 41 Richardson J indicated that the question is answered by an analysis of the functions, powers and duties of the Commissioner and his officers.

Section 6 of the Tax Administration Act 1994 then becomes relevant. That section requires officials, when (inter alia) discharging functions under the Revenue Acts, at all times to use their best endeavours to protect the integrity of the tax system. Releasing confidential taxpayer information in response to public criticism could be justified as an endeavour to protect the integrity of the tax system.

However, the issue is not so clear-cut. The phrase "the integrity of the tax system" is defined in s 6(2). While it is true that one of the elements of the definition is taxpayer perception of the integrity of the system, two of the listed factors are directed towards the maintenance of confidentiality of taxpayers' affairs: ss 6(2)(c) and (e). Thus the concept of the integrity of the tax system includes a strong emphasis on the principle of confidentiality. Issues then arise as to whether parts of the s 6(2) list can override others and if so how to deal with what appears to be the doubly reinforced requirement to maintain secrecy. The answer is not immediately apparent. The Committee of Experts' report, para 16.14 recommended legislative change so as to clarify this matter.

A related issue is waiver. This sometimes arises explicitly when a taxpayer publicly states that he or she wishes to waive any confidentiality in their tax affairs. The law on waiver of statutory provisions is then relevant. Everyone has the right to waive the advantage of a law which is made solely for the benefit and protection of the individual in his or her private capacity and which may be dispensed with without infringing any public right or public policy. See Maxwell *Interpretation of Statues* 12th edition p 329 and Burrows *Statute Law in New Zealand* 2nd ed p 23.

Where the taxpayer is wishing to waive confidentiality the critical issue is whether the secrecy provisions are solely for the benefit of the individual and if so whether waiver would infringe any public right or public policy. As to the first aspect, obviously one reason for the secrecy provisions is to prevent taxpayers being embarrassed by having their financial affairs publicly available.

There is, however, not much guidance in the case law. In *CIR v E R Squibb & Sons* (NZ) Ltd (1992) 14 NZTC 9,146 Richardson J touches on the purpose of the secrecy provisions. But his focus is more on why one taxpayer's affairs should not be revealed to another taxpayer (see p 9,159). The policy justification is that the Commissioner needs continued access to information from independent third parties as an important source of objective verification of the taxpayer's tax position. Openness of disclosure was therefore important. In *Fay, Richwhite and Co Ltd v Davison* (1995) 17 NZTC 12,011 Hardie Boys J said at 12,021 that s 13 protected the IRD rather than individual taxpayers: "a taxpayer has no special right to confidentiality in his own taxation records". Thus there is a discernable public policy rationale. In that case, there is a sufficient public policy aspect to the secrecy provisions to mean that it cannot be concluded that s 81 is enacted solely for the benefit or protection of the taxpayer.

There is also the question whether in any event the waiver would infringe any public policy or public right, especially when considering information obtained from third parties.

With respect to information provided by and concerning the taxpayer only, there is not the same obvious infringement of a public right. However, the law on waiver of a statutory provision seems focused on the policy intent of the provision. It does not invite an inquiry as to whether on the facts in a particular case the provision can be waived without offending the policy for which is was enacted. See by implication the discussion in *Burrows* p 24 to 26 and *Maxwell* p 330.

The solution may lie in a statutory provision expressly allowing a taxpayer to waive the effect of the secrecy provisions or deeming them to be waived in certain situations. Any such provision would also need to address the scope of what could be communicated by the Commissioner once the statutory waiver applied.

CONCLUSION

There have been Select Committee suggestions that changes be made to s 81(4) to provide individuals with greater access to their tax affairs. If s 81 is to be amended then it should be done comprehensively and the issues raised in this article also dealt with. ❑

THE MEDIATION MARKET: DEMANDING THE SUPPLY

Virginia Goldblatt, Massey University

finds government support undermining mediation

The present government has espoused mediation as the process of choice for dispute resolution in an unprecedented way. The visibility of mediation, and mediators, is greater than ever before; the consequences are mixed. True, high profile in the media means the public is increasingly aware of mediation as an option. But when the spotlighted mediation collapses, the fall-out is wider than the participants in the dispute concerned.

One problem is that where ministers encourage mediation to occur, perhaps even agree to paying costs directly out of government funds, there is the expectation of a "report" to the relevant minister, plus a public outcome everyone can feel good (or bad) about. Nowhere has this been more conspicuous than the recent lengthy and bitter dispute over Carter Holt Harvey's use of Tauranga-based Mainland Stevedoring to load logs on the ships in the South Island Ports.

Walter Grills, described by the *Dominion* 11 April 2001, as a "veteran industrial mediator", according to the same article "defended *his* controversial compromise, *rejected* the Waterfront Workers Union's (WWN) views, *suggested* Mainland Stevedoring give preference to local people, and *found no legal substance* to Union complaints (and) *no evidence* of Mainland Stevedoring's discrimination against the Union". We are also told "*his push for a compromise* ... had been attacked by (both sides)". [Emphasis mine.]

The *Evening Standard* on 9 April 2001, in turn reported that the mediator "*concluded all the claims* made by the Union against Mainland Stevedoring *were either incorrect or particularly inaccurate*". The *Evening Standard* quotes Mr Grills as stating "Mainland was not denying work to South Island Waterfront Workers, casualising the workforce, undercutting other Stevedoring firms paying lower wages or introducing dangerous work practice". He accepted that efficiencies achieved meant [Mainland] could pay higher wages ... [but] said that the permanent contracts offered by Mainland were *not as good* as those of rival Stevedoring companies. Mr Grills "*acknowledged* the concerns of affected port employees ... *were genuine.*" He "*proposed a compromise* that would see both parties enter a cross-hiring agreement".

This was a draft of a final report not confidential to the parties concerned, but one intended for the Minister of Labour, the Hon Margaret Wilson. This was made clear in the *New Zealand Herald* 27 April 2001, and also by the report itself which says at s 49 (p 14) that it "clearly identifies for the government and the public the concerns raised by the pickets".

The language throughout the coverage of the draft report was rights-based, fact-finding, blaming and justifying. It looked to evidence and decisions on legal issues. The solutions appeared not to be those of the parties, as indeed time would confirm, but those of the mediator.

If this is mediation, Margaret, it is not as we know it.

For those of us in the profession, the situation only got worse with the publication of the final report and the collapse of the mediation. Speculation about the reasons for the "failure" of the process was the subject of a number of further reports between the end of April 2001 and the beginning of May 2001. *Dominion* reporter, Jonathan Milne, spoke of "Carter Holt Harvey withdrawing from the mediation in disgust at the 'politicisation of the process'" and the NZPA report described the process as "futile" from CHH's point of view. Brian Callaghan, the Union's Nelson branch president said he "believed Charter Holt Harvey had pulled out because the compromise being proposed would have showed that company 'had got it wrong'".

The final report was significantly different from the draft and called for a government inquiry into the social impacts of port reform created by casualisation and flat pay rates. Jay Goodenbom of CHH, said the final report was a political position statement that had little to do with Mr Grills' discussions with the company.

The final report is less judicial in its language and at ss 22 (p 8) and 27 (p 9) claims not to "take sides" nor to "support one side or the other". However, it is still peppered throughout by references to the "conclusions" of the report (ss 1 and 35), to there being "no evidence of a conspiracy" (35) and of Mainland being "legally entitled" to establish its business at South Island ports. At s 42 the mediator speaks of "common sense [saying] that these workers have a legitimate important complaint".

As mentioned earlier, the recommendations (p 17) are those of the mediator rather than the parties and are addressed to government as much, and sometimes more, than to the disputants themselves. Recommendation (v) in particular says that the "social impact of the port reform [should] be a subject of government inquiry with a view to preserving the efficiencies achieved, and providing solutions to problems arising from the social impact of the reforms".

However, for those concerned with the reputation of mediation, probably the most demoralising coverage of this "mediation" was that of TV One's Late News on 1 May 2001. Linda Clark questioned why the "much vaunted mediation had failed", spoke of it as a test of the mediation service under the new Employment Relations Act and asked if political pressure could have been a reason for the difference between the draft report and the final version. Chris Liddell, CEO of CHH, who appeared on the programme, spoke of the mediation as having "lost credibility". The overall impression left was that the "failure" to reach agreement in the dispute was the responsibility of the mediation process rather than the parties themselves.

While this dispute may be the most widely publicised instance of mediating in the limelight it is not, regrettably, the only one. Also, at the instigation of a minister, Massey University and UCOL (formerly the Manawatu Polytechnic) agreed to submit their dispute over the provision of nursing qualifications to mediation.

The *Evening Standard* reported on 23 December 2000 that "an offer by the government to pay for a mediator to settle a row between Massey University and UCOL over a nursing degree has halted threatened Court action. Associate Education (Tertiary) Minister Steve Maharey made the offer to the two institutes ... as a deadline set by UCOL loomed near.

'In my view the issue is best dealt with outside the Court and accordingly I have offered to both institutions the assistance of a mediator paid for by the Crown' said Mr Maharey". In a further report the minister is quoted (18 Jan 2001) as saying "it would be up to the two institutions to decide who they wanted to mediate discussions but he would suggest who he thought would be most suitable".

This problem appeared to be an ideal one for an interest-based process. It should have been possible for the parties to reach a consensual solution. Two institutions with common goals should have been able to cooperate rather than compete in a way that would benefit their local community and improve relationships for the future. That did not happen and, while the reasons for the lack of success will not be known by anyone outside the process, the prognosis cannot have been improved by the constant media scrutiny and the frequent comments attributed to parties and the mediator. There were tit-for-tat claims of breaches of confidentiality and an apparently unquestioned acceptance that there would be feedback to Mr Maharey.

On 1 February 2001, he was reported as "being disappointed that mediation had not led to a resolution [when] after just two days of talks the two tertiary institutions failed to reach an agreement. He said he was seeking advice from the mediator before deciding his next move". The following day's *Evening Standard* reported Mr Maharey as saying that "the mediator, Sir Ian Mackay, briefed him yesterday about what went on during the talks. Mr Maharey said he understood both Massey and UCOL had made a 'good, honest and frank attempt' to find agreement during the mediation".

We cannot ignore the role of the press in both these disputes and the inability of many journalists to distinguish rights-based from interest-based processes. No doubt when the *Sunday Star Times* 25 March 2001 spoke of ex-chief of the Employment Tribunal, Ralph Gardiner, who had held both mediator and adjudicator warrants, as a "mediator ... who handed down his decision in the case of the *Holmes* reporter Mike McRoberts versus Television New Zealand", the confusion of processes was that of the *Sunday Star Times* and not Mr Gardiner.

Difficulties are created by reading about mediation and mediators frequently in a way so inconsistent with proper practice and so likely to produce unsatisfactory outcomes. The public may well be much more aware of mediation, rather in the way one can suddenly become aware of necrotising fasciitis – as something to avoid.

The growing commitment to mediation by the public administration causes other difficulties as well – not only do we need skilled, educated, experienced and accredited mediators, we also need a lot of them.

Overnight on 2 October 2000 a market was created for 42 highly skilled and trained mediators employed directly by the Department of Labour, required to provide mediation services under the Employment Relations Act when it came into force and established mediation as the primary problem-solving mechanism for all employment relationship issues.

That demand was filled by a range of people with a variety of backgrounds. Anecdotally, it seems the selection was made by a panel without, at least in some areas, a mediator member. Only a minority of those appointed had any qualifications or experience in mediation (a colleague suggests seventeen of 42) and it is reported that a significant number acknowledged, at a week's training they received from a private overseas provider, that they had not even attended a mediation conducted by someone else.

It is not therefore surprising a number of employment lawyers and advocates working under the 2000 Act express disquiet at the variations in the standard of mediation available through the national service. A week's training – with many starting from a zero base – cannot possibly turn out a professional mediator, safe to practice on live subjects. It is rather like giving someone a scalpel, a video of a surgeon at work, one well-dead, bloodless corpse to cut up and then sending them off to do brain surgery.

This is not a cheap attack on good people doing their best, but a cautionary tale about how to make sound ideas operational in a responsible manner. It doesn't stop there. The Department for Courts recently advertised for expressions of interest for the position of restorative justice facilitators in Waitakere City, Auckland City, Hamilton and Dunedin – a total of 120 over all.

The public notice states that the department wishes to "hear from people interested in applying to 'train' as facilitators for restorative justice conferences". It goes on to identify personal qualities (well organised, good communicators, flexibility and own transport, for instance) but does not mention formal qualifications or accreditation. The offer is to train successful applicants although "experienced" restorative justice facilitators "may not be required to complete the full training programme". This "full programme", I am advised by one of the listed restorative justice coordinators, will be a four day block course and a two day follow up.

If all District Courts were to promote Court-ordered mediation, as has been discussed, that would provide a demand for at minimum a further 66 and that would be just one per Court. The fact that such a large number of mediators can suddenly be needed at one time provides a specific focus for a much larger issue – that of mediator standards and how to educate the professional mediator and maintain the credibility of the profession itself.

The problems over the past six months which have been identified above are linked and two-fold.

Firstly, the "high-profile mediator" is an oxymoron. Ideally, the best mediators are unnamed, invisible, efficient and effective. The results are resolutions that nobody knows about, problems that are solved, differences that are settled. These mediators are educated, experienced and professionally accredited and there are not unfortunately enough to satisfy the present demand.

This leads to the key point, if we need more skilled practitioners, how can we produce them? If there is growing demand, how can we supply it with educated, accredited professionals who add to the reputation of mediation with every process they manage?

Universities have a significant role to play here but they face a challenge in doing so. At the Hewlett conference on Negotiation Pedagogy at Harvard last year, Bordone and Mnookin made the following comment:

> By far the biggest challenge will be for negotiation to be considered a "mainstream" academic course in American law schools. Even though much progress has been made during the past thirty years, many of the instructors expressed the view that their discipline still has a "second class" status at their institutions and at most American law schools. Because it is skill-centred, it is not considered scholarly enough. The challenge will be to improve the scholarly underpinnings of the field while not sacrificing the essential skills-centred nature of the enterprise. It will be difficult to find young academics who are both research-focused and highly-skilled interpersonally in order to be outstanding negotiation instructors and coaches. Consequently, it is important that law faculties broaden their notion of what is "academic" or "scholarly" to include activity on the interpersonal or emotional sides of "intelligence".

We could replace "negotiation" by "mediation" and make the same plea in New Zealand. How can we hope, as a profession, to promote the use of experienced, accredited mediators if either we cannot supply that demand or if users like the government choose to ignore the need for demonstrable qualifications and ability in the field?

One method of dealing with the issues raised here is to restrict certain mediator activities to lawyers only. In the *Dispute Resolution Journal* of the American Arbitration Association (August – October 2000) Cooley observes that two states, Virginia and North Carolina, have "already implemented guidelines defining certain mediator activities to be the practice of law". His view is that this is to attack "the very foundations of our fledgling ADR profession" and is a "concerted effort to, in effect, neutralise the neutrals".

Indeed, as a solution this one is based on a thoroughly flawed premise. There is no necessary connection between the possession of a law degree and the ability to be safe and effective mediator. Some lawyers make excellent mediators as well as advocates, many though do not.

A more constructive approach is to put potential mediators through a lengthy programme of education rather than training and to lobby those who are promoting the use of mediation in the community. We need to convince ministries that if they want to promote the process, they also need to protect the public by providing the professionals and ensuring those professionals are accredited.

While there are, of course, many ways in which this can be done, in order to achieve a worthwhile result, the chance to master the theory, practice the process, and reflect on that practice, are necessary features of an appropriate programme. The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) has designed in conjunction with Massey University a graduate diploma for those who wish to become practitioners in the fields of mediation and arbitration. This includes six semester length papers taught extramurally as well as two practicums totalling 16 days and takes a minimum of two years to complete. Although students may obtain associate level membership of AMINZ after four papers (including the 200 level Practicum), even the completed diploma is insufficient by itself for either panel membership or fellowship.

The AMINZ/Massey model conforms to the norms established in many major American academic institutions. Fortgang, Subramanian and Wheeler, in a paper prepared for the Hewlett Conference drew on information provided by sixteen staff from twelve major schools of business and management in the United States and Canada. These included Harvard, Ohio, Chicago, Duke, Pennsylvania and York Universities. The courses run by the schools consulted ranged from a quarter semester to a full semester and from 10 to 26 sessions. While a range of pedagogical techniques are used, all the programmes emphasised student reflection on experiential work. The reflexive relationship between learning and practice requires time. Actionable knowledge does not come from pressure-cooker environments or from information overload – especially where there is a considerable amount of legal knowledge also required.

Simulations formed part of all the programmes Fortgang et al evaluated. One instructor "wondered aloud how any course that had skills-building as part of its mission could possibly work without the use of simulations". Another "wisely noted that a simulation without a good debrief and a clear purpose has no pedagogical value at all". I would go further. To be able to learn in the applied, simulated session, the students need a thorough grounding in the legal and theoretical frameworks in which they are working. They need to reflect following the immediate debrief in a way that encourages them to separate the game from the meta-game. They need a commitment to continuing development and assistance in order to become reflective practitioners in a profession which puts them in contact with people who are often already disturbed and distressed and sometimes deeply damaged or vulnerable. We do not want doctors and pilots learning from their mistakes on real people and we should not let mediators do so either.

We are left with a dilemma. Is it better to provide a week's training than nothing? How can the public determine the standard of the service mediators provide if the training they receive is so varied? If we can not supply enough accredited professionals, how do we preserve and enhance the reputations of mediation as a process?

This is a challenge we face in the Dispute Resolution Centre of Massey University. We turn away those who want the *Reader's Digest* version of our programme, but where do they go then? It is a challenge faced by AMINZ which polices vigorously entry to both fellowship and membership of the mediation panel, with the consequence that there are only currently 52 panel members in mediation nationwide, most of those in Auckland and Wellington. It is a challenge for LEADR and for the legal profession as Court-ordered mediation expands. Not all lawyers are mediators, by instinct or by education, they require additional training and accrediting as well as their legal qualifications.

If we want to continue to promote mediation as a valuable process for dispute resolution, if we continue to encourage demand, we must be able to supply the market we create with sufficient competent professional mediators. ❑

FOSKETT v McKEOWN

Charles Cato, Meredith Connell, Auckland

ponders mixing of trust moneys, proportionate shares and restitution

In *Foskett v McKeown* [2001] 1 AC 102; [2000] 3 All ER 97, the House of Lords by a majority (Lords Browne-Wilkinson, Hoffmann and Millett with Lords Hope and Steyn dissenting) emphasised the penal consequences that follow where a trustee mixes trust funds with his own in an investment. (For an earlier English decision where the inadvertent mixing of trust funds with personal money was treated sympathetically, *Re Tilley's Will Trusts* [1967] Ch 179; [1967] 2 All ER 303) In *Foskett*, the facts were rather unusual. The settlor, a Mr Murphy, was a property developer who had interests in Portugal and access to moneys invested with him by purchasers of allotments. He took out a whole-life insurance policy on his life with an insurer, Barclays, the principal beneficiaries being his children. The policy stated that:

> in consideration of the payment of the first premium already made and of the further Premium already made and of the first Premiums payable and subject to the Conditions of this Policy the Company will on the death of the Life Assured pay to the Policyholder or his successors in title ("the Policyholder") the Benefits specified.

Mr Murphy paid a number of premiums that were substantial; the first and second being out of his own pocket, a third of uncertain origin derived from either the settlor or the purchasers' funds, and the fourth and fifth being derived from the purchasers. He subsequently committed suicide and Barclays paid out a death benefit of one million pounds. The unusual issue for determination was whether the defrauded purchasers were entitled to a proportionate share of the proceeds of the death benefit based on the percentage contribution of the premium contributions or were limited to a lien or charge on the proceeds for reimbursement of the misappropriated moneys together with interest.

The case was complicated by the terms of the policy. Although primarily a whole of life policy, it had a notional investment content which determined the surrender value, an alternative calculation of the death benefit and further, the investment element was used to pay for the cost of life cover after the payment of the second premium. Under the policy, after the first premium had been paid, units were notionally allocated to the policy from later premiums and the insurers cancelled sufficient accrued units to meet the cost of life cover for the next year. The effect of the arrangement was that if a premium were not paid then (provided at least two years' premiums had been paid) the policy was converted into a paid up policy and units that had been allocated to the policy were applied annually in meeting the cost of life insurance until all the allocated units had been consumed. Only at that point would the policy lapse. This had the effect that, at the time of Mr Murphy's death, the units from the earlier premiums were sufficient to have sustained the policy without any recourse to the fourth and fifth premiums derived from the purchasers.

It was thus argued for the children that, although there had been a mixing of personal and trust funds, this did not affect the entitlement, which would have arisen on the settlor's death. It was submitted that to allow the purchasers a proportionate share of the proceeds constituted a windfall that they should not enjoy. The case was described by Lord Browne-Wilkinson as unusual in this sense that it raised the question which of two innocent parties was to benefit from the activities of a fraudster whereas the more usual case involved an issue of which of two innocent parties should suffer from the activities of a fraudster.

HIGH COURT AND COURT OF APPEAL

In the lower Courts, opinion was heavily divided; indeed, as it was in the House of Lords. The first instance Judge found for the purchasers. The Court of Appeal, however, held for the children by a majority [1998] Ch 265, [1997] 3 All ER 392. Sir Richard Scott V-C considered that the children had a vested interest in the policy at its inception before any of the purchasers' moneys were applied by way of latter premium. He considered that the stolen money had not enhanced the value of the investment and thus the purchasers were limited to a lien over the proceeds of the policy to the extent that their money could be traced into the premiums with interest. Hobhouse LJ adopted a similar approach; the investor's money made no difference to the amount of the death benefit. There were sufficient premiums paid by the settlor out of his personal finances to keep the policy alive without recourse at the time of his death to the premiums paid from the purchasers' investments. Morritt LJ, however in dissent, held that the investors not only had a lien over the fund into which their payments could be identified but also they should have the right to participate in that which had followed from the use of their money together with other moneys taking their share out of that joint stock.

HOUSE OF LORDS

In the House of Lords, two of the Law Lords in dissent agreed with the opinion of the majority of the Court of Appeal. Lord Steyn (at 106-107) held the payment of the purchaser's premiums did not contribute or add to the sum received by the children. Lord Hope expressed the view that the fund must be divided between the competitors in such proportions as could be shown to be equitable. (at 113.) This did not depend solely on the terms of the policy. In this case, he also considered that the purchasers' moneys had not enhanced the value paid to the trustees of the policy. In his view an evaluation of the equities did not justify an application of proportionate sharing.

For the majority, however, Lord Browne-Wilkinson (at 99-104) indicated that, although he had initially aligned himself with the children's interests he had been converted to the view that the investors should be entitled to a proportionate share of the proceeds after reading the judgment of Lord Millett. Lord Hoffmann also favoured proportionate sharing. (at 108.) Lord Millett considered that Mr Murphy had entered into a contract with the insurers for life insurance in exchange for the payment of annual premiums and it did not matter that there were sufficient units derived from the earlier premiums to have sustained the policy at the time of his death. Lord Millett observed that it was beyond doubt that the death benefit of one million pounds paid on Mr Murphy's death was paid in consideration of all the premiums that had been paid before that date, including those paid with the purchasers' money and not just some of them. As a consequence, part of that sum represented the traceable proceeds of the purchasers' money. (at 125-6.) Had the settlor chosen to take his life later then the units derived from subsequent premiums would have been called into account. (at 128-9.)

Even though it has the effect of providing the purchasers with a very substantial windfall gain at the expense of the unfortunate children, the majority approach is preferable. In this case, although the conflict was between two innocent parties, they were not of equal standing. Whilst the children were not privy to their father's fraud, (and to that extent were innocent parties), they, as volunteers, were not in a position to deny the purchasers a proportionate claim. On this point, as Lord Millett observed, although the children were merely passive participants of an asset acquired in part by the use of misappropriated money and were innocent of any personal wrongdoing, they were not contributors. They were volunteers who derived their interest from the wrongdoer otherwise than for value and were in no better position than he would have been if he had retained the policy for the benefit of his estate. It was not, added Lord Millett, a case where there were competing claimants to a fund who were innocent victims of a fraud where the equities were equal. (at 131.)

Indeed, it is submitted that to allow restitution by way of a charge or lien only on the misappropriated money together with interest would have weakened the penal consequences that should follow where a person mixes trust moneys with his own in order to secure an advantage. In using the purchaser's money rather than his own to satisfy his obligations under the policy, Mr Murphy had acted fraudulently, and it was a mere matter of chance that when he died the policy was still alive quite independently of any application of the purchasers' money, a point Lord Millett also emphasised.

The rule that a defrauded investor should enjoy a proportionate share of any profits in an investment has been applied in several cases in Australia. In *Scott v Scott* (1963) 109 CLR 649, the High Court of Australia held that the estate of a defrauded testator was entitled to a proportionate share in the increase in value of a property that a trustee had acquired partly with trust moneys and partly with his own. The fact that the trustee had repaid the money prior to his death did not absolve his estate from liability. In *Paul A Davies Pty Ltd v Davies* (1983) 1 NSWLR 440, by contrast the Court of Appeal of New South Wales was not receptive to a claim by fiduciaries, directors of a company, for a proportionate interest, where they had not used their own money in the purchase of a property but had, in addition to the unauthorised use of trust moneys, provided the balance of the purchase price by way of a mortgage secured over the purchased property. The fact that the directors had a personal commitment under the mortgage did not justify an application of *Scott v Scott*; however, a liberal allowance was made to them for their time and effort in securing the profit. (On the point of allowance for profit see also *Hagan v Waterhouse* (1991) 34 NSWLR 308, but cf *Trustee of Jones and Sons v Jones* [1997] Ch 159; [1996] 4 All ER 721 (CA) where an allowance for profits was not allowed where trust moneys were used to profitably speculate.)

Although, equity may in some cases be said to have overreached, as in *Regal Hastings v Gulliver* [1967] 2 AC 135; [1942] 1 All ER 378 and *Phipps v Boardman* [1966] 3 All ER 721, [1967] 2 AC 46 where it may be argued that there were no sensible conflicts between the interests of the fiduciaries and that of their principals so that the fiduciaries should not have had to disgorge their profits, it is otherwise where there has been a deliberate mixing of trust moneys and private moneys in an investment. There is no doubt in this case that, as Lord Millett pointed out, Mr Murphy could not have met his obligations to pay the annual premiums had he not used the purchasers' money. (at 128) Plainly, he did so to meet his obligations and it was merely a matter of chance that when he died, there were sufficient units derived from his personal payments to sustain the policy at the time of his death. A deliberate wrongdoer should not be able to deny a defrauded party a proportionate share in the fruits of his fraud and nor should volunteers benefit from such a fraud, even though they may be innocent of it. The importance of *Foskett v McKeown* is that it emphasises the penal consequences of wrongful mixing of trust and personal moneys in relation to investments even though there must have been a natural temptation to have preferred the interests of the children.

An incidental consequence of the application of proportionate sharing in *Foskett v McKeown*, is the rejection of the view taken in *Re Hallett's Estate* (1880) 13 Ch D 696, at 709 that a defrauded victim should be confined to a lien on any investment purchased from mixed moneys. Indeed, the dictum of Jessell MR on this point was obiter since the fund in question was deficient so that a lien over the fund was necessary to protect the defrauded trust.

Of interest also in the case were certain observations concerning tracing and restitution. Lord Browne-Wilkinson (at 101), Lord Hoffmann (at 108) and Lord Millett (at 121) considered that the claim to a proportionate interest was founded in property rather than in unjust enrichment. The result was a consequence of, or a "vindication of a proprietary right" as Lord Hoffmann put it. The claim in their view did not lie in Restitution. Such a view has been applauded by Professor Rickett in his note on the case earlier in this *Journal* ([2000] NZLJ at 309) where he says "the affirmation of a law of equitable property based on hard-nosed property rights is welcome". It is submitted, however, that hard-nosed proprietary claims do legitimately fall within a modern treatment of Restitution. Tracing rules, be they at law or equitable (and Lord Steyn (at 106) and Lord Millett (at 120) would suggest such rules should be uniform constituting no more than an evidential basis for identifying misappropriated property) have been developed over many years to effect in substance restitution where there has been a misappropriation of property. Underlying these remedies is the object of the restoration of a benefit to the defrauded party so as to deny the wrongdoer the proceeds of the fraud. Professor Holdsworth long ago accepted that unjustifiable enrichment could depend partly upon the rules of the common law and partly upon equity. ("Unjustifiable Enrichment" (1939) 55 LQR 37, at 37) The writers of the Restatement of the Law of Restitution in 1937 (American Law Institute, Ch 13, ss 202-213) certainly included proprietary tracing claims as part of their seminal treatise. Goff and Jones also in their Law of Restitution, (1st ed, Sweet & Maxwell, 1966 at 38) discussed tracing claims and described inter alia equitable tracing claims as being rationalised in terms of unjust enrichment. Professor Birks describes these claims as "restitutionary rights in rem" in his "Introduction to the Law of Restitution" (Clarendon Press, Oxford, 1993 at 379). Mason and Carter, ("Restitution Law in Australia", Butterworths, Sydney 1995 at 98-101) appear to adopt a more conservative approach perhaps indicative of the reticence of the judiciary and academia in that country to view Restitution as an independent subject of rules worthy of study (as Lord Wright observed in his comment on *Sinclair v Brougham* [1914] AC 398 in [1938] 6 Camb LJ 305, at 322) until its judicial acceptance in the High Court of Australia in *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 321. To suggest that such rights are linked to property and are exclusive of Restitution is to unnecessarily narrow the scope of Restitution and, it is submitted, promotes a rather arid, conceptual distinction between property and restitution.

there is a risk that undue sophistry or refinement will retard the development of this subject as it did in the late nineteenth and early twentieth centuries when it was shackled to a theory of implied contract

Lord Millett also observed that a restitutionary cause of action based on unjust enrichment involved a successful plaintiff having to establish that the defendant has been enriched at the plaintiff's expense. (at 121) Whilst as a general proposition claims in restitution be they personal or proprietary, common law or equitable, will usually lead to a benefit being acquired by the defendant, this will not always be the case. Thus, a defendant, who is a knowing party to a fraudulent acquisition of property will have to account for the loss, that is make restitution to his victim, in equity even though assistance may have been given for the preferment of a third party rather than himself. (See the dictum of Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244, at 251; *Royal Brunei Airlines v Tan* [1995] 2 AC 378; [1995] 3 All ER 97.) If a defendant has acted towards the plaintiff unconscionably in advancing the interests of a third party then it would seem appropriate that he should have to make restitution for the losses his actions have caused even though he may not have derived a benefit personally but secured it for another. Some may prefer to rationalise this kind of benefit as a form of unjust enrichment based on an extended or perhaps a related benefit, but a more robust argument would justify restitution in these circumstances simply on the ground that the defendant's unconscionable conduct has caused the plaintiff loss. Whilst traditionally, Restitution has been associated with the notion of the enrichment of the defendant, a point Lord Wright made in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; [1942] 2 All ER 122 at 61, a reason for this limitation, it is suggested, is the connection of Restitution with common law claims, or common counts principally quantum meruit and moneys had and received which focus on reimbursement for a defendant's enrichment. The inclusion of equitable remedies into our law of Restitution which has its modern origins in academic writings as early as the first American Treatise on the subject in 1937 (Restatement, supra), means that it is legitimate today for the scope of Restitution to be extended from considerations of unjust enrichment to include wider concepts of equitable obligation based on the nature of the defendant's conduct and the plaintiff's resultant loss. Indeed, one suspects a reason why Restitution was so slow to gain recognition in Australia was because law and equity were fused in New South Wales only in the latter part of last century with the result that amongst some lawyers and academics there was a reluctance to take seriously a subject which embodied a fusion of common law and equitable remedies.

This dictum of Lord Millett (at 121) suggests also judicial support for an independent remedy or cause of action in unjust enrichment, rather than an adherence to the more conservative and orthodox view that there is no independent cause of action in unjust enrichment. Rather, there are causes of action and remedies of different kinds at law and in equity, (the boundaries of which may be uncertain), which can legitimately be grouped together under an over-arching concept of Restitution having unjust enrichment (or if the view expressed above is correct) unconscionable dealing as a common theme. Quite apart from the fact that it is doubtful whether the law has reached the point where there can be said to be a cause of action in unjust enrichment, the argument advanced here is that modern Restitution should not be confined inexorably to unjust enrichment, but should also include cases worthy of equitable relief where the defendant's unconscionable dealing has caused the plaintiff loss, even though the defendant has gained no personal benefit.

CONCLUSION

In recent years, much has been written on the theory of restitution. Whilst this debate has focused attention on the subject and promoted its development and acceptance as an independent legal subject, there is a risk that undue sophistry or refinement will retard the development of this subject as it did in the late nineteenth and early twentieth centuries when it was shackled to a theory of implied contract. It will be interesting to see whether the observations of Lord Millett do encourage the development of a truly independent restitutionary cause of action based on the fact of unjust enrichment, and also whether the scope of Restitution is circumscribed in future years. Hopefully, the parameters will not be narrowed since Restitution has the potential to be the third important limb of civil obligation along with contract and tort as Lord Wright recognised. Indeed, it is submitted that Restitution should be a core subject for law students who should be well versed in both common law and equitable remedies aimed at relief for unconscionable dealing. It is to be hoped that the academic debates and the quest for some divine theory of Restitution that has so dominated the subject in recent years, will not lead to it being regarded as the exclusive domain of the more able student. It should not be viewed as an esoteric subject. It is simply a subject, which fuses together in a reasonably harmonious way certain common law and equitable rules that provide relief against various forms of unconscionable behaviour. ❑

DEALS WITH POLICE – WORTH THE PAPER?

CRIMINAL PRACTICE

with

Robert Lithgow

A-G v District Court at New Plymouth M19/01, 11 July 2001, HC New Plymouth, Smellie J

This is one of two unrelated cases that come at the same problem from different angles. In this case, police did a deal and accepted a guilty plea to one reduced but serious charge and withdrew the others. The Crown Solicitor then advised them to relay the earlier charges which they did. The defendant challenged that as an abuse of process and the District Court agreed. The Crown Solicitor applied for judicial review. In *Franicevic* (below) The High Court in a criminal appeal was considering the convictions for receiving where the theft alternatives had been withdrawn following Judge alone, summary verdict. The High Court thought the theft was the better go but considered whether he could substitute the theft charges on appeal.

Fox went out drinking with a loaded pistol in his pocket. When he left the bar he walked through a group of young people and made a derogatory remark. One of the young people questioned what he said and Fox pulled out his pistol and shot him. The bullet went through his shoulder and lodged in the muscle; the victim had to be hospitalised. Fox walked on and was seen to fire the pistol again but no one could say what, if anything, he was aiming at. When the police caught up with him, he also admitted having a sawn-off shotgun at home.

Eventually, he was charged with wounding with intent to cause GBH (max 14 years) under the Crimes Act and three other charges under the Arms Act. Extensive plea bargaining culminated in an agreement under which a further information was laid charging wounding with intent to injure (max seven years) and leave was sought to withdraw the GBH charge and two of the Arms Act charges. Fox applied under s 153A to be brought before the Court to plead guilty and the police, as they believed necessary, referred the file to the Crown Solicitor.

The Crown Solicitor regarded the charges as inadequate in light of the offending and he recommended police re-lay the two Arms Act charges. Police relaid the charges but they were dismissed for abuse of process. The Crown sought judicial review of that decision. (In the meantime, Fox got five years and four months for wounding with intent to injure and unlawful possession of the shotgun.)

On review, the basic argument for Fox was "a deal is a deal is a deal". The Crown argued that the Solicitor-General has a supervisory role in the prosecution process and a duty to ensure that the Court is able to address the true extent of criminality and, therefore, charging deals entered into with police do not bind the Crown.

Section 36(3) Summary Proceedings Act provides that any information may be withdrawn with leave of the Court but that "does not operate as a bar to any other proceedings in the same matter". The question as Smellie J saw it was whether that phrase included the very charges that had been withdrawn; he held that it did following *Morgan* [1980] 1 NZLR 532 (CA). In that case, the Court of Appeal observed that s 36(3) was a practical recognition of the pressure under which summary prosecutions are often conducted and the fact that many prosecutors at summary level are not lawyers. Smellie J held that relaying the charges was not an abuse of process as it did not improperly involve the Court process – the Court is presumed to know, when it grants leave to withdraw an information, that it does so without prejudice to relay the charge. In reality, the District Court had challenged the prosecutor's discretion to charge and that was inappropriate.

Smellie J also specifically noted that the Solicitor-General (through the Crown Solicitor network) occupies a different constitutional position from the police and has a different role to play. Therefore, although the Court will not ratify the police striking a bad bargain to draw the plea knowing full well that the Crown Solicitor will not abide by that deal, absent such behaviour, mere "back-tracking" will not amount to abuse of process. In terms of relief – which is, of course, discretionary on review – only one of the relaid charges was reinstated and ordered to proceed.

Smellie J was sitting on review. He was not happy to have been manoeuvred into hearing the case, belatedly identified as a test case. His Honour said had he been told what was involved he would have sought to sit with at least one other Judge with up-to-date understanding of the District Court Practice.

Certain matters seem to have been overstated. It is said in the case that the Solicitor-General has a supervisory function, through the Crown Solicitor network, of the prosecution process. Certainly that direct and unambiguous power was proposed by the Law Commission, but fell by the wayside. With certain statutory exceptions not relevant here, the summary phase is for police. The only power that the Solicitor-General has is to stay any prosecution. But that is a blunt instrument, and seldom used. Crown Solicitors can advise the police in the summary phase, ie up to committal for trial, but the decision is for police. In this case police believed that they were bound by a Cabinet direction to refer the so-called indictable sentencing to the Crown. In fact that is limited to those committed for trial at the completion at depositions and does not relate to sentencing after guilty pleas on purely indictable matters under s 153A SPA. This case was in Taranaki. Police in Wellington and other areas do the bulk of their own indictable sentencing. So what was originally advice, a "recommendation" offered and accepted, albeit under a misapprehension as to who was the boss, became an alleged Crown right to re-jig the charges the police laid.

The Judge's concerns that he was making a big call without the big picture may be precisely correct.

AUTREFOIS ACQUIT AND SUBSTITUTION OF CHARGES

Franicevic v Police AP 202-3/01, 8 May 2001, HC Christchurch, Panckhurst J

Franicevic was charged with 21 counts of theft and, in the alternative, 21 of receiving. The Judge at trial had said that he had his suspicions but that no one had actually identified the thief. However, based on the doctrine of recent possession, the elements of receiving were proved. The Judge invited the prosecutor to withdraw the theft charges – which was done – and convicted on the receiving charges. Franicevic appealed.

The appeal commences as follows:

> [1] The appeal was filed by the appellant in person and on the grounds that the evidence was insufficient to justify the convictions. That contention was hopeless.

The Judge then takes 11 pages to show that convictions for theft were the correct alternatives. And since you cannot be convicted of being both the thief and the receiver, the appellant was right, however hollow the victory.

The first issue was whether F should have been convicted for receiving. The Crown took the position that the case against F was overwhelming and it was a matter of discretion for the tribunal of fact as to which of the two alternatives was appropriate. Panckhurst J observed that the issue was not necessarily clear-cut. His Honour referred to *R v Gilson* (1991) ALJR 416 and *Beazley* [1994] 11 CRNZ 524 (HC) where Thomas J had applied the "lesser charge" approach. It was also noted that *Gilson* is in opposition to the English case *Yip Kai-Foon* [1988] 1 All ER 153. However, the issue did not need to be confronted because, in fact, the evidence was sufficient to prove theft.

The doctrine of recent possession allows an inference that the person found in possession of stolen property is either the thief or a receiver. Panckhurst J observed that the absence of direct evidence was not determinative in establishing which was the appropriate charge. Looking at all of the evidence, in particular the nature of the property taken, the MO of the thief, the geographical area (Franicevic's immediate neighbourhood), the inherent unlikelihood that someone else was the thief bearing in mind the nature of the property stolen, and the doctrine of recent possession, there was enough to convict for theft. That raised the question whether the High Court on appeal could substitute theft convictions for the receiving convictions.

Section 132(1) Summary Proceedings Act provides that the High Court may, on appeal, substitute one offence for another provided that the defence has not been prejudiced. No issue of prejudice arose. The issue was whether the unusual course the trial Judge took in granting leave to withdraw the alternative charges raised autrefois acquit.

Section 358 Crimes Act provides that the plea in bar autrefois acquit is available to prevent conviction if the defendant was formerly charged with the same (or substantially the same) offence and, "if all proper amendments had been made [on the first trial] that might have been made" so as to secure conviction.

The issue raised was whether the "previous jeopardy" limb of autrefois acquit required a final determination on the earlier charge or whether mere jeopardy of conviction would suffice. If an acquittal was required, then it was not applicable because the charges had been withdrawn rather than dismissed. If mere jeopardy was enough then F could avail himself of the special plea because the Judge had considered the theft charges and determined that there was insufficient evidence. After canvassing the authorities and concluding that, had the Judge specifically held that the theft charges were not proved and therefore dismissed them that would have precluded substitution on appeal. Panckhurst J inferred that the District Court Judge knew what the law was and had invited withdrawal of the charges as a legitimate way to avoid the possibility of autrefois acquit and thus preserve the s 132(1) substitution power in the event of appeal: F was always in jeopardy of conviction for theft or receiving, the Judge had merely kept that original jeopardy open. In light of the dice-like applicability of the s 358 plea depending on methods of District Court disposal of charges, Panckhurst J suggested reform to take account of alternative counts.

SENTENCING

R v Leger CA 22/01, 17 May 2001, Blanchard, Doogue and Randerson JJ

Every criminal lawyer has his or her eye out for a rape case that will break out of the strait-jacket of *R v A* [1994] 2 NZLR 129 tariff of an eight year starting point for a contested rape. In this case Her Honour did break out and give a suspended sentence, upheld, or more correctly "survived" on appeal, but in such a way that the case cannot give any positive precedential value.

Leger, 18 years, was convicted at trial of raping a 14-year-old girl who had been staying with him for three days. At sentencing the Judge considered the following factors important: some form of relationship; youth of both parties; no previous convictions; accused unworldly and immature; and low risk of reoffending. She also observed that the complainant was living a lifestyle where "something of this nature was inevitable". The Court of Appeal did not comment on the soundness of that latter view. In any event the Judge agreed with the Crown prosecutor that eight years was "utterly inappropriate". Leger was sentenced to two years' imprisonment, suspended for two years, eight months' periodic detention, seven months' supervision and a $2000 fine. The Solicitor-General sought leave to appeal, but was out of time.

Under s 388 Crimes Act, the Solicitor-General has ten days to seek leave to appeal a sentence in the indictable jurisdiction. In this case, the appeal period would have expired on Christmas Day. The Court of Appeal began from the premise that the application was made 35 days out of time and that there was no excuse. That is a little unfair because, although time continues to run in criminal matters even when the Courts are closed for the holidays, the Solicitor-General could have filed his application within time by filing it in the New Year, on the first day that the Courts reopened. In reality, it was about 20 days out of time. However, the Crown did accept that it had no excuse for lateness, the matter had simply not been referred to Crown Law Office in time. In the meantime, Leger had begun his periodic detention and, by the time the appeal was argued, he had served half of that sentence. There is no discussion as to why the Court and the parties took four months to hear the appeal.

The Court of Appeal observed that when it is the defendant applying for leave to appeal out of time, the touchstone is the interests of justice in the particular case. Matters which will be relevant include: the merits of the appeal, the length of the delay and the reasons for it, the impact on the administration of justice, and the position of the victim of the offending. The implication in the case is that the same test applies to a Crown application but that is not explicitly stated and the outcome indicates otherwise.

The Crown attacked all the alleged mitigating factors as follows:

- relationship: "a woman's rights over her body are not subject to any prior relationship with the offender";
- youth: "does not automatically justify leniency";
- no previous: "not unusual for sex offenders";
- naivety: "offending was merely a result of ... lack of self-control";
- low risk of reoffending: "is not a mitigating factor but a lack of an aggravating one".

In short the Crown view was that there were no mitigating factors.

The Court adopted a more vague analysis. All the factors were considered relevant but, bluntly put, the sentence could not and should not have got down below five years. The two-year mark was well below what was available and therefore the suspended sentence should not have been an option. Nevertheless the Court decided that there would be an appearance of injustice if the appeal were allowed. Key factors in that decision appear to be the fact that the Crown Solicitor appearing at sentence did not object to the Judge's approach, the delay, Leger's age and the partial completion of the periodic detention.

So they reckon he should have got at least five years, but he does periodic detention because the Crown was late.

HOME INVASION

R v Martin T000045, 28 February 2001, HC Rotorua, Potter J

Martin was convicted of rape. He had met the victim at a bar and, when she left he jumped in the taxi with her and invited himself back to her place. She reluctantly agreed, although she did try to give the taxi driver money to take Martin onward to his house. Once inside the house he made a vigorous pass at her. She made it clear she was not interested but she did tell him that he could sleep on the couch. He forced her into the bedroom and raped her. She eventually pushed him off and told him to leave. She rang a taxi for him and went outside to wait for it. He in turn stole her television, car and a carving. The issues at sentence were whether preventive detention was required and, if not, whether the home invasion provisions applied so as to increase the penalty.

Martin had previously been convicted of rape and sentenced to ten years' imprisonment. That case is well known: a woman was attacked, beaten and robbed, Martin ran the attackers off and offered to take the victim to the police station but, instead, raped and sodomised her. The current rape occurred some 18 months after his release from that sentence. The sentencing Judge was not satisfied that Martin posed such a risk of sexual offending that an indeterminate sentence was required so he declined to impose preventive detention.

However, the seriousness of the earlier rape and the relatively short time between release and reoffending would justify a significantly higher sentence. On that basis, the Judge considered that a sentence of 14 years was justified but for the fact of home invasion, for which he imposed a further two years making the sentence 16 years' imprisonment.

The home invasion ruling is oddly strained. The second variation more so than the first. Section 17A Crimes Act 1961 defines home invasion as:

> ... the person who committed the offence did so –
>
> (a) while breaking and entering, or otherwise unlawfully entering, an occupied dwellinghouse; or
>
> (b) while in an occupied dwellinghouse, after having broken and entered, or otherwise unlawfully entered the dwellinghouse; or
>
> (c) while breaking out of an occupied dwellinghouse; or
>
> (d) while otherwise unlawfully in an occupied dwellinghouse.

Subsection (3) provides that:

> if a person has entered a dwellinghouse under an express or implied licence, that licence must be regarded as having been revoked if the person commits an offence specified in s 17B or s 17C [which includes rape] in circumstances that render the person who could revoke that licence unable to ask the other person to leave.

The Judge accepted that Martin did not break and enter the victim's home – he was there with her acquiescence or, having entered, he remained there with her acquiescence. However, the Judge said that the evidence could also be interpreted as showing that he cornered her into a reluctant acquiescence. Having lawfully entered her home, he then took her to the bedroom and raped her. The Judge looked to s 17A(3) and said that "inability" to ask the person to leave can arise out of the trauma and intimidation of the moment when confronted in a situation where rape is a real possibility and all of the victim's energy is focused on resisting that threat. I suggest that that analysis is perfectly logical, but it draws attention to the crude and fawning drafting of the Act, which in effect, if this decision is correct, means that if you are raped in your own home, it is a home violation as well as a sexual violation, whereas if it is next door it is a lesser offence.

The second analysis seems strained. This was that the invitation to sleep on the couch was a term of a license. When he set about raping her, he exceeded the terms of that license and that placed him unlawfully in the dwellinghouse and guilty of home invasion. That makes almost any crime occurring in the victim's home a home invasion.

Home invasion evasion

R v Leger CA 444/00, 13 June 2001, Thomas, Heron and Rodney Hansen JJ

A similar issue arose in this case and the Court of Appeal had a go. John Leger (not related to *Leger* above) was convicted of rape and other charges. He was sentenced to 11 years' imprisonment on the basis that the increased penalties for home invasion applied. He appealed, arguing that the offending took place in his "home".

The victim had been in a relationship with Leger for eight years. In 1999, she got a temporary protection order against him and, it appears, left him. However, six months later she accepted an invitation to move to another town. Leger argued that he organised a house, entered a verbal agreement with the landlord to pay the rent and, it seems, had been staying in the house with the complainant for two or three days before the incident that gave rise to the charges. The Crown referred to the evidence and claimed that Leger stayed at the house when it suited him but he was not actually living there – the only belongings he had at the house were personal effects – and he was not a "tenant". The Crown argued that he was at the house pursuant to a licence and the victim was entitled to revoke that licence.

Another case where help is required with a troublesome piece of drafting. The Court agreed that the matter was difficult and topical but "shorn of fine distinctions, the substance of the crime is the same whether or not the home invasion legislation applies". That is demonstrably correct but could equally be expressed "the substance of the crime is the same whether or not the home invasion legislation exists".

MULTI-CHOICE DRUG CHARGING

R v Karpavicius CA 50-53/01, 24 May 2001, Richardson P, Thomas, Keith, Blanchard and Tipping JJ

Karpavicius and three others were the subject of a police operation centred on the importation of drugs. The evidence made it clear, and for the sake of legal argument everyone agreed, that drugs in the form of a white powder were imported. What was not clear was whether it was the Class A drug cocaine or the Class B drug speed. Importing a controlled drug is an offence against s 6(1)(a) Misuse of Drugs Act. Section 6(2A) makes it an offence to conspire to contravene s 6(1) and provides that, if the conspiracy concerns a Class A drug then the maximum penalty is life imprisonment [s 6(2A)(a)]; 14 years for a Class B drug [s 6(2A)(b)]; and "in any other case", seven years [s 6(2A)(c)]. The Crown presented an indictment with alternative counts of conspiring to import Class A and conspiring to import Class B. The High Court directed an acquittal on the basis that there was insufficient evidence to prove which class of drug was imported and, therefore, the Crown was unable to establish that element in either charge.

The question of law reserved under s 380 Crimes Act was whether, in the circumstances, an accused could be properly convicted on either count. Section 380 is the only section of the Crimes Act that allows the Crown to appeal an acquittal as the verdict is subject to the s 380 reservation. A second issue was whether, if lack of proof of class was fatal to the Class A and Class B counts respectively, could the Crown fall back on s 6(2A)(c) "in any other case".

The Crown argued that the correct course was to leave both counts to the jury and direct that, if in doubt, it should convict on the "lesser charge". That was the position taken by the Australian High Court in *R v Gilson* (1991) ALJR 416 and applied by Potter J in *Van Den Bogaard* (1999) 6 CRNZ 328 (HC). The accused argued that the class of drug involved is an essential element of the charge and if there is insufficient evidence to prove which class drug was the subject of the conspiracy then neither count in the indictment could go to the jury.

The Court of Appeal approached the case as a question of statutory interpretation and held that if, as here, there was insufficient evidence to prove the class of drug to which the conspiracy related then it would still fall within s 6(2A)(c) and render Karpavicius and the others liable to seven years' imprisonment. The class of drug was an essential element of the charge but the "any other case" in subs (c) was not confined to Class C drugs, it would also capture the don't-knows. In cases of doubt it is open to the Crown to present an indictment containing mutually exclusive alternate counts directed to each subsection of s 6(2A) but, if there was no evidence as to the class of drug involved then it would be confined to s 6(2A)(c) and the lower penalty. It followed that *Van Den Bogaard* was wrongly decided. The Court also observed that the Australian approach in *Gilson* caused more problems than it solved. The acquittal was quashed and a new trial ordered.

APPEARANCE OF JUSTICE

R v Lauti 16 May 2001, CA, Blanchard, Doogue and Randerson JJ

In this case jurors talked to the complainant and the family of the complainant during the lunch break and the Judge found this acceptable.

Lauti was tried for rape of a child then aged eight or nine. The complainant and another girl were running to and fro from a group that included witnesses/family members yet to be called. Two members of the jury at least sat close and conversed with the group (all Samoan). Defence counsel saw this and called the Crown counsel and officer in charge to look; all saw it.

> [6] The Judge had the jury brought into Court and spoke to them. He made it clear to them that justice must not only be done but must manifestly be seen to be done. He said that if he was to continue with the trial he needed very real and clear assurance that any contact between the jurors and those associated with the trial was in no way related to anything going on in the courtroom and that there had been no discussions of any nature about anything which related to the matter presently before the Court. He asked the jury to retire and to discuss the matter and to come back and to advise him whether any of the discussions related to the trial or not. The jury retired and subsequently returned to the Court, where the foreman announced, "There was no conversation involving anything to do with the trial". The Judge recorded that and then recorded: "Both counsel then indicated in Court in the presence of the jury that they had nothing further to say on the issue" and the trial accordingly continued.

On appeal the matter was put on trial counsel. They should have insisted at the time if further action was to be taken. This overlooks the simple fact that it is for trial Judge to make sure the trial is both fair and appears fair. How can it possibly look fair when the witnesses are talking to the jurors at lunchtime? Asking the jurors to reflect amongst themselves rather misses the point.

This case, and *Shepherd* [2001] 1 NZLR 161; [2000] NZLJ 423 where the Crown talked to the witness, secretly, for an hour during a break in cross-examination, and where the Court of Appeal condoned the conduct by not ordering a retrial, demonstrates a breakdown in the standard of trial by jury, where the misery of a retrial is considered above the need for the most basic of rules being enforced. ❑

INSOLVENCY AND DEEMED DIRECTORS

TRANSACTIONS

with

Jane Anderson

In *Fatupaito v Bates* HC Auckland, 23 May 2001, M521/00, O'Regan J addressed the "deemed director" provisions of the Companies Act 1993 (s 126), and the insolvent trading provisions of the Companies Act 1993 (ss 135, 136 and 301).

From its incorporation the company had only one director. Bates provided accounting services to the company, including preparation of budgets. Over time, the company's position deteriorated and Bates (at his suggestion) was invited to act as "receiver". Although the parties understood that a receivership had been created within the Receiverships Act 1993, this was a misapprehension, and no valid appointment took place.

The sole director thereafter ceased involvement in the company and Bates became sole signatory to the company's bank account. Rather than terminating the business, Bates continued trading the company based on his view that upon completion of a small amount of work it would be entitled to a significant payment on a contract, and that some customers had paid large deposits for contracts and would be disadvantaged if the company ceased trading. Decisions regarding management were taken in conjunction with O, who appears to have taken on operational management once the sole director left.

The company continued trading for four to five months. Thereafter Bates continued to undertake some activities on behalf of the company, which was eventually placed in liquidation by a creditor six months later.

The liquidators of the company alleged that Bates was a deemed director within the Act and had acted in breach of ss 135 and 136 because the proper course would have been to cease trading when he was appointed.

The first issue was whether the defendant was deemed a director under s 126. That section excludes a receiver from the deeming provision (s 126(1A)) but no receivership had occurred here.

The liquidators argued that the defendant was a director within 126(1)(b)(iii), being a person who exercises or controls the exercise of powers which "apart from the constitution of the company" would fall to be exercised by the board. O'Regan J rejected this. Noting that the meaning of the phrase was unclear, His Honour held that the subsection requires that there be a provision in the company's constitution giving the person powers which would otherwise have been exercised by directors. That was not the case here. It was not sufficient that Bates did exercise powers that would normally be exercised by the board. This appears to be the way to give proper effect to the quoted words and accords with the view of the authors of *Anderson's Company and Securities Law*.

The Court accepted the alternative submission that Bates was a deemed director within s 126(1)(c), being a person to whom a power or duty of the board has been directly delegated by the board with that person's consent, or who exercises the power or duty with the consent or acquiescence of the board.

Bates argued that the true "director" of the company from the time of his appointment as receiver was O. It was argued that Bates did not exercise the powers of the board because he operated in a way which involved consultation and discussion with O, and did not in fact exercise any particular degree of control over O.

The Court rightly rejected this contention. Bates' appointment by the sole director was clearly intended by him to pass to Bates the powers that the director had as the board. This conformed with Bates' own belief that the sole director had no continuing involvement. The authority to allow the company to keep trading and the role of the sole director was handed over to Bates. The fact that Bates acted in consultation with O did not alter the position.

The Court considered whether Bates ceased to be a director within s 126 when he caused the company to stop trading, or whether his directorship continued until liquidation, the relevance being that once he ceased to act as director his liability as director ceased. The Court held that although he took some steps consistent with terminating the "receivership" such as notifying some suppliers that the company had ceased trading, he did not hand control back to the sole director and there was insufficient action taken to sever his status as director.

The Court went on to assess whether Bates was in breach of ss 135 and 136 of the Act.

Section 135 precludes a director from agreeing to or causing or allowing the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditor.

O'Regan J stated that when a company has negative shareholders' funds, a decision to keep trading is one that necessarily involves risk for present and future creditors. In considering s 135, His Honour warned that while continued trading might be justified by the prospect of collecting pre-existing debts or generating significant income from reasonably minor expenditure, directors must be very cautious in embarking on such a course.

O'Regan J expressed the obiter view that there is no room in the wording of s 135 for the Court to balance the risk being taken against the prospective gain to the company of taking a course of action. His Honour expressed the tentative view that the effect of the wording is to undermine the principle of limited liability.

The issue is of significance. Business decisions require assessment of both the risk of loss and the prospective gain. Concerns have been raised that the section is likely to cause directors to be too risk adverse (see R D Deane, "Besieged by Duties", *The Company Law Conference*, 1994; Hodder (1994) TCL 762 17 at 1). The proper question, it is argued, is not the taking of a substantial risk, but whether the risk was unreasonable. This would enable the director to assess the probability and magnitude of both gain and loss together with other factors. As noted by O'Regan J a reference to "unreasonable risk" proposed by the Law Commission did not appear in the section.

Some commentators have argued that there is room to interpret s 135 to allow a balancing of risk against potential reward, either by regarding a risk of serious loss as "substantial" only if it is not balanced by a prospect of gain (Tompkins J extra-judicially in [1994] Waik LR 13) or by achieving this balancing approach through interpretation of the word "likely" (Gould [1996] NZLJ 437).

O'Regan J may be correct on a strict interpretation of the section. It is a pity Parliament did not provide specifically a "balancing" or "unreasonableness" test. However, it is submitted that since business judgment involves the taking of *appropriate* business risks it is commercially unrealistic to interpret the section in this way. There is sufficient latitude in the section to adopt a purposive interpretation (refer Gould).

Bates in *Fatupaito v Bates* also argued that he did not "cause" or "allow" the company to continue trading because what was involved was a continuation of projects to which the company had already committed. The Court rejected this argument on the basis that it is always open, and sometimes wise, for directors of a company to cease trading notwithstanding pre-existing commitments. Bates' decision not to cease trading was "allowing" the company to continue in business, and within s 135. A breach of the section was found.

Bates was also found to have breached s 136, which precludes a director agreeing to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform it when required.

The Court went on to consider what sum Bates should contribute to the company in the liquidation as a result of the breaches. O'Regan J adopted as a starting point, an amount based on a comparison between the financial position of the company at the date when the breaches commenced and its position at liquidation (being a reasonable time to after Bates was appointed).

Having heard submissions as to reductions to this sum that were appropriate, by reference to the causation, Bates' culpability, and the duration of the breach (factors adopted in decisions under the 1955 Act), the Court reduced the prima facie figure of some $60,000 to $30,000.

The deemed director provisions of the Companies Act 1993 are a trap for the unwary. In a sense this was a clear case, given that the parties involved thought Bates had been validly appointed a receiver. However, O'Regan J considered it arguable that O, who was involved in the day-to-day running of the company, was also a director within s 126. The case highlights difficult issues that may arise as to the timing of when a deemed directorship starts and ends.

As a case where liability was (in my view correctly) imposed under the insolvent trading provisions, this decision also demonstrates the difficult decisions facing directors when a company's position is marginal. There was no doubt that Bates here was acting in the genuine belief that he was doing the right thing by the company and its creditors. However, given the state of the company when he was appointed and warning signs based on the company's previous performance, Bates contravened the Act in his decision to keep trading for a period.

INHERITANCE RIGHTS FROM 1 FEB 2002

Kristina Andersen

This article discusses the effect of the Property (Relationships) Amendment Act 2001 ("Act"), and other related amendments, on inheritance rights. In this article, the terms partner and relationship, refer to both married and de facto relationships unless otherwise stated. Moreover, unless stated otherwise, this article refers solely to events on or after 1 February 2002.

Key changes

Part 8 of the Act, together with contemporaneous amendments to the Family Protection Act 1955 ("FPA") and the Administration Act 1969 ("AA"), impose key changes on existing rules applying upon death:

- de facto partners, and spouses, will be entitled to apply for a property division upon the death of a partner, effectively overriding the deceased's will (if any);
- if a property division is applied for, all property owned by the deceased at the date of his or her death will be presumed to be relationship property (in the absence of evidence to the contrary);
- the *Matrimonial Property Act 1963* is repealed. This means that, in general terms, the surviving spouse's property sharing rights will not be determined by whether a marriage ends by death or separation;
- de facto partners will have the same rights under the AA and the FPA as spouses currently have;
- de facto partners will only be able to take advantage of the new provisions if their relationship has lasted at least three years. However, the new provisions may apply sooner if there is a child of the relationship (the child does not have to be the biological child of either partner), or one of the partners has made a substantial contribution to the relationship, and the Court is satisfied that serious injustice would result if orders were not made;
- the rules applying upon death will apply where a de facto partner dies on or after 1 February 2002. Partnerships where a spouse has died prior to 1 February 2002 will also be caught by the new rules in certain circumstances.

Election upon death of a partner

Upon the death of a partner, the survivor (of which there may be more than one), can elect to apply for a division of relationship property (option A), or the survivor can elect to take the benefits that they are entitled to receive under the will of the deceased, or on intestacy (option B). A survivor who fails to make a choice in time will be deemed to have chosen B. If A is chosen, relationship property should be divided equally between the survivor and the estate. Surviving partners contemplating A need to be aware that property passing to them outside of the estate, will not automatically be treated as the survivor's separate property. The status of any such property will be determined as if the deceased had not died (unless a Court decides otherwise).

If more than one surviving partner chooses option A, the relationship property will be divided according to the chronological order of the relationships, if the relationships were successive. If the competing relationships were contemporaneous, property orders will be satisfied according to the property attributable to each relationship, or, if this is not possible, the property will be divided in accordance with each relationship's contribution to the acquisition of the property.

The option choice is irrevocable and can only be set aside by application to the Court by the survivor. The Court may set aside a choice if the estate has not been finally distributed, it is satisfied that it would be unjust to enforce the choice, and any of the following apply:

- the option choice was not freely made;
- the survivor did not fully understand the effect and implications of the choice;
- since making the choice the survivor has become aware of information relevant to the choice made; or
- since the choice was made, someone else has made an application under the Law Reform (Testamentary Promises) Act 1949 ("TPA") or the FPA.

It may be possible for the survivor to obtain a division of relationship property and to receive benefits under the will, or on intestacy, if the Court is satisfied that this is necessary to avoid injustice, or if the deceased's will makes express provision for this to happen. In addition to making an election, the survivor can apply for a greater provision under the FPA or the TPA.

The deceased's personal representative will be able to apply for a division of relationship property by leave of the Court. However, leave will only be granted if the Court is satisfied that refusal to grant leave would cause serious injustice.

Effect of intestacy

If the deceased dies intestate, all surviving de facto partners (or surviving spouse and one or more de facto partners) will be entitled to an equal share of the estate (whether or not this will be a share of the whole or only part of the estate will depend on who else survives the deceased). This new AA provision makes no quantitative or qualitative distinction between relationships. For example, a short abusive marriage that ended in separation many years prior to the death of the deceased (assuming that the marriage had not been dissolved, and no property division had taken place) would have the same financial value, for the purposes of the AA, as a lengthy de facto relationship that ended only with the death of the deceased.

Effect of s 21 agreements

If the partners had a contracting out agreement, this should determine how relationship property is shared in the event that option A is chosen by the survivor. It will, however, be possible for the survivor to challenge any agreement after the death of the deceased. The deceased's personal representative will not be able to make such a challenge, even if the deceased's children, or other dependents, are severely disadvantaged as a result.

FPA changes

From 1 February 2002, eligible claimants will include de facto partners living with the deceased at the time of death, and children of the de facto relationship, which includes any child who was a member of the family of the de facto partners, regardless of whether the child is biologically related to either partner.

Summary

Even amongst couples with an awareness of some of the changes arising from the new property sharing regime, there is usually a complete lack of awareness of the new provisions applying on death. Clients usually expect that their will will operate to protect their children financially if something happens to them. From 1 February 2002, this belief will in many cases be incorrect. From this date, sole reliance on a will to provide for children will be dangerous. A surviving partner (or someone who wrongly alleged that they were the partner of the deceased) will be able to override the provisions of the deceased's will by choosing option A, regardless of the effect of this on the financial wellbeing of the deceased's children. The inheriting partner may have no wish, and no legal obligation, to care for the children upon the death of their parent.

For lawyers, these changes mean that clients' existing situations should be carefully reviewed as soon as possible (and certainly prior to 1 February 2002). In order to achieve adequate protection, consideration should be given to the execution of a s 21 agreement in conjunction with drawing up new wills for a couple. In other cases, complex asset planning arrangements may be appropriate in order to provide clients with the protection that they thought they had prior to the new regime being enacted.

PROPERTY – TRANSITION PROVISIONS UNDER THE PPSA

Roger Fenton

The transition provisions of the Personal Property Securities Act 2000 come into operation on the day the Act itself comes into force, on current estimates, 1 May 2002. In a nutshell, the transition provisions provide that interests registered under the old regimes (Chattels Transfer Act 1924, Industrial and Provident Societies Amendment Act 1952, Motor Vehicle Securities Act 1989 and Companies (Registration of Charges) Act 1993) or interests that are otherwise protected under the prior law are "deemed to be perfected by registration" for the transition period of six months (ss 195, 196). This protection, however, will last for six months only and unless the security interest is perfected under the PPSA by the close of the transition period (on present counts 31 October 2002) will be deemed to be "unperfected" (s 198). It is critical therefore that security interests created under the pre-PPS systems be re-registered under the PPSA by the end of the transition period. Interests not registered within this period can still be registered, but they lose the right to have their perfection back-dated to the date they were registered under their previous Act and hence run the risk of losing priority during the period prior to perfection under the new Act.

The transition provisions contain their own definition section and "prior law" means the law that existed immediately before the commencement of the new Act (s 193). "Prior security interest" is defined as meaning a security interest created or provided by a security agreement or transaction made or entered into before the commencement of the new Act, but expressly excludes security interests that are renewed or extended by a security agreement on or after the commencement of the Act (s 193, definition of prior security interest). Renewals or extensions of prior security interests renewed or extended after 1 May 2002 (or whatever date is the commencement date) need to be perfected under the new Act (s 193). A prior security interest that was enforceable against third parties under the prior law continues up to the end of the transition period to be enforceable against third parties under the new Act (s 194). Prior security interests registered under prior registration law are "deemed to be perfected by registration" under the new Act until expiration of the transition period (s 195). The PPSA catches a number of transactions, for example, retention of title clauses, which frequently were not registered under previous legislation but which under the prior law had priority over another security interest and these are also "deemed to be perfected by registration" (s 196). However, s 196 expressly excludes transactions where the collateral has been taken into possession by the secured party. The reason appears to be that as possession is a method of perfection under the PPSA, registration or further acts of perfection are unnecessary. The phrase "deemed to be perfected by registration" in ss 195 and 196 refers to the particular method of perfection under PPS ("perfection by registration" in contrast to "perfection by possession" (see, s 16)) rather than registration under a prior Act, although the phraseology can be confusing.

The priority rules during the transition period are set out in s 200:

(a) ***Priority between prior security interests*** – During the transition period priority between security interests will be determined by the prior law (s 200(1)). For example, the priority of company charges registered under the Companies (Registration of Charges) Act 1993, will be determined during the transition period by the pre-PPS legislation (under s 4 of the 1993 Act the registration provisions in Part V of the Companies Act 1955 continue to apply). The same charges will need to be perfected under PPS during the transition period otherwise they will be deemed to be unperfected at the end of the period.

(b) ***Priority between prior security interests and interests perfected under PPS*** – During the transition period priority between prior security interests and security interests perfected under the PPSA will be determined in accordance with the PPSA (s 200(2)). It has already been seen that prior security interests registered under the pre-PPS legislation are "deemed to be perfected by registration" and, until the end of the transition period, have their priority determined as if they were perfected security interests under the PPSA. The time of registration of security interests deemed to be registered under s 195 or s 196 dates from the time the security interest was registered (s 195) or created (s 196) under the prior law. The general priority rules applicable to all security interests provide that priority between perfected security interests turns on the date of registration (s 66(b)): applying these rules under the transition period, a security interest registered under the Companies (Registration of Charges) Act 1993 in say 1996, has priority over a security interest created and perfected after the PPSA came into force ie after 1st May 2001. However, this priority lasts only for the transition period and to retain priority after the transition period ends a secured party registered under the 1993 Act (or any other prior registration provision) must perfect the interest under the PPSA. If a prior security interest is perfected within the transition period then it seems priority runs not from the date of perfection under the PPSA but from the date of registration (or creation) under the pre-PPS legislation (s 199(a)). Indeed, the wording of s 199(a) may vary the position under the pre-PPS law since priority appears to run from the date of prior registration, whereas priority under the prior law, for instance under the Companies (Registration of Charges) Act 1993, runs from the date the charge is created although it becomes void if not subsequently registered within the registration period of thirty days.

(c) ***Priority between unperfected prior security interests*** – Priority between an unperfected prior security interest and another unperfected security interest is determined by order of attachment (s 200(1)(c)).

Section 200(2) states that during the transition period interests registered under pre-PPS legislation and deemed to be perfected by registration under s 195 or s 196 have priority over any unperfected security interests. The general rule is that during the transition period prior security interests that are deemed to be perfected, or security interests actually perfected under the PPSA, will have priority over unperfected security interests (s 200(2)). Section 200(2) establishes the priority of perfected interests over unperfected security interests.

The priority of prior security interests and prior third party interests (third party interests arising before the commencement of the PPSA) is laid down in s 201. During the transition period, priority between a prior security interest and a prior third party interest is determined by the prior law (s 201(a)). However, priority between a prior security interest and a third party interest that has arisen on or after the commencement of the Act is determined under the PPSA (s 201(b)). Priority between a security interest that is not a prior security interest and a prior third party interest is determined by the Act (s 201(c)). A prior third party interest appears to be a prior interest that is not a security interest, such as the rights of a purchaser. The PPSA contain a number of provisions under which buyers or lessees take free of security interests including s 52, which establishes that a buyer or lessee of collateral for value takes free of unperfected security interests unless the buyer or lessee was a party to the transaction creating the security interest, and ss 57 to 65 which replace the Motor Vehicle Securities Act 1989 and contain special provisions as to when a buyer or lessee of motor vehicles takes free of perfected security interests. These provisions, and other sections under the PPSA, become applicable during the transition period in accordance with the rules under s 201.

PPS Day is now close. The Brave New World, North American style, will be upon us. The transition provisions will apply in full vigour from 1st May 2002, and it is necessary to protect the priority of security interests registered or created under the prior law. ❑

WHAT IS A MINI TRIAL?

ALTERNATIVE DISPUTE RESOLUTION

edited by Carol Powell

A lot of public focus on alternative dispute resolution has been on the mediation process. However, alongside mediation there are rafts of other processes which have evolved and which are worthwhile considering when making decisions about the best way towards resolution of a dispute.

The processes that evolve may take the form of a one-off process designed by either the parties themselves or their advisers, to meet the needs of a particular dispute. This kind of one-off design, over time, can result in new processes and the mini trial is an example of such a process which has evolved over time and which still retains a significant amount of flexibility as to format and content.

The essential elements of a mini trial are (i) that it takes a relatively short period of time (generally pre-agreed by the parties); and (ii) it involves a presentation of issues or evidence followed by a decision-making process.

Within the boundaries of those elements there is a large amount of variation of process. In most cases a mini trial is a confidential and private process. It takes place in a private venue and is not open to the public nor is there any form of reporting the outcome (unless the parties agree on some sort of public statement).

The nature of the process is such that it is generally used by corporations and organisations to resolve disputes rather than by individuals and often the disputes can be very raw and can involve significant amounts of money. It is a process which has been utilised in many construction disputes, often very soon after the dispute arises and as a result there has been minimal disruption to work in progress.

The time-frame

A mini trial can be organised on reasonably short notice, as there is often no one outside of the parties themselves who will be involved. Mini trials are, however, as the name suggests, a form of trial and there is therefore often significant preparation required.

In most mini trials, the parties agree to limit the time for each party to present its case. This can be a total of only a couple of hours, which forces the parties to focus on the essential issues and the strongest parts of their case. An outcome can therefore often be reached within a day whereas had the parties opted for a third party decision type process such as Court or arbitration, the same dispute would have taken months at least, if not longer.

This is very useful when the dispute arises during part of an ongoing relationship, such as a major construction project, as the dispute does not taint the ongoing progress and often the fact that the parties work together to resolve their problem early on results in stronger and more flexible working relationships.

The format

In some cases the parties agree on some pretrial procedures such as an exchange of witness statements, expert reports or a form of discovery. Discovery does not need to be in the detailed format it follows for Court proceedings and in some cases is not even in written form. In some cases parties can simply allow each other access to certain documents. Clearly, there are risks in this procedure and it is advisable for the parties to have sought prior advice and what documents would normally attract privilege, as of course there is always a risk that the dispute will end up in a formal Court proceeding.

The hearing time can also be reduced by an exchange of submissions or statement of facts. Documentation does not need to be in any particular form and the timeframe can be as long or short as the parties themselves require.

The case may take the form of a presentation given by one person or a team of persons. Viva voce or affidavit may be used, and generally the decision whether to call evidence, in what form and whether there will be the right to cross-examine witnesses is pre-agreed. The strict rules of evidence do not apply and in most cases any witness is not under oath. This, in itself, indicates that there is still a significant amount of trust which exists between the parties and the process works to maintain that trust.

In some cases parties will present expert reports or appraisals and in others the parties agree not to refer to expert opinion at all. There have been situations involving significant construction issues where the rights and wrongs of the case appeared to turn on what was appropriate engineering advice or action, and yet the parties decided not to allow expert opinion as part of the mini trial process. This would not have prohibited either party from obtaining an expert view prior to the mini trial and for that view to be available to that party's decision maker. However, what it would have meant that the expert's view would be factor in weighing up the BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement) of the problem for the decision maker, but would not have been available as a negotiation tool.

In many cases the parties agree to keep the mini trial closed to lawyers, so strict legal issues do not form part of the presentation nor a major part of the final negotiations and decision. This does not, of course, preclude either party from seeking legal advice prior to the mini trial and often the preparation of the submissions is done in conjunction with the parties' legal team.

As with any form of consensual dispute resolution process, the parties should seek full advice on the legal aspects of their case prior to the trial, even if it does not form part of the presentation. In many cases it may be more appropriate for the legal views to be distilled into writing and provided to the representative of the relevant party who will be taking part in the decision making process.

The parties may also agree to keep lawyers away from the trial process itself, but to allow the decision makers to have the benefit of legal advice either by each party obtaining their own, or by jointly instructing an independent third party lawyer who would effectively act as an expert on legal issues.

Who makes the decision?

The decision makers can be independent "experts" who may give a binding decision or may simply give an expert appraisal of the issues which will then be used to assist the parties to negotiate their own outcome. In other cases, the decision makers come from the parties themselves.

Where the dispute is between large corporate organisations it is not unusual for the decision maker to be the CEO or another senior management representative. In this type of case each party will put forward their own decision maker from within their organisation. In some cases another independent will also form part of the tribunal.

What tends to happen in this type of case is that the trial is held and then the decision makers retire to private rooms to negotiate an outcome on the basis of what they have heard. Where an independent person is used in conjunction with party representatives, that person generally will give a view of the outcome and will then leave the negotiations to the parties' representatives. In some cases the independent may have a mediation or process role and will assist the parties to negotiate as a facilitator. In other situations the independent third party will have a role similar to that of a referee in an arbitration with three arbitrators – one appointed by either party and a third referee, who is called upon only when the other two cannot agree.

The benefit of party representatives acting in the decision making capacity is that it keeps the outcome within the control of the corporate party, while separating it from the individuals who are personally involved in the dispute. The parties get an opportunity to hear what each other has to say and to evaluate the comparative strengths of any competitive arguments – a relatively quick way of getting up to speed on each parties' BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement).

The individuals who negotiate the outcome are able to use any bargaining approach or style they chose and often a "gin and tonic" approach enables a mutually acceptable resolution to a problem that may otherwise have taken considerable time, process and money to end.

The decision or negotiated agreement should then be recorded in writing, and this is another part of the process where legal advisers are useful. The formality and finality of the agreement will be a matter for agreement by the parties at the time.

While the outcome may not reflect the legal rights and wrongs of the situation, it will often meet more of the commercial needs and interests of the parties and a party may well take a commercial overview of the whole business relationship when developing an outcome which resolves the current problem and allows business to continue in a smooth and comfortable way.

THE PROPOSED CONSTRUCTION CONTRACTS BILL

Recent economy climate effects have seen the demise of a number of the larger construction companies in New Zealand. Perhaps less publicised is the concurrent demise of numerous smaller subcontractors who were pulled down with the large head contractor with whom they had contracted.

One of the reasons for the smaller businesses to fail has been the failure of the head contractor to pass on payments when received or, in the event that the head contractor was not paid, the reliance on a "pay when paid" or "pay if paid" clause. Pay when paid clauses have been standard in most construction contracts here, in Australia and the UK for over twenty years. Most standard form subcontracts contain a pay when paid clause and more recently, this has become a pay if paid clause.

The effect of these has been for the head contractor to pass on the risk of non-payment to its subcontractors, arguably spreading the risk load, but also placing smaller businesses in a high-risk situation, which they could not sustain if the clause was relied upon. This has recently resulted in business failures and job losses for subcontractors' employees.

The Construction Contracts Bill is aimed at reforming the law relating to construction contracts, in particular,

- to facilitate regular payments between parties to a construction contract; and
- to provide for the resolution of disputes arising under a construction contract; and
- to provide remedies for the recovery of payments under a construction contract.

One of the ways the Bill aims to achieve these goals is to establish a "quick and inexpensive adjudication process for resolving disputes that allows binding (but not final) determination to be made in relation to, among other thinks, whether any of the parties to a construction contract are liable to pay an amount under the contract".

The Bill will apply to construction work carried out in New Zealand, regardless of whether a law other than New Zealand law governs the contract or whether it is executed outside of New Zealand. Any agreement that purports to exclude, modify or restrict the operation of the proposed Act will be void.

The adjudication of disputes section of the bill sets out a "fast track" dispute resolution process that applies to all construction contracts (whether commercial or residential). The Bill preserves the parties' rights to agree (whether before or after a dispute arises) to submit the dispute to another dispute resolution procedure such as mediation, arbitration or the Courts, although it appears that it is intended that an application for adjudication under this part of the Bill may be able to be made alongside any ongoing or proposed civil proceedings.

The adjudication process proposed is set out in subpart 2 of part 3 of the Bill. The adjudication is initiated by way of a written notice served on the other parties to the dispute. There is a process for the selection of an adjudicator, and any agreement on who will be the adjudicator made prior to the dispute arising is not binding.

The adjudicator has two working days to indicate whether she or he is willing and able to act in that capacity by serving notice of acceptance on all parties, which notice must confirm that the person meets the eligibility criteria for adjudicators – ie is not a party to the dispute, has no interest in the dispute and has no direct or indirect relationship with any of the parties.

The claimant then has five working days to refer the dispute in writing by notice to the adjudicator and all parties which:

- must specify the nature or the grounds of the dispute;
- must be accompanied by copies of or relevant extracts from, the construction contract; and
- may contain submissions and documents that the claimant intends to rely upon.

Unless agreed otherwise the other parties then have five working days in which to serve a written response to the claim.

The adjudicator has an obligation to act independently, impartially and in a timely manner as well as to avoid unnecessary expense and to comply with the rules of natural justice. The adjudicator has the discretion to call for further submissions, to appoint expert advisers to report on specific issues (with the consent of the parties), to call a conference and to inspect the work.

In making a decision the adjudicator is limited to considering only the matters set out in s 35, namely:

- the provisions of the proposed Act;
- the provisions of the relevant construction contract;
- the adjudication claim submitted, together with the submissions and documentation submitted;
- the report of any experts appointed to advise on specific issues; and
- the results of any inspections carried out by the adjudicator.

The adjudicator must in writing and with reasons determine:

- whether or not any of the parties to the adjudication are liable to make a payment under the contract; and
- if so, the amount payable; and
- the date on which that amount became or becomes payable;
- the adjudicator can also make an order as to costs and expenses.

The adjudicator must make a determination within 20 working days after the end of the period during which the respondent may serve a written response to the claim. All in all this means that a decision will be made no more than 32 working days from the time of appointment of the adjudicator, unless the parties agree to extend the time for making submissions.

The determination is enforceable as a debt and non-payment entitles the unpaid party to suspend work.

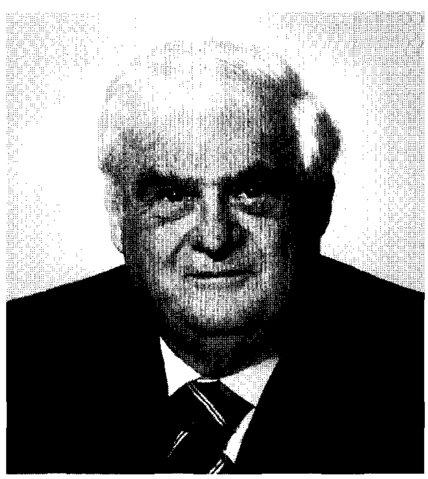
The process is effectively a fast track arbitration, which enables subcontractors to obtain payment, or the right to pursue non-payment as a debt and suspend the work within a month of the initial failure to pay. The proposed change will reduce the burden carried by subcontractors and while passing the risk on to head contractors, will also enable the head contractor to obtain payment from the employer within a reasonable timeframe before the amounts involved become impossible to sustain. The process will run alongside other dispute resolution processes selected which will continue to deal with the more substantive disputes and will provide an appeal structure if required.

MEDIATOR PROFILE – SIR IAN BARKER QC

Sir Ian Barker was a well-known face on the Bench of the High Court for over 20 years. Prior to that he practised as a Queen's Counsel. At the time he was in practice, mediation was unknown, and even arbitration was regarded as a "very poor relation".

Since retirement in 1997, Sir Ian has conducted some 70 or so mediations, mainly commercial in flavour. He has also conducted numerous arbitrations, including two international ones under ICC auspices. He has also been engaged in inquiries of various kinds, such as the Montana share inquiry and the Canterbury University Holocaust thesis inquiry.

Sir Ian first became interested in mediation when in the early 1990s a group of Australian mediators from LEADR came to a High Court Judges' Conference in Rotorua. They gave a most entertaining and educative mock mediation. He could then see the



potential for settling many civil disputes that came before the Court.

Sir Ian undertook the LEADR course in Sydney under the strict regime of Sue Duncombe and Joanna Kalowski. Sir Ian was of those responsible for the introduction of the new High Court Rules in 1985/6, when judicial settlement conferences were introduced. As Executive Judge in Auckland at the time Sir Ian did what he could to encourage the utilisation of the new provisions for settlement conferences. Over his last eleven years on the Bench, he conducted many such conferences, with a fair measure of success. These conferences are not the same as mediation with caucusing, since Sir Ian does not believe that judicial officers should see one party without the other, save in exceptional circumstances.

Sir Ian speculates that years of hearing disputes as a Judge can condition one to seeing solutions to problems in many situations.

Sir Ian also gave support to the organisations in New Zealand which were taking on a public role in mediation. He has been the patron of LEADR

NZ since its formation in about 1992 and is now the President of AMINZ.

Sir Ian acknowledges that his background is likely to influence the decision of parties to select him as a mediator. He doesn't think that most parties want to employ somebody of his background without the possibility of some reality testing, based on his experience. Consequently, he believes that parties expect a tendency towards evaluative mediation. He feels that he can use his experience, if requested, to assist parties to see their case more objectively. He believes that questions of loss of face are important for any party. For this reason he does not provide any evaluative comment other than in private.

He takes each mediation and set of circumstances individually and adapts to the needs of the parties involved. For this reason different parts of the process have value in different situations and the role he takes as mediator varies.

Sometimes, the initial face-to-face discussion in the public session is important, since it allows for venting of feelings etc.

In other cases, the caucusing is where the real progress is made; or where parties are hostile to one another, the mediator's role can be acting, if requested, as a "Henry Kissinger-type messenger".

Sir Ian's aim in mediation is always to assist the parties to come to a resolution with which they can live and which, in appropriate cases, will enable them to do business with each other in the future.

LEADR NZ UPDATE

LEADR is seeing increased interest in its workshops as lawyers and others are recognising the strength of the process and the value they can gain with the development of the skills that the workshop provides. Many who have found the workshops valuable do not intend to be mediators themselves.

LEADR NZ held a very successful (full) workshop in Wellington in June of this year and there is strong interest in the remaining two workshops being held in New Zealand this year – in Christchurch on 19-22 September and in Auckland on 14-17 November (both of which now only have a few places available).

The new membership year for LEADR begins at the end of this month and there is a new affiliate category of membership for the judiciary, who obviously cannot and do not want to mediate, but who nonetheless have interest in mediation as one of the possible processes available for dispute resolution.

LEADR believes that it is in everyone's mutual interest that it maintains the liaison with members of the Bench.

The Accreditation system for entering one of the LEADR panels of mediators has now been streamlined as between Australia and NZ. Video assessment is now available and LEADR is looking at ways to offer more ongoing short course training.

In recognition of the need to work with and cooperate with other organisations, which promote the use of ADR, LEADR is in the process of negotiating a cooperative venture with AMINZ, which focuses on the need to provide short course training throughout the country. ❑

WHAT'S HAPPENING

2001

August 14
AMINZ breakfast meeting – environmental mediations
Various

August 15-18
LEADR NZ – 4 day mediation workshop
Christchurch

September 11
AMINZ breakfast meeting – appointment of an Arbitral Tribunal
Various

September 18
Arbitration in the 21st century – NZLS – CLE
Dunedin

September 19
Arbitration in the 21st century – NZLS – CLE
Christchurch

September 20
Arbitration in the 21st century – NZLS – CLE
Wellington

September 25
Arbitration in the 21st century – NZLS – CLE
Hamilton

September 25
Mediation Training Centre workshop – fundamentals of mediation

September 26
Arbitration in the 21st century – NZLS – CLE
Auckland

October 9
AMINZ breakfast meeting – family mediations/relational disputes
Various

October 23
Mediation Training Centre workshop – advanced skill development

October 31,

November 1-3
LEADR NZ – four day mediation workshop
Auckland

November 13
AMINZ breakfast meeting – arbitration – decision making and award writing
Various

THE NAPSTER SAGA

Clive Elliott, Barrister, Auckland

with the first part of a two-part article looking at the Napster *and* DeCSS *cases*

In an increasingly decentralised and fluid world the appropriate demarcation between legal rights and freedom of choice and expression is a difficult one. Today, direct copying of content poses fewer intractable legal problems than in the past. The difficulty is in the fringe area where private and public domain rights clash and the concepts of authorisation and facilitation of infringing conduct become the real issues.

The internet undoubtedly represents the greatest challenge the film and record industries have faced in recent years and possibly ever. Two highly contentious cases in the USA are presently shaping the future. They have major implications, both in the USA and internationally.

I will endeavour to explain what is happening and where we might be heading.

NAPSTER

Napster is a music file sharing system. It is built around a computer programme written by an 18-year-old American, Shawn Fanning. To put it simply, what it does is combine a music search function with a file sharing system, which allows communication and instant messaging. It uses existing functionality, allowing simple and effective connectivity, by combining:

- the instant messaging system of Internet Reload Chat;
- the file-sharing functions of Microsoft Windows; and
- the advanced searching and filtering capabilities of search engines.

Napster lets users swap data from one computer to another, without the need to rout the data through a central server (effectively a third computer linking the two together). The users' computers are referred to as "peers" and the data sharing "peer to peer" sharing. The software is loaded on a user's computer. This software allows the user's computer to connect to Napster's server. When a search is made, Napster does a search of its database and identifies which users have the particular file, eg a song – defined by the artist, the version, the download speed and the like. If the required music file is found, Napster puts the two users in touch with each other. They then exchange files.

The enormous success of the venture is characterised by the words of a recent *Time* magazine feature (October 2, 2000, p 62):

> Legal issues aside, Fanning's program already ranks among the greatest internet applications ever, up there with email and instant messaging. In terms of users, the Napster site is the fastest growing in history, recently passing the 25,000,000 mark in less than a year of operation. And, as Fanning predicted, his program does everything a web application is supposed to do: it builds community, it breaks down barriers, it is viral, it is scalable, it disintermediates – and, oh, "yeah", it may be illegal.

PRELIMINARY INJUNCTION

Napster's huge success almost guaranteed some form of retaliation. It came predictably when a number of music companies issued proceedings for copyright infringement. For convenience I will refer to them collectively as the Recording Industry Association of America (RIAA). In July 2000 Judge Marilyn Hall Patel heard the motion for a preliminary injunction: *A&M Records Inc v Napster Inc*, USDC ND Calif, No C99-05183 NHP, July 26, 2000.

Napster argued that while there was a degree of infringing use, it was not its responsibility. It also asserted that the Napster system could be utilised quite legally. That is, on the basis that either the content was not subject to copyright in the first place, or if it was, the copyright owner did not object, or where the copyright had expired or been lost. Another situation would be where the copyright owner had given Napster consent. It is reported that as at the time of the first hearing approximately 25,000 artists had authorised Napster to share their music

Finally, Napster argued that sampling of excerpts of songs was legal. That is, where a user listens to a brief portion of a music track, without reproducing or even listening to the entire track. While in the USA the legal status of sampling is somewhat less certain than space shifting and dealing in non-copyright works, Napster argued that there was no real doubt that part of their operation was entirely legal and accordingly that the entire service should not be shut down just because part of it might infringe.

Napster asserted that they were an internet service provider (ISP) and accordingly were entitled to the benefits of the legislation (the Digital Millennium Copyright Act) which gave ISPs a so-called "safe harbour". That is, that generally they would not be held liable for their users' activities. This is a trend that has occurred around the world and has been given serious consideration in New Zealand through various Law Commission reports. The Complainants argued that this safe harbour did not apply if the service provider was aware that its users were engaging in copyright infringement.

Napster evidently has a system where if they become aware of any clear infringement, they put that user on notice and unless a counter-notice is provided to them, they say they shut down that particular user. Napster said this was a practical solution to the problem. The RIAA disagreed and argued that effectively it was no more than a means to get around the Digital Millennium Copyright Act.

These arguments suggest that Napster's position and its reliance on the doctrine of "fair use" and remoteness from the actual individual infringing acts was far from fanciful. Indeed, both from a legal and public policy point of view there seems to be some merit in their position.

Notwithstanding this, on 26 July 2000, Judge Patel granted the complainants' motion for a preliminary injunction. In rejecting the Napster argument, the Judge drew a distinction between a portable MP3 player such as the portable "Rio" players or VCRs. In doing so she indicated that an on-line service like Napster went beyond just sharing among friends which could not be classified as typical personal use, the distribution of music to many anonymous users not being synonymous with typical personal use.

On the reliance by Napster of a lack of actual or constructive knowledge, Judge Patel dismissed this, based on internal Napster correspondence which the Judge said acknowledged the existence of at least some exchange of pirated music. The Court also found that Napster was liable for contributory copyright infringement because by its conduct it knowingly encouraged and assisted the infringement of copyright.

The Judge also noted that Napster supplied the proprietary software, search engine and means of establishing a connection between Napster users' computers, without which the users would not have engaged in the conduct in the first place.

Accordingly, the District Court found that Napster users had engaged in the commercial use of copyright materials and that it could not be construed as personal use as the requester was anonymous and Napster users were receiving for free something they would ordinarily have to buy. It was found that Napster users were also copying the whole of the copyright works and this was having an effect on the market. Finally, it was found that a sampling service provided by Napster was a commercial use, even if users eventually bought the music. Given the above, direct infringement was established.

Stay

The preliminary injunction, which would have effectively shut down Napster, would have come into force on 28 July 2000. Napster appealed that ruling and sought an immediate stay. The US Court of Appeal for the 9th Circuit granted the stay. By doing so it permitted Napster to remain in business until an expedited hearing. The Court did so on the basis that the appeal raised "substantial questions of first impression against the merits in the form of the injunction": *A&M Records Inc v Napster Inc*, No 00-16401; and *Lerber v Napster Inc*, No 00-16403, 9th Circ, July 28, 2000.

APPEAL

On 12 February 2001 the Court heard the main appeal. *A&M Records Inc v Napster Inc* (239 F 3d 1004(209)).

To succeed under US law the complainants needed to establish that Napster was liable for direct copyright infringement. To show such direct infringement they had to show ownership of the allegedly infringing material and that at least one of the exclusive rights of the copyright proprietor had been breached. Napster did not deny direct infringement by its users but relied on, inter alia, a fair use defence.

More specifically, Napster's defences related to the Audio Home Recording Act 1992 and the Digital Millennium Copyright Act 1999. The company argued that it should not be held responsible just because some of its users engaged in copyright infringement. It maintained that it could not be liable for vicarious or contributory infringement, as the service also involved substantial non-infringing uses. Reliance was placed on the decision in *Sony Corp v Universal City Studios Inc*, 464 US 417 (1984) involving home taping on VCRs. In a landmark ruling the US Supreme Court held that even though VCRs were predominantly used to copy copyrighted materials, because there were substantial uses that did not infringe copyright that overall the conduct did not amount to an infringement

Napster submitted that in this decision the Supreme Court recognised a general right to engage in home taping of copyrighted materials for personal use. However, arguably the case was decided on specific factual grounds – it involved the use of VCR recording technology by consumers to make home copies of broadcast programmes for viewing at another time ("time-shifting"), the Court holding that this constituted a non-infringing "fair use" of the copyrighted material. It did not give the Court's general approval to home taping as such.

The Appeal Court agreed with the District Court that the Audio Home Recording Act was not applicable to the downloading of MP3 files to computer hard drives. The Digital Millennium Copyright Act provided a safe harbour from copyright infringement for ISPs. However, the Appeal Court held that in this case the complainants had raised serious questions about whether Napster could obtain shelter under that Act and the balance of hardship was in the complainants' favour. There was also doubt as to whether Napster was an internet service provider at all.

Section 1008 of the Audio Home Recording Act of 1992, 17 USC. Section 1008 warrants a closer look. It prohibits actions for copyright infringement based on:

- the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium; or
- the non-commercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

Napster argued that s 1008 protected its users and that it therefore could not be held accountable for contributory or vicarious infringement based on those activities. The US Government argued against this construction. To quote from *Brief for the United States as Amicus Curiae*, http://www.napster.com/pressroom/legal.html:

> First, it is undisputed that Napster's users are not using any "device" or "medium" specified in Section 1008, and Section 1008 applies only to consumer use of "such a device or medium". Second, when Napster's users create and store copies of music files on their computers' hard disks, they are not making "digital musical recordings or analog musical recordings" as those terms are defined in the Act. Third, Napster's users are engaged not only in copying musical recordings, but also in distributing such recordings to the public, and Section 1008 immunises only non-commercial copying ("non-commercial use ... for making digital musical recordings or analog musical recordings"), not public distribution.
>
> The AHRA was intended by Congress to embody a compromise between the music industry on the one hand and the consumer electronics industry and consumer groups on the other. At the heart of that compromise is a quid pro quo: in exchange for allowing non-commercial consumer use of digital audio recording technology (Section 1008), the music industry receives financial compensation (Sections 1003-1007) and protection against serial copying (Section 1002). Permitting Napster to shelter itself behind Section 1008 would defeat this basic statutory quid pro quo: Napster's users would be permitted to engage in digital copying and public distribution of copyrighted works on a scale beggaring anything Congress could have imagined

> when it enacted the Act, yet the music industry would receive nothing in return because the products used by Napster and its users (computers and hard drives) are unquestionably not subject to the Act's royalty and serial copying provisions.

Another case relied on by Napster was *RIAA v Diamond Multimedia Systems Inc*, 180 F.3d 1072, 1078 (9th Cir 1999). In this case it was held that the statutory definition of "digital audio recording device" did not cover personal computers and their hard drives. The action was brought by recording industry interests against the manufacturer of the highly successful Rio portable MP3 music player. The complainant claimed that the Rio player is a "digital audio recording device". If so found Diamond Multimedia would have been liable to meet the Act's royalty and serial copying provisions. The Court rejected this argument, finding that the Rio player did not come within the Act's definition of a "digital audio recording device" and therefore fell outside the scheme of the Act, see pp 1075-1081.

Napster ran a similar argument, saying that while personal computers are "capable of" making "digital audio copied recordings", neither computers nor computer hard drives are "designed or marketed for the primary purpose of" making such recordings. It was argued that for similar reasons, it was apparent that hard drives arguably fall outside the statutory definition of "digital audio recording medium", since they are not "primarily marketed or most commonly used for the purpose of" making such recordings.

Napster also relied on a more general passage from the Court's opinion in *Diamond Multimedia* at 1079:

> That "[t] he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, non-commercial use." S. Rep. 102-294, at 186. The Act does so through its home taping exemption, see 17 U.S.C. Section 1008, which "protects all non-commercial copying by consumers of digital and analog musical recordings", H.R. Rep. 102-873(I), at 159.

However, as the US Government's amicus Brief noted, *Diamond Multimedia* was of little help to Napster:

> Diamond never invoked Section 1008 as a defense. Accordingly, the Court was not called on to decide whether Section 1008 protected Diamond itself, much less whether or how Section 1008 may protect defendants in other cases that (unlike Diamond Multimedia) involve claims of copyright infringement.

In the end, the District Court's judgment was largely affirmed, reversed in part and remanded for further orders. The Appeal Court concluded however that the scope of the injunction needed modification, in that contributory liability could only be imposed to the extent that Napster had reasonable knowledge of specific infringing files, knew or ought to have known that such files were available on its system and failed to prevent their distribution. In the Court's view, it was insufficient that they simply existed. Likewise, on the issue of secondary liability, the Appeal Court found that Napster materially contributed to the infringing activities of its users by providing the "site and facilities" for direct infringement. Accordingly, it could be vicariously liable where it affirmatively failed to use its ability to patrol its system, to preclude access to potentially infringing files. In view of these findings the matter was remanded to the District Court for appropriate orders to be drawn up.

THE SAGA CONTINUES

Napster's problems were far from over. On 5 March, 2001 Judge Patel issued a modified injunction. The Court ordered entry of modified preliminary injunctions in five actions: *A&M Records, Inc v Napster, Inc*; *Leiber v Napster Inc*; *Metallica v Napster Inc*; *Young v Napster Inc*; and *Casanova Records v Napster Inc*. It required Napster to begin filtering songs from its file-trading system, three days after it was notified of the violations by the recording industry. Since that time, neither side has been able to agree on who should ultimately be in charge of monitoring the system.

In a contentious Court hearing in April this year Judge Patel, in discussing the filtering technology Napster has been building for the last five weeks, said these efforts were "disgraceful" and noted "If you can't, [make it work] maybe the system needs to be shut down". This comment followed the Judge being shown a list of some 6000 songs that should have been blocked. Evidently over 5000 of the songs still appeared on Napster. The Judge is also reported to have repeated her oft-quoted statement: "You created this monster, now you go figure out how to stop it". Brad King, "Judge Steams; Napster Cooked?" *Wired News*, 10 April 2001, http://www.wired.com/news/lycos/0,1306, 42963,00.html . It seems that this does not augur at all well for Napster.

At the 10 April hearing the District Court appointed Dr Nichols to serve as a technical expert to assist it. On 3 May 2001, the Court ordered Napster to get rid of its text-based filtering system altogether and employ largely untried acoustic waveform recognition and fingerprinting technology. At a hearing on 6 June it ordered Napster to complete deployment of the system by 27 June. On 27 June the Napster system was converted to the new architecture. Napster in turn required all users to use the new system for their file-sharing. There were however technical implementation problems and in early July Napster decided to suspend the transfer of all files until it sorted the problem out.

At a judicial conference on 11 July, Napster provided the Court with evidence that the new system was effective in the order of 99 per cent.. Nevertheless, Napster was still ordered to disable file-sharing until it had achieved "zero tolerance" of noticed works on the system. The Court also ordered that, before it would permit Napster to allow its users to resume file-sharing on its service, the Court would rely on the judgment of its Court-appointed expert, to certify that Napster had done everything to block noticed copyrighted works in a manner consistent with the March 2001 orders. Napster sought a stay of the order, which was denied. Napster then appealed that decision. At the time of writing the parties are exchanging their pre-appeal papers and that appeal should be heard shortly.

NAPSTER'S POSITION

Notwithstanding this outcome, we should not be too hasty in doubting the integrity of some of Napster's arguments or indeed the questions the case poses to traditional thinking in this area. Napter's lead counsel David Boies explained some of these. (David Boies: *The Wired Interview*, by John Heilemann, 8 October 2000.)

Q: Napster's rallying cry is perceived to be "Free Music for Everyone!". But it actually takes a different position. Napster believes that artists should get paid, right?

A: Absolutely. This is a company that believes in copyrights. The RIAA would like to pretend this case is about Napster wanting to eliminate intellectual property. Nobody at Napster wants to eliminate intellectual property. The question is, What are the limits to intellectual property and should those limits be changed? And if the limits should be changed, as the RIAA seems to be saying, should that be done by a Court or by Congress?

Q: *You started off by saying that you got interested in this* case because it went so far beyond music. Given the scope you've described – copyright, free speech, antitrust – it looks like a landmark case.

A: I think there's a very real possibility this case will set standards of what can be done on the internet generally. And it's an issue that's far too important, as I was saying before, to be decided on the basis of labels. People are throwing around labels – piracy, stealing. Those labels don't tell you much about what the technology is; they don't tell you much about what's really going on. All the CDs out there were bought by somebody. The industry has gotten a lot of money from it. The question is, How much more money does the industry deserve?

Q: Every time a new media technology comes along, the same questions seem to wind up in Congress' lap.

A: Look at cable television. Cable television came along and copyright owners said, "Oh, this is terrible. They're reproducing our copyrighted shows and not paying us". They sued to stop it. And the Supreme Court said, "No, we're not going to stop it. It's up to Congress to make a legislative judgment". And, of course, the explosion in cable viewing and the consequent explosion in the demand for content has tremendously enriched copyright holders. The same thing happened with the VCR. Copyright holders came in and said, "This is terrible. They're copying our works". The Court said, "If there's a problem here, it's up to Congress". And the VCR, again by exploding the demand for content, has enriched copyright holders.

THE ROAD AHEAD

The *Napster* litigation has had a salutary effect on the interent music business in the USA. Scour Inc, a service allowing the swapping of music, video and other files, is said to have laid off most of its staff, saying an RIAA suit, similar to the Napster litigation, has scared off investors. It has also been reported that MP3.com, a music locker company that has to pay millions of dollars in damages after Universal succeeded in its claim against it, has turned to the US Congress for help.

> Some Congressmen have introduced a Bill that would basically legalise MP3.com's MyMP3 service – which is at the heart of the Universal dispute – by letting people store and access digital copies of songs they already own on CD. MP3.com has organised a "Million E-Mail March" to support the Bill.
>
> Lisa M Bowman, "Napster in Court to plead for future" *ZDNet News* 29 September 2000, http://www.zdnet.com/zdnn/stories/news/0%2C4586%2C2635202%2C00.html .

NAPSTER'S DEMISE

Even so, it is clear from both the first instance and appellate decisions that Napster's days are probably numbered. Napster is rumoured to be in discussions with various record companies. However, it seems to be a case of one step forward, two steps back. The latest problem Napster faces is that a range of music interests have sought to join the proceedings and to bring a class action against it. Napster is of course resisting these efforts. Napster had offered earlier in the year to pay the record companies US$200,000,000 per year over the next five years to license songs traded on its servers. It was able to offer this on the basis that it would charge users for access to titles. Refer *Dan Goodin, Stayin' Alive – Napster Proposes a Deal*, February 20, 2001, http://www.thestandard.com/article/display/zero,1151,2235500. html .

The point of all of this is that in terms of assets, Napster is not a substantial company and a massive award of damages will inevitably result in it going into liquidation and paying no one. Further, even if the music industry or, some would say, Judge Patel, succeeds in destroying Napster (which it seems intent on) it may not solve the underlying and arguably more significant problems. Indeed, the music industry's focus on Napster may turn out to be misguided.

NAPSTER DERIVATIVES

The service provided by Napster, good as it is technically, has already been superseded. Recent reports suggest that between February and June this year time spent using the service dropped by a massive 65 per cent. A number of variants have found their way onto the market. The best known is Gnutella. Briefly, the way Gnutella works is that a "hello" message is sent to a computer connected to a network. This message is then viral like forwarded onto another group and then another. A request for a particular file passes through the network until it reaches a computer that has the file. When this occurs Gnutella connects the two computers directly and the file is downloaded. It is apparent how this system differs from Napster. It is truly decentralised and does not rely on any central server. This could be a significant difference in terms of legal knowledge and liability. More worrying for the owners of content, however, is that Gnutella works on all kinds of files, not just MP3 music files. It literally takes the technology to the next level and substantially ups the ante. Bodetella, an application designed to work on the Gnutella network, is said to have over a million users already. It is but one of many.

There are however other, but perhaps less palatable, options. One other potential target for record companies is the ISPs. They are, after all, allowing their systems to be used as conduits for infringing data traffic. However, to encourage the growth of the internet, governments worldwide have been reluctant to impose liability on ISPs, according them status equivalent to telephone companies when it comes to control of the content flow through their networks. As one commentator notes, legislators would do well to invest in effective digital rights management systems to prevent infringement, including technology such as digital watermarking to identify the source of the work. Derek Roth-Byster "Securing Your On-line Rights in File-Sharing Age" *IP Asia*, April 2001, p 31.

If the record companies were worried about Napster, they have far more to worry about with the various Gnutellas that have emerged. However, to my knowledge, they have yet to face serious legal challenge.

It may turn out to be difficult, if not impossible, to tie Gnutella down, given its hands off approach and lack of any central locality. Furthermore, it uses the same transfer protocol as ordinary web data traffic, making identification near impossible.

In Part II of this article I will look at the DeCSS hacking case and consider how New Zealand law is adapted to deal with these emerging situations. I will also try and identify where things may be heading. ❑

BEWARE THE EUROPEAN BUYER

Adrienne Ali, the University of Bremen

reports on jurisdiction in international B2C e-commerce

The European consumer is highly protected within the European Union (the "EU") via an abundance of consumer-oriented community law. EU consumers rest assured that almost all their commercial transactions are regulated in their favour. Regulations and directives abound, determining the volume of pre-packaged fluid products, food labelling according to geographical indications and appellations of origin, transparency in gas and electricity prices charged to industrial end-users in order to increase consumers' freedom of choice, and even protection when concluding contracts negotiated away from business premises amongst many others.

Within the EU, rights are enforced before national Courts by means of domestic law to obtain nationally available remedies, however, questions of jurisdiction in civil and commercial cases are governed by the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Convention). Contrary to popular belief, the Convention does not constitute community law, rather it is an international agreement to which the EU member states are signatories to which there is a protocol, the Luxemburg Protocol 1971, which allows reference of questions of interpretation to the European Court of Justice. The non-EU members of EFTA are parties to the similar Lugarno Convention.

The Convention provides a basic uniform legal framework for cross-border litigation and the recognition and enforcement, in the Courts of one state, of judgments of Courts of another state. The directly applicable rules of jurisdiction governing where proceedings must be brought form the basis for European consumer protection. These rules do not govern substantive laws applying to disputes, thus it does not automatically follow that if a country has jurisdiction over a case that its law applies to the substance of the dispute. The 1980 Rome Convention, to which the EU member states are signatories, deals with applicable law. The Convention does not, in general, apply to disputes between a party residing in a Contracting state and one who is not. Unless the defendant is an EU residing consumer, applicable private international law (conflicts) principles determine jurisdiction and forum.

The Convention is not binding on the Contracting states, who can opt out or be exempted from individual provisions. Numerous protocols and differing dates of ratification have resulted in a less than uniform application of the agreement, prompting the European Commission to draft a binding and directly applicable legal instrument in order to unify national conflict of jurisdiction laws, whilst ensuring the sound operation of the internal market.

THE BRUSSELS REGULATION 2001

On 22 December 2000, the Council of Ministers passed Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Regulation), raising the anxiety levels of businesses worldwide conducting business-to-consumer (B2C) transactions with EU consumers. The drafting of the Regulation had been accompanied by unprecedented apprehension and criticism. Businesses engaging in e-commerce feared that they would have to contend with potential litigation in every EU member state. This view was not erroneous, albeit a little exaggerated.

The Regulation forms directly applicable community law and as of 1 March 2002, every civil or commercial transaction with an EU domiciled consumer will be subject to the jurisdiction of his/her country of domicile, with the exception of Denmark, which is not participating in the adoption of the Regulation. Denmark will continue to fall under the auspices of the Convention. This does not, however, mean that the applicable law of the seized Court will necessarily be that country's national law. That is a matter decided by the Court seized, based on the facts of the case.

The basic principles

The Regulation is substantially based upon the Convention with few, albeit significant, amendments. Examples include that: the new art 5 now defines "place of performance"; art 6 introduces a "close connection" link; art 15 (ex art 13) changes the definition of consumer transactions and includes package holidays; and art 23 (ex art 17) removes the ability of a party to bring proceedings in an Court having jurisdiction if an agreement conferring jurisdiction was concluded for the benefit of only one of the parties. The provisions of both become effective not on the basis of European citizenship or permanent residency, rather one need only be residing or "domiciled" within a contracting state. The underlying principle of both is that a defendant must be sued in his country of domicile irrespective of whether or not the transaction was a private or business one. (Convention, art 2.)

This preferential treatment of a defendant is balanced by art 5(1)(a) (Convention and Regulation) "Special Jurisdiction", whereby in contractual matters, an EU (non-consumer) defendant may be sued in the Courts of the place of performance of the obligation in question. In addition, where a dispute arises out of the operations of a branch, agency or other establishment, the defendant may be sued in the Courts of the place in which the branch etc is situated. (art 5(5).)

Third country nationals

Defendants residing in non-contracting states are not catered for under either the Convention or the Regulation, except for arts 22 and 23 of the Regulation (arts 16 and 17 of the Convention) – EU Courts have jurisdiction irrespective of domicile where immovable property, companies with business seats in member states, patents and trademarks, and so on, are at issue. Where an EU plaintiff sues a non-contracting state national, the jurisdiction of the Courts of each member state, subject to arts 22 and 23, is determined by the law of that member state, whereby the plaintiff can take advantage of the national jurisdiction laws to the same extent as citizens of that state can. (art 4.)

B2C TRANSACTIONS – THE EU CONSUMER

Both the Convention and the Regulation provide distinctive jurisdictional provisions for EU consumers. Contractual disputes between consumers and businesses are specifically covered under arts 13 and 14 (Convention) and arts 15 and 16 (Regulation), which provide that a consumer may only be sued in the Courts of his/her country of domicile when the provisions of art 13 (or 15) have been met.

Under EU law, a consumer is any natural person who, when concluding a contract, is not acting in his/her business or professional capacity. Under art 13 (Convention) B2C contracts must either: involve a contract for the sale of goods on instalment credit terms (para (1)); or a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods (para (2)); or any other contract for the supply of goods or a contract for the supply of services (para (3)), and the conclusion of the contract was preceded by (a) an express invitation addressed to the consumer or advertising in the consumer's country of domicile, and (b) the consumer took steps to conclude the contract that state.

This essentially characterises the consumer as "passive", as he does not seek, rather he is sought. Thus, an advertisement in an American magazine sold in many countries, including Europe, would not qualify under art 13(3)(a), but an advertisement in an edition of an American magazine specifically printed for sale in a European country, would. As it would be extremely cumbersome for a consumer to prove that she/he concluded a contract on the basis of a particular advertisement, it suffices that an advertisement appeared in some form in his/her country of domicile and a contract was at some stage concluded with the advertiser.

The rationale for art 13 is twofold. First, EU consumers have been characterised as the "weaker party" in terms of consumer contracts, and insurance and employment matters, and are, therefore, afforded additional protection by rules more favourable to their interests than are provided for by general rules. Secondly, where a business purposely takes advantage of the opportunity to sell to consumers in a particular national market, the consumers should be able to take action in their home Courts in the event of a dispute, rather than pursuing the business abroad. The Convention pre-dates the internet and in the absence of relevant case law, it is unclear how art 13 applies to e-commerce and websites. The nature of the relevant website would have to be examined (discussed below).

Article 14 of the Convention (Regulation art 16) endow the EU consumer, as plaintiff, with a choice of Courts when suing the contracting partner, that is, either before the Courts of the consumer's country of domicile or those of the EU-based contractual partners. The consumer-specific provisions may be departed from by agreement if the provisions of arts 15 and 17 respectively are met. That is, the agreement must be concluded after the dispute has arisen, or the agreement provides the consumer with a wider choice of jurisdictions than provided for by the section, or the agreement was concluded when both seller and buyer were domiciled in the same member state and jurisdiction is awarded to that state's national Courts.

THE INTERNET STRIKES BACK

The advent of commercially constructed websites and ensuing e-commerce transactions have raised hitherto unforeseen jurisdictional problems. The intentions of a commercial enterprise advertising in the French edition of an American magazine sold in France are unambiguous. The same cannot, however, be said for a commercial website without a geographic internet address (eg .com, or .net), or any indication of whom the website is specifically aimed at. Singularly, a website's language or preferred currency of payment does not clarify matters – without a disclaimer to the contrary, a French language website could be perceived as aiming at any French-speaking nation, or even French-speaking nationals living in non-French territories, and payments may be required in other currencies of economic or tax benefit to traders.

The two most disputed internet-related jurisdiction issues arise from whether an internet trader aims its website at the whole world, and if so, whether the resulting borderless jurisdiction is obviated by an active consumer searching out the website and its offers. These were issues in EU Law until the advent of the Regulation, which has removed the need for debate.

Literally "world wide"?

Internet traders ordinarily do not aim at a particular recipient in a particular country. Their intention is to increase their customer base and not to limit with whom they engage in business. Doing business with all and sundry affords no obstacles so long as the trader is safely ensconced under the protection of a preferred jurisdiction. Exposure to differing consumer-supportive jurisdictions creates uncertainty.

Arguably, the internet is a worldwide medium of which a trader partakes and must accept the accompanying risks. That the trader has chosen to utilise such a medium cannot, under EU law, disadvantage consumers and result in less protection for them. Whether directly aimed at a particular country or not, as long as an advertisement appears in the consumer's country of domicile, and she/he takes steps to conclude a contract with the advertiser, the Convention is applicable.

Active or passive – who follows whom?

Some websites are considered to be passive in that they solely list the services or products offered by an internet trader, whilst others are interactive and encompass electronic order forms. By stipulating that the consumer follow a specified commercial procedure (notably by interactively providing certain information, such as the user's name and email address), sellers invite users to conclude contracts with them. Unless the seller stipulates that an offer is not issued, most European and North American national legal systems will consider that a commercial offer has been made, and that its acceptance by the buyer on the internet constitutes the conclusion of a legally binding contract. In such cases, online-sellers would be best advised to specify on their website, that the commercial proposals are not offers in the legal of the term, and cannot have any effect in law (for instance, by utilising expressions such "not binding", "subject to confirmation" etc). They would then simply be inviting the other party to negotiate.

As to passive websites, it has been argued that without a more concrete legislative indication, a website presenting a generic listing of products and services cannot be considered as a specific offer or advertisement. Nor can a consumer be considered to be passive who makes efforts to seek offers, even by "websurfing" with search engines.

Others, however, have argued that a commercial website is the equivalent of an "electronic" storefront: it entails commercial offers and is therefore classifiable as an advertisement in terms of art 13(3)(a) irrespective of how an order is placed, for classification is not based on the medium used, rather on the content of the site. Arguably, consumers can only respond to advertising to which they have been exposed – professional marketing techniques designed to capture attention to the product or service – without which the consumer would see only a blank screen. It may be that a consumer is active in the communication process, however, it is the internet trader who pursues a commercial activity, provoking a reaction from the consumer: a reaction which forms the second step in the transacting process.

At the very least, a website embodies an invitation to treat, and that suffices to invoke art 13(3). It may be that the consumer approaches the trader, makes an offer or requests information material be sent to him or her, nevertheless art 13(3) is applicable on the grounds of the approach by the advertiser to the consumer by means of an advertisement or offer. The fact that the consumer was motivated to conclude a contract justifies protection of the commercially weaker party.

THE REGULATION – UNPRECEDENTED CONSUMER PROTECTION

The Regulation updates and harmonises jurisdiction rules within the EU, and has its most significant impact on B2C e-commerce transactions. The preconditions in art 13(3), (Regulation art 15(1)(c)) hitherto narrowly defining "consumer", have been removed, sealing the loophole whereby consumers induced by co-contractors to leave their country of domicile to conclude contracts were not protected by art 13(3). Whilst consumers must still be acting privately and not in a business or professional capacity, they are afforded national jurisdiction where "the contract has been concluded with a person who pursues commercial or professional activities in the member state of the consumer's domicile or, by any means, directs such activities to that member state or to several states including that member state, and the contract falls within the scope of such activities".

No longer is a preceding offer or advertisement required, nor is the consumer required to take steps within his country to conclude the contract. The debate regarding passive or active consumers is redundant and a passive website suffices to engage the Regulation, so long as the contract is related to the commercial or professional services offered by the trader. Under the Regulation, every offer on a publicly available website is directed at every consumer in the world. A trader can therefore be said to be directing its activities to all EU countries, thus disputes involving EU consumers automatically employ a jurisdiction favouring the consumer. This interpretation extends the scope of art 13 Convention/art 15 Regulation to all transactions stemming from websites. It departs from the principle of allowing the consumer to sue at home only if he or she had been deliberately targeted there. On-line businesses cannot limit their exposure by stating which member states they are targeting. It is possible that a business which targeted only its own national market would still be deemed to be directing its activities to all other member states as well.

It has been argued that the first limb of the new art 15(1)(c) means that conducting any type of business-related activity within a country would expose a business to the jurisdiction of that country. That, taken in conjunction with a seller's website, and maintaining a warehouse, in a given EU country, which does not make deliveries within that country but only to a neighbouring country, would lead to a customer from the former country being able to enjoy the place of jurisdiction of a consumer despite there being no close connection with the consumer's home state.

The concept of activities pursued in or directed towards a member state applies to consumer contracts concluded via an interactive website accessible in the state of the consumer's domicile. The emphasis of the article is thus placed on the means of concluding the contract. In this way, passive websites are, to a certain extent, exempted. That a consumer merely had knowledge of a service or opportunity to purchase goods via a passive website accessible in his country of domicile does not initiate the protective jurisdiction, thus the contract is in the same category as those concluded by telephone, telex, fax etc.

The requirement for a consumer to have taken certain steps in concluding the contract in his home state also aims at contracts concluded via interactive websites. In such cases, the place where the consumer takes these steps is difficult, if not impossible, to determine, and these steps may in any case be irrelevant to creating a link between the contract and the consumer's state. The philosophy underpinning art 15 is that the online-seller creates the requisite link when directing his activities towards the consumer's state and then invites the consumer to conclude a contract with the seller by means of its interactive website.

Business organisations and enterprises with an internet presence have protested vehemently that the Regulation exposes internet traders to every EU legal system, and adherence to multiple jurisdictions involves considerable expense. Having said that, they have proffered no alternative options which would offer consumers a reasonable measure of protection. There is currently no adequate, systematic, cost-effective dispute resolution process for cross-border commercial and civil matters with internationally accepted jurisdiction and applicable law rules.

Since the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters has been many years in the drafting process and has to date failed to acquire full acquiescence from all 47 participating nations, it appears that a fully international dispute resolution process for e-commerce is far off. All it takes is for one country to decline to participate, currently the US, and the system fails. A better solution appears to be bi-lateral and multi-lateral international agreements along currently existing conventional lines, which encourage further states to participate.

JUSTIFYING CONSUMER PROTECTION

The emphasis on consumer protection within the EU is justified, not only on the basis of consumers being the commercially weaker and less experienced party, but also because it is in the interests of businesses that the rules for electronic commerce be predictable and inspire consumer confidence. Furthermore, businesses have self-protection mechanisms at their disposal which consumers do not.

Although consumers enjoy special rules of jurisdiction, they tend to shy away from litigation in cross-border disputes. Court action is usually a last resort and is rare in cross-border cases. The average duration of cross-border law suits in Europe is two years at the defendant's residence and two-and-a-half years at the plaintiff's residence. (see (1998) 22 *J of Consumer Policy* 315, 335) Add to that, the time required for a recognition or enforcement of process procedure. The median B2C transaction is US$244 and over one-third of such transactions are less than US$100 (www.glreach.com/index.php 3), however, a Court process to resolve a claim with a value of ECU2000 has been found to cost the consumer between ECU980-6600 not to mention the language barrier, the need to instate a foreign lawyer, the costs of losing, the minimal amount received when a case is won, and the ability to enforce a judgment in a foreign state. Should consumers not be afforded the advantage of national jurisdiction, they would be in a dire position, which would only serve to further discourage cross-border, let alone internet, transactions.

If a business wishes to avoid the requirements or enforcement mechanisms of a particular sovereign state, it can exclude or "de-target" that jurisdiction by placing a disclaimer on its website

Secondly, e-commerce sales are estimated to amount to US$1.6 trillion by 2003, of which B2C e-commerce is expected to total US$108 billion. The critical issue faced by online businesses is to encourage B2C e-commerce, which has not eventuated to be the phenomenon that was envisaged. Consumers face certain risks which serve to decrease their interest in conducting online transactions, such as credit card fraud, misuse of personal information, obstacles to refunds where pre-payments, credit card payments have taken place, and so on. Should online businesses not be prepared to take on a significant portion of the risks and afford consumers favourable protection measures, B2C e-commerce will not reach desired levels.

The internet trader, whilst facing certain risks, has several options to protect itself and having to take this initiative is based on the reciprocation of its desire to increase its customer base – spreading its business into differing jurisdictions entails an increase in exposure to a variety of legal systems.

Self-protection mechanisms

The prevailing option that an internet trader has is the ability to decline to conclude a contract with a party to whose jurisdiction exposure is not desired. There are several enabling procedures, beginning with the technical ability to block undesired internet and email addresses by way of geographic identification, for instance, .de (Germany), .fr (France) etc. Although .com, .net. or .edu servers do not pinpoint the location of a server or the consumer and proxy servers can be used to log-on anonymously, the business's ability to control its legal transactions is not negated.

If a business wishes to avoid the requirements or enforcement mechanisms of a particular sovereign state, it can exclude or "de-target" that jurisdiction by placing a disclaimer on its website, notifying the boundaries of its sales territories and informing buyers from certain countries not to place any orders with them. American case law (eg *Miller v Asensio*, 101 F.Supp 2d 395, 405 (DSC 2000)) as an example of cases rejecting jurisdiction based on the availability of a passive website, and guidance issued by administrative agencies such as the Securities and Exchange Commission is refining formulae for targeting and de-targeting.

A business which conducts a transaction with someone from a restricted country would lose any protection it may have claimed against an undesired jurisdiction, thus the trader must also investigate the identity and place of domicile of its contracting partners. A buyer's email address does not provide reliable information: the trader can only rely on information provided to it by means of a form integrated into the website requiring particular details from buyers prior to processing of the order, or from delivery details. A buyer could provide false information, however, that would negate any jurisdictional protection she/he may have had before and the contract could be set aside for abuse of law.

Individually, self-protection mechanisms, such as a disclaimer, use of a particular language, use of a password or a particular mode of payment, do not provide the online trader with a sufficient geographic limitation. Yet together, they identify that the business has a limited sales territory which is intended to exclude buyers out of certain jurisdictions.

Online traders protest that the costs of self-protection measures are high and difficult to instate, particularly as they have to examine every customer's place of residence, as well as the legal systems of their countries of domicile. Not only was this already necessary under the Convention, but it is the reflected result that an online trader faces when expanding his/her business via unconventional means. Businesses online have the opportunity to develop an international identity and to expand their customer base whilst still conducting business by conventional means. This, whilst simultaneously having workable mechanisms at their disposal for self-protection, which can only further encourage and stimulate B2C e-commerce. The costs of self-protection are significantly lower than the costs of international litigation.

Nevertheless, there are self-protective mechanisms which either do not cost the online seller anything or which distribute the costs amongst the parties. An excellent example of which is "ebay law". Ebay, the worldwide auction site offers "iEscrow", which allows purchasers to escrow their payments until they accept delivered merchandise to protect the interests of both buyer and seller in international transactions in which there is a risk of non-performance on one side or the other. (http://pages.ebay.com/help/community/escrow.htm/)

It ought not to be forgotten that for all the advantages which community law provides consumers domiciled within the EU, few can actually afford to sue a business, and are unlikely to do so where the value of the disputed item or service is low. That is a significant benefit for businesses, and one which balances out any advantages community law grants consumers. ❑

UNDERMINING THE GRUNDNORM?

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ask whether R v Pora *strikes at the roots of our constitution*

Lawyers educated in the common law tradition have always been uncomfortable with statute law. Statutes are often perceived as politically partisan bodies of rules hastily grafted onto the serene common law landscape. This disquiet has, paradoxically, been accompanied by an acceptance of the supremacy of statutes over the common law. In the last quarter century, this orthodoxy has come under repeated assault, with academics and Judges asserting the authority of the judiciary to strike down legislation that breaches "fundamental" principles. (See for example *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394; Laws, "Law and Democracy" [1995] PL, 72.) The Court of Appeal decision of *R v Pora* [2001] 2 NZLR 37 continues this trend, implicitly questioning parliamentary sovereignty.

A challenge to legislative supremacy, the core political and legal fact that underlies our constitutional order, arose out of "home invasion" amendments. These were first considered by the Court of Appeal in *R v Poumako* [2000] 2 NZLR 695. Following *Poumako*, the Court was castigated for failing to clarify the scope and application of the amendments, and failing to consider the constitutional implications of its decision. (See MacDonald and Pilditch, "Retrospective home invasion penalties" August 2000 *LawTalk* (546), 13; Joseph, "*R v Poumako* – a pot-pourri of constitutional issues", [2000] *NZ Law Review* 301; Scorgie and Killeen, "*R v Poumako*" [2000] NZLJ 429.)

In *Pora*, the Court again had to consider the retrospective effect of these amendments. Despite being heard by a full Bench of the Court of Appeal, *Pora* does nothing to clarify the situation, particularly for lower Courts faced with similar situations.

THE "HOME INVASION" AMENDMENTS

The "home invasion" amendments are contained in two separate statutes: the Crimes (Home Invasion) Amendment Act 1999 ("CHIAA") and the Criminal Justice Amendment Act (No 2) 1999 ("CJAA"). The effect of the CHIAA was to insert a definition of "home invasion" into the Crimes Act 1961 and to raise the maximum penalties for specified offences involving home invasion. The CJAA amended s 80 of the Criminal Justice Act 1985 ("CJA") by raising the minimum non-parole period for murder from ten to thirteen years in cases involving home invasion.

The section causing the controversy is s 2(4) of the CJAA. It states:

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

Section 2(4) purports to give s 80 retrospective application; the newer (and harsher) penalties apply even if the offences occurred before the amendments came into force.

The principle of non-retrospectivity

It is a cardinal principle of the rule of law that a citizen should be able to rely on the law as it was when he or she acted. Thus, retrospective legislation, which changes legal rights and obligations ex post facto, is generally regarded as abhorrent. The retrospective imposition of criminal liability, or the imposition of a heavier penalty after the offence has been committed, is considered especially pernicious.

This principle of non-retrospectivity is manifest in ss 25(g) and 26 of the New Zealand Bill of Rights Act 1990 ("NZBORA"), s 7 of the Interpretation Act 1999, and art 15(1) of the International Covenant on Civil and Political Rights ("ICCPR"). Most significantly, the principle is embodied in s 4(2) of the CJA. This section provides:

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

Therefore, there would seem to be a direct inconsistency between s 2(4) of the CJAA and s 4(2) of the CJA. In light of this apparent inconsistency, the Courts in both *Pora* and *Poumako* have had to determine the effect, if any, of s 2(4) of the CJAA.

R v Poumako

In *Poumako*, the majority of Richardson P, Keith and Gault JJ determined the issue by narrowly construing the amendments. They interpreted s 2(4) as only having retrospective effect to the point in time when the concept of "home invasion" entered the law. This meant retrospectivity was limited to the 15 days between the passing of the CHIAA (which created the definition of "home invasion") and the CJAA (which includes s 2(4)).

Henry and Thomas JJ both wrote separate judgments. Henry J's view was that, despite the general presumption against retrospectivity, s 2(4) of the CJAA was clearly intended to have retrospective effect. There was no ambiguity which could allow the operation of s 6 of the NZBORA. Henry J did not accept the majority's argument that s 2(4) could be given limited retrospective effect. He noted the definition in the CHIAA simply set out the combination of facts that together constitute "home invasion". It was irrelevant whether this definition was retrospective or not. What was relevant was whether s 80(2A) of the CJA, which incorporated the definition of "home invasion", had retrospective application by virtue of s 2(4) of the CJAA. In Henry J's opinion, the clear words of Parliament had to prevail.

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

In his view, nothing less than a formal declaration that s 2(4) was inconsistent with the NZBORA would suffice to maintain constitutional integrity; obiter statements lacked the force needed to express requisite judicial disapproval. According to Thomas J, this was an appropriate case for a declaration of inconsistency.

Thomas J was not convinced s 6 of the NZBORA could be used to support an interpretation which did not accord with Parliament's intent. Such an approach was inconsistent with s 4 of the NZBORA. In his words:

> [81] ...
>
> To attribute to a statutory provision which is neither equivocal nor malleable in its terms a meaning which is admittedly contrary to Parliament's discernible intent is to effectively challenge Parliament's primacy.

THE DECISION IN *PORA*

The facts of *Pora* were more complex than those of *Poumako*. It is convenient to lay out a chronology of the key events in *Pora*:

23 March 1992 – Pora is a party to the rape and murder of Susan Burdett in her home.

1 September 1993 – Criminal Justice Amendment Act 1993 creates minimum non-parole periods for serious offences.

1 July 1994 – Pora found guilty of murder and sentenced to life imprisonment.

2 July 1999 – Crimes (Home Invasion) Amendment Act 1999 passed.

17 July 1999 –Criminal Justice Amendment Act (No 2) 1999 passed.

18 October 1999 – Pora's conviction is set aside on appeal and a new trial ordered.

23 June 2000 – A new sentence of life imprisonment with a minimum non-parole period of 13 years is imposed after a second conviction.

The rape and murder of Susan Burdett within her home clearly came within the definition of "home invasion" and, accordingly, the Court had to consider whether it was obligated to sentence Pora to a minimum non-parole term of 13 years' imprisonment. This was a penalty that could not have been imposed when Pora committed the crime. Thus, the Court had to decide whether, and to what extent, the home invasion amendments applied retrospectively.

High Court

Williams J held the amendments applied retrospectively without temporal limit. He declined to follow the majority decision in *Poumako*, finding Henry J's analysis more convincing. Like all the Courts that have considered this issue, Williams J considered it to be fundamentally contrary to justice to impose a higher sentence on the appellant than could have been imposed at the time of the commission of the offence. Nonetheless, he felt compelled to apply Parliament's clear words and sentenced Pora to life imprisonment for murder, with a minimum non-parole period of 13 years.

Court of Appeal

The appeal was heard by a full Bench, seemingly recognising the need for an authoritative decision to end the uncertainty. The Court unanimously allowed the appeal, but was divided over the extent to which s 2(4) had retrospective application. Elias CJ, Tipping and Thomas JJ considered the section had no retrospective effect whatsoever. Keith, McGrath and Blanchard JJ held the section had retrospective application to 1993. Richardson P relied on Keith J's reasons to allow the appeal but expressed no view as to whether the section applied retrospectively between 1993 and 1999.

Elias CJ and Tipping J

The joint judgment of Elias CJ and Tipping J, delivered by the Chief Justice, opens with the statement that "[i]n the Criminal Justice Act 1985 Parliament has said two inconsistent things". The assumption is that two presumptively equal sections within the CJA, s 4(2) and the s 80(2A) as amended by s 2(4), are inconsistent. This assumption shapes Her Honour's entire judgment. Elias CJ conceded there was no ambiguity in s 2(4) that would allow the two inconsistent sections to be reconciled. She then proceeded to determine which of the two sections should prevail.

After citing s 7 of the Interpretation Act 1999 and ss 25(g) and 26 of the NZBORA, Elias CJ contended one should not be quick to infer Parliament intended to act in breach of human rights obligations.

The judgment then proceeded to consider, and dismiss, orthodox means of resolving inconsistencies between statutory provisions. First, Elias CJ examined the lex posterior derogat priori principle. This principle requires earlier provisions to be treated as impliedly repealed to the extent they are inconsistent with later provisions. The Chief Justice dismissed this approach as being too formulaic. She then dealt with the generalia specialibus non derogant principle: general words in a later provision do not repeal earlier provisions dealing with a specific subject. Again, Elias CJ asserted the current problem of statutory interpretation could not be answered by resort to old legal maxims.

The legislative history of the section is also briefly examined. Elias CJ suggested Parliament simply did not understand what it was doing when it passed s 2(4); it was implausible to believe Parliament would knowingly act in breach of the NZBORA and its international obligations.

Elias CJ concluded that within the scheme of the CJA, s 4(2) was the dominant provision. The amended s 80 was subordinate. Therefore, s 4(2) prevailed and s 2(4), which amended s 80, was of no effect. In Her Honour's view, this did not erode parliamentary sovereignty because the enactment of s 2(4) by Parliament was not a clear expression of intention to derogate from s 4(2).

Thomas J

Thomas J's judgment, which is entitled "Taking rights seriously", begins by briefly traversing the Court of Appeal's NZBORA jurisprudence. Like the Chief Justice, Thomas J held s 4(2) prevailed over s 2(4). This result was mandated by a rights-centred approach to interpretation, which in His Honour's opinion the Court in the modern era should choose to adopt. This stands in contrast to Gault, Keith and McGrath JJ's reliance on the traditional canons of construction. His Honour contends such an interpretative model does not challenge Parliament's supremacy, rather, "it provides a barrier against inadvertent legislation which would have the effect of abridging human rights" (at para [121]).

The learned Judge praises the Chief Justice's judgment. His own judgment substantively accords with that of Elias CJ and Tipping J. Thomas J's position in *Poumako* and *Pora* makes for an interesting juxtaposition. It would appear that he has changed his mind as to the clarity of Parliament's intention as regards s 2(4).

Gault, Keith and McGrath JJ

Keith J delivered a joint judgment that allowed the appeal on the narrow ground that the power to fix a mandatory non-parole period did not extend to offences committed before that power was first conferred. The provision that conferred the power to fix a mandatory minimum period only came into force after 1 September 1993. According to Keith J, this meant s 2(4) could only be retrospective back to 1 September 1993. Therefore, the increased mandatory non-parole period could not be applied to Pora.

His Honour noted, as did all the Judges, the importance of international and statutory instruments that embody the principle of non-retrospectivity. However, Keith J considered there was no doubt, when looking at the text of s 2(4) and the statement of the member of Parliament who promoted that section, that Parliament intended to abrogate the principle. In Keith J's words, at para [107], "Parliament clearly directed the Courts to apply the new powers in respect of home invasion murders committed earlier".

COMMENTARY

Three of the six Judges who expressed an opinion on the matter concluded s 2(4) had no retrospective effect. With respect, this cannot be correct. Nor do we find the position of Keith, Gault and McGrath JJ entirely convincing. We prefer Henry J's argument in *Poumako*, at paras [44] to [69], namely that it does not matter when the power to impose minimum non-parole periods came into existence. Parliament has instructed the Courts to use that power, which exists now, and apply it to offenders who come up for sentencing now, regardless of when they committed the offence. The instruction in s 2(4) cannot be tied to when the power to impose minimum non-parole periods came into existence. There is no logical connection between them.

Points of disagreement

None of the judgments in *Pora* is persuasive in its interpretation and application of s 2(4). In particular, the views of Elias CJ, Tipping and Thomas JJ require detailed consideration. Close analysis is warranted because although they acknowledge Parliament can abridge human rights by expressing its intention clearly, in our opinion, they decline to apply a law that is clearly intended to abridge a human right.

As the judgments of Elias CJ and Thomas J are substantively the same, this commentary focuses on the Chief Justice's judgment. We have three specific points of disagreement with Her Honour's argument. First, she rejects the principle that an earlier statutory provision is impliedly overridden to the extent of its inconsistency with a later provision. If that principle were applied here, the earlier provision, s 4(2), would be impliedly overridden to the extent of its inconsistency with the later provision, s 2(4). The result would be that s 4(2) still prevents the retrospective application of heavier penalties, except where the retro-spectivity applies pursuant to s 2(4).

The Chief Justice's view renders s 2(4) nugatory. The section becomes devoid of any meaning or purpose because it is subordinate to s 4(2). The amending subsection does not in fact amend the CJA. This is a strange result.

This outcome is based on Elias CJ's description of the inconsistency between s 4(2) and s 2(4) as a clash between two sections in the same Act. This allows Her Honour to treat the sections as presumptively equal. However, s 2(4) appears in the CJAA enacted in 1999. The long title of the CJAA declares it to be "An Act to amend the Criminal Justice Act 1985". Therefore, we are not dealing with two inconsistent sections within the same Act. We are dealing with an inconsistency between a specific, unambiguously worded section in an amending Act passed fourteen years after the principal Act, and a section in the principal Act. The clear words of s 2(4), and its place in an amending Act, permit only one inference: s 4(2) is impliedly repealed to the extent of its inconsistency with s 2(4). This conclusion follows from an acceptance of parliamentary sovereignty.

Second, Elias CJ rejects the application of the principle that the general does not override the specific. Where statutory provisions are inconsistent, it is presumed the provision enacted later in time will prevail. An exception to this presumption arises where the later provision is general, and the earlier provision specific. We infer Parliament did not intend the later provision to repeal the earlier provision. Thus, the later general provision applies except where it is inconsistent with the earlier specific provision. The Chief Justice does not use this rule in *Pora*. If this rule were applied, s 4(2) could not be saved from implied repeal: s 2(4) is a specific provision enacted after s 4(2), a general provision.

There is authority for the proposition that the special character of human rights legislation can sometimes justify a departure from this rule. Elias CJ cites *Re Winnipeg School Division (No 1) and Craton* (1985) 21 DLR (4th) 1 in support of this. Craton was employed under a contract requiring her to retire at age 65. She contested the validity of her contract. This revealed an inconsistency between Manitoba's Public Schools Act 1980, which allowed school divisions to stipulate a mandatory retirement age, and Manitoba's Human Rights Act 1974, which prohibited age discrimination. On the orthodox view, the later and specific Public Schools Act should have prevailed. McIntyre J held otherwise, at p 6:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended or repealed by the Legislature. It is however of such nature that it may not be altered, amended or repealed ... save by clear legislative pronouncement.

Craton can be distinguished from *Pora* because the clear legislative pronouncement of which McIntyre J speaks is present. Section 2(4) unambiguously instructs the Courts to apply the increased minimum non-parole period retrospectively.

Third, we disagree with the Chief Justice's use of legislative history. Effectively, her position is that if Parliament had properly considered the implications of s 2(4), the section would never have been enacted. We agree. But this is not a valid reason for declining to apply a statute. The section was enacted. Parliament's words and intention are clear. What Parliament would or should have done if it had thought things through has no effect on the legal validity of a clearly worded enactment.

Taking rights too seriously?

One must pause to consider why three Judges would decline to apply a clear expression of legislative intent. Perhaps it is due to increasing judicial cognisance of the importance of human rights. International human rights documents and the NZBORA feature strongly in the judgments of Elias CJ, Tipping and Thomas JJ. For example, at paras [49] to [50], the Chief Justice states:

> The language of s 4 and its prominence in the Criminal Justice Act indicate that it is a dominant provision. Section 2(4) of the amending legislation is irreconcilable with s 4. Being subordinate, it must give way.
>
> This interpretation, being tenable, is one the Court is required by s 6 of the New Zealand Bill of Rights Act to adopt.

The NZBORA was passed some ten years ago. Originally intended as supreme law, the Act was eventually passed as an ordinary statute. Despite this, the Act has had considerable impact on New Zealand law. Of particular importance is s 6, an interpretative direction to Judges:

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

Elias CJ uses this section to reinforce her holding that s 4(2) of the CJA prevails over s 2(4). She considers this interpretation affirms the rights in ss 25(g) and 26 of the NZBORA. Therefore, her interpretation is to be preferred to the alternative, which would give effect to s 2(4) of the CJAA and thus abrogate rights.

Section 6 cannot be read in isolation. It must be read in concert with the other operational sections, ss 4 and 5. (See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 and Rishworth "Affirming the Fundamental Values of the Nation: How the Bill of Rights affects New Zealand Law" in Huscroft and Rishworth (eds) *Rights and Freedoms* (1995).) Section 5, which allows reasonable limits to be placed on rights, is not of immediate relevance here. It suffices to say no Judge has ever considered s 2(4) to be a reasonable limit on rights

That is not the end of the matter. Section 4 of the NZBORA provides:

> No Court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), –
>
> Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.

The section is directed specifically at Judges. When faced with a statute the Judge believes unreasonably limits rights, s 4 of the NZBORA stipulates the Judge must nevertheless apply the statute, unless an alternative interpretation, which does not unreasonably limit rights, exists. If such an interpretation can be found, s 6 directs the Judge to prefer it. But any such interpretation must be plausible.

Elias CJ, Tipping and Thomas JJ held s 4(2) prevailed over s 2(4). The Chief Justice argued this construction was consistent with the NZBORA and therefore she was required by s 6 to prefer it. In our view, Her Honour's construction is not plausible. It depends upon the setting aside of standard rules of statutory interpretation and it deprives s 2(4), a specific subsection in an amending Act, passed fourteen years after the principal Act, of any effect. Section 4 of the NZBORA expressly forbids precisely this. (See Henry J in *Poumako*, para [57].)

Parliament clearly intended s 2(4) to apply retrospectively. That requires an exception be made to s 4(2). We agree with Keith J's observations at para [116]:

> We do not deny of course that s 2(4) of the 1999 Act, as we interpret it, is a serious breach of a fundamental rule of our legal and constitutional system and of New Zealand's international obligations. We agree that we should strive to interpret legislation consistently with that fundamental principle, the presumption about interpreting legislation consistently with international obligations, the strong wording of s 4 and the direction of s 6 of the Bill of Rights all require that. But Parliament's words and purpose are, we consider, so plain that we do not think that the breach can be removed by judicial interpretation.

CONSTITUTIONAL CONUNDRUMS

The home invasion amendments are, in our opinion, extremely bad law. Our criticism has nothing to do with the fact they raise sentencing levels for serious crime – in our opinion this is long overdue. Rather, our complaint is that they create an unjustifiable distinction between victims of "ordinary" rapes and murders and victims of home invasions. Worse, the disparate sentences this law imposes have to be applied retrospectively. It is hard to muster a great deal of sympathy for Pora, but the retrospective imposition of an increased criminal sanction is repugnant to the rule of law. Every Judge who has considered this issue has regarded the legislation with abhorrence. In *Pora*, this view led members of the Court of Appeal to dispense with orthodox principles of statutory interpretation and thus unsettle the relationship between Parliament and the judiciary.

Our constitutional order is predicated on the notion of parliamentary sovereignty. The linchpin of our political and legal order is the simple rule that Parliament makes laws and no other person or body in the legal system has authority to call into question the legal validity of those laws. It has been popular in recent times to lambaste this doctrine. In the words of the Chief Justice, prior to her elevation to the Bench: "it seems to me that it is time to recognise that the notion of arbitrary parliamentary sovereignty represents an obsolete and inadequate idea of the New Zealand constitution". (Elias, "The Treaty of Waitangi and the separation of Powers in New Zealand", in Gray (ed) *Courts and*

continued on p 308

PROVING ABORIGINAL TITLE

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finds rules of expiry emerging in New Zealand and elsewhere

Throughout New Zealand Maori continue to assert and exercise customary rights. The character of these rights remains uncertain as does their legal status. The mahinga kai section of the Ngai Tahu Report (1992) indicated that flora gathering, bird trapping and fishing (freshwater as well as sea) and proper environmental management (such as the correct planting beside rivers) remain an integral part of Maori life. One can also add access to *urupa* (sacred sites), certain minerals (*pounamu*, for instance) and traditional waters (for non-fishery purposes). The full range of customary rights has not been identified or compiled, rooted as it is in actual Maori practice although the Ngai Tahu and other reports of the Waitangi Tribunal signal more extensive practice than is popularly realised or acknowledged.

The legal status of these customary rights also remains uncertain although statute has certainly modified any common law basis for customary fisheries. Once the sea fisheries claim was settled by legislation, it was thought that common law aboriginal title had become once again largely inapplicable to contemporary New Zealand. Presently working its way through the Courts, however, is a claim to a customary title – the statutory version of the fullest common law aboriginal title – over the Marlborough Sounds. Three years ago the Ministry of Justice, concerned that customary rights, lesser "non-territorial" forms of common law right – might continue in law to affect Crown and SOE land commissioned a report. The report concluded that these claims might well be sustainable at law but their success depended upon sufficient factual proof of the continuance of the right. There was – and remains – a vital difference between proof of an aboriginal title and its extinguishment, a distinction to which this article will return.

In *Te Runanganui o te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (at 24) the Court of Appeal suggested that there might be a common law aboriginal right to the flow of water. This was a new variety of aboriginal right, reminiscent of the water right long recognised by federal Indian law in America. It has been one the scope of which has not been explored in litigation despite the significance of its implication. Cooke P added that the removal of such a right "by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power". This case – and, to give another example, the respectful language of Blanchard J in *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 and in *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA) carefully saving his position on common law aboriginal title – show that New Zealand Courts may yet be called upon to consider the legal status of residual customary rights. The recent judgments of the Supreme Court of Canada in *Mitchell v MNR* (16 June 2001) accepted that there might be an aboriginal right of mobility across the American border. This, like Cooke P's observation in *Ika Whenua*, indicates that there may well be a range of common law aboriginal rights relating to land which Courts will recognise notwithstanding their nonconformity with conventional proprietary rights.

ABORIGINAL TITLE: LEGAL NOT HISTORICAL TRUTH

The common law is primarily a problem-solving mechanism that uses the past as a tool for resolving disputes in the present. All common lawyers know how to construct a legal argument marshalling authority (case-law in particular) in order to deal with the present problem. The problem at hand provides a grid that is superimposed over the past. The past (an explanation of the case-law) is thus constructed in terms of the demands of the present problem, a central technique of common law reasoning sometimes known as "presentism". But presentism, vital to common lawyers, is un-historical in that it reports the past according to a modern agenda and sense of priority that might not have existed at the time. A presentist historian supposes the existence of timeless questions (that are really his own) and rests on the possibility of re-educating the dead in the modern sensibility. Presentism is thus acceptable where we seek to resolve problems in today's world the way common lawyers do, for it is an indispensable and vibrant element of common law reasoning. Common lawyers have always re-educated their dead. But presentism is not a fair way of seeing or understanding a past that was as riddled with its own issues and sense of contingency as that which we feel today. Good law is not good history.

Presentism flourishes in aboriginal litigation, not least because this litigation is so immersed in the actual past (rather than the artificial one usual for common lawyers constructed entirely from case law). Frequently and perhaps understandably, litigation funnels the aboriginal peoples' historical experience into the particular issue(s) on which they are suing. This is because proceedings by aboriginal people against the Crown (including in New Zealand claims before the Waitangi Tribunal) involve not a momentary, single event or episode, as in most litigation, but a momentum of historical grievance. The aboriginal litigants' past becomes reconstructed in new, highly juridicalised terms that reproduce the priorities and elements of late twentieth century common law doctrine. This is a past in which their "aboriginal title" was never "lawfully extinguished" or, in Canada, one in which imperial and colonial officials did not follow minutely the requirements of the Royal Proclamation of 1763. It is a past re-educated by late twentieth century legal doctrine, a common lawyer's (and not a true historian's) past fashioned by the requirements of contemporary litigation. (This historiographical tendency is explained more fully in some of the essays in Sharp and McHugh eds, *Histories, Power and Loss* (Bridget Williams Books, forthcoming), notably the essays by W H Oliver and myself.)

In these vague reaches between the scope of the common law and the role of history we have recently had the following scenarios: Maori have claimed that the bed of the Marlborough Sounds remains customary title and, therefore, still in tribal ownership. Australian Aboriginal groups have claimed native title over land in northern Victoria and southern New South Wales, much of it encompassing the highly-populated and farmed Murray River. The Chippewa Indians of Ontario have claimed that most of the industrial town of Sarnia near the American border remains in their ownership, alleging that the procedures of the Royal Proclamation (1763) were binding on the Crown and not followed in the surrender of their title during the mid-nineteenth century. The connecting thread in all these claims is the claim to an aboriginal title over land that demonstrably is not in the use and occupation of the tribal claimants. The claimants are describing an aboriginal title over this land as though it was still subsisting on the basis of an alleged non-extinguishment of the title.

Two points must be made about such claims.

First, common law aboriginal title is not a historical truth, although the work of some writers – the early publications of this writer included – has tended to describe it as such. In the nineteenth century there was no doubt that imperial and colonial officials regarded native peoples as holding a lawful right to their lands that could not be extinguished without their consent. However, those officials did not live in a world where late twentieth century Judges had already described those rights as justiciable and enforceable against the Crown. These officials did not conduct themselves on the basis, congealed in their minds, of the late twentieth century legal doctrine. They were living in a highly deferential, loyalist and non-litigious world dominated by the Governor where modern notions of judicial review of public authorities were still a century away. Where redress in matters of government administration was concerned, the primary (and, effectively, sole) instinct of the colonial community was to petition rather than sue the Crown. So, in the Chippewa Indians of Sarnia example, the Royal Proclamation has been reconstructed unhistorically by aboriginal advocates (legal and historical) into a code that *applied to* the Crown, rather than being seen as it actually was, as principles *applied by* the Crown. In this example a nineteenth century sense of the Crown as the source of justice has been re-jigged into a decidedly modern legal view of the Crown as the subject of justice.

DV Williams' monograph on the history of the Maori Land Court *"Te Kooti Tango Whenua" – The Native Land Court 1864-1909* (Wellington: Huia Press, 1999) (at 24-32) is another example. The author deliberately uses a late twentieth century template (the retrospective "Treaty jurisprudence" of the Waitangi Tribunal) as a way of describing and interpreting the past. This is conscious presentism, concerned not with the integrity of the past – which was as contingent a world as that which we now inhabit – but with a contemporary agenda of claims resolution.

Secondly, common law aboriginal title was devised by the Courts as a way of responding to claims by native peoples to lands on which they continued to exert some presence or enduring association. Those rights might range from full use and ownership (sometimes called a "territorial aboriginal title"), through lesser rights analogous to third party rights such as hunting and fishing (sometimes called a "non-territorial aboriginal title"). The Courts did this by looking at the historical pattern of Crown conduct in which aboriginal peoples were treated as though they had a lawful right to their ancestral land. That historical pattern of dealing supplied the justification for characterisation of the aboriginal right as one that was now to be regarded as legal in character. The Courts were not saying that the historical actors had always regarded those rights as being "legal" in the modern sense, as that would re-write the past. Rather the Courts were saying that henceforth they would be so regarded in order to protect those rights of use and occupation that continued to be exercised. Common law aboriginal title was and remains concerned with protecting *extant* aboriginal use and association with land. It is essentially *preservative* rather than *restorative* in scope. It is modern doctrine designed to protect modern, continuing rights.

DISTINCT ISSUES OF FACT AND LAW

It is essential to distinguish (a) the facts necessary to commence a claim based upon an aboriginal title (the "factual matrix") from (b) the extinguishment of that title. In all the above claims there was insufficient factual matrix for the claim to an aboriginal title. If there is insufficient evidence of a continued aboriginal association with the land or waters in question by a traditional community, it is plain that a claim based on the common law title cannot proceed. This means that an aboriginal title can "expire" by usurpation or abandonment (say in the face of urban encroachment or displacement by recreational user) or disappearance of the traditional group. However, where such evidence of an unexpired title is successfully led, the question then becomes one of legal extinguishment. Extinguishment is an issue of law, expiry is an issue of fact. This article is concerned with expiry and recent judicial clarification of its scope.

Put this way the doctrine of aboriginal title has no role to play where there are no continuing rights it might protect. This means that an aboriginal title can expire (it is *not* extinguished, but lost) by usurpation, abandonment or disappearance of the group. Title loss by the first two methods is an unpalatable approach in most jurisdictions where the judicial recognition of aboriginal title has acquired political symbolism as well as legal consequence. In Canada the Royal Proclamation is immensely totemic and the loss of title by abandonment is seen as incompatible with that instrument, whilst in New Zealand such loss would be regarded as a breach of the principles of the Treaty of Waitangi. Further, a conclusion supporting loss of title by usurpation or abandonment cuts against the grain of the leading cases. Quite rightly, these cases realise their own historic importance when the Judges talk in heightened tones, often almost poetically, of the correction of years of legal neglect. However, it must also be recalled that all the leading aboriginal title cases concerned land in respect of which there was a clearly identified aboriginal presence and it was those continuing rights that formed the factual matrix for the claim and that were being judicially recognised.

FACTUAL MATRIX

What, one may ask, will be sufficient factual matrix to found a claim to aboriginal title? Effectively, the requirement of a continuing association comes down to two elements: "who?" and "what?" How must the collection of individuals or group claiming the association with the land identify itself? What type of association or presence must that identified group make out in relation to the land? These are questions that the Australian Courts have been considering recently and give a much clearer picture of the factual matrix necessary to support a common law aboriginal title.

The nature of aboriginal "tradition"

As the New Zealand Law Commission observes in its recent Study Paper on *Maori Custom and Values in New Zealand Law* (2001) (at para 47), it is now axiomatic that the common law doctrine of aboriginal title is based upon the legal recognition of the continuity of aboriginal laws subsequent to Crown sovereignty. This means that the foremost element in any claim to common law rights will be proof of tradition, as it affects identity of the group and its membership and the land or waters in question.

In *R v Van der Peet* [1996] 2 SCR 507 the Supreme Court of Canada took a restrictive view of native custom or tradition. The majority held controversially that the activity must be integral to the distinctive culture at the time of Crown sovereignty. This was an approach freezing the tradition to historic existence at a date linked to a moment in Anglo-legal time unconnected to actual native life. The Court backtracked in *Delgamuukw* when it adopted a more flexible approach towards territorial aboriginal title. However in *Mitchell* the Court returned to the *Van der Peet* test. McLachlin CJ (Gonthier, Iacobucci, Arbour and LeBel JJ concurring) held that a claimant must prove that a modern practice, custom or tradition has a reasonable degree of continuity with a practice, tradition or custom that was in existence prior to contact with the Europeans. The practice, tradition or custom must have been integral to the distinctive culture of the aboriginal people in the sense that it distinguished or characterised their traditional culture and lay at the core of the aboriginal people's identity. Hence although the Court agreed that trade was a distinguishing feature of Mohawk trade at the time of contact, it was not integral to their collective identity. This result shows the difficulties that come from the *Van der Peet* test. Even whilst the Supreme Court protested against Courts using Anglocentric legalism, it applied a test that required it to decide the core of aboriginal identity. The *Mitchell* judgment (which reversed the lower Court and Federal Court of Appeal judgments) will re-ignite the controversy sparked by *Van der Peet*.

In Australia, however, the Courts have adopted a more flexible approach towards native tradition whatever type of aboriginal title is involved. The Courts have followed the approach of the High Court in *Mabo (No 2)* which accepted the dynamic character of traditional law and custom (Deane and Gaudron JJ at para 110; Toohey J at para 192). In *Yanner v Eaton* (1999) 166 ALR 258, for instance, a motorised dinghy used to catch crocodiles and the storing of the carcass in a deep freezer was regarded as consistent with the traditional custom. In their joint judgment, Gleeson CJ, Gaudron, Kirby and Hayne JJ pointed out (at para 38) that native title rights and interests must be understood as "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right". This was a case of an established tradition being practised in a modern way, rather than the adoption of a new custom. In that regard the majority judgment of the New Zealand Court of Appeal in *McRitchie* appears fundamentally flawed in limiting the custom to a particular type of fish (indigenous only) rather than recognising the tradition as extending to the fishery irrespective of type.

Nonetheless, as the recent judgments of the Federal Court of Australia in *Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 have shown, that the line between continuation of tradition and the adoption of new customs is not always clear. In this case, the first major case under the Native Title Act, the trial Judge, Olney J, found that by 1881 those through whom the claimant group sought to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances within which they found themselves, ceased to observe laws and customs based on tradition. That dispossession had continued to the present time. Despite the genuine efforts of members of the claimant group (descended through two Aboriginal ancestors) to revive the lost culture, native title once lost was not capable of revival. Once the factual matrix for the title disappeared, full beneficial title to the land vested in the Crown. Therefore neither the group itself nor their association with the land displayed the necessary nexus with tradition to support native title:

> The evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title. (at para 129.)

On appeal the majority, Branson and Katz JJ, considered that the trial Judge's finding that there was a period of time between 1788 and the date of the appellants' claim during which the relevant community lost its character as a traditional Aboriginal community was a finding that it was open to the Judge to make. In their opinion no case had been made out for disturbing that finding.

Black CJ could not agree. He held that Olney J had taken too restrictive a view of what was "traditional" when finding that native title expired before the end of the nineteenth century. He referred to *Yanner* as an example of an adaptation of a traditional right. Once that was recognised, he added, it could also be readily appreciated how less physical or tangible manifestations of traditional laws and customs could be seen to be rooted in the past and to be traditional customs in the adapted form currently observed. Adaptations of this nature might manifest themselves in many ways including, to take one example, changed leadership structures within Aboriginal society. Thus, he held (at para 50):

> ... an application for the determination of native title will, ordinarily, involve the making of comprehensive

> findings of fact about what are claimed to be the traditional laws presently acknowledged and the traditional customs presently observed that provide the foundation for the asserted native title rights and interests. Such an approach will, obviously, involve an inquiry as to whether the laws and customs in question – which may very well be adapted or evolved laws and customs – are in fact "traditional" in the sense in which that concept is to be understood in this area of the law. A process that begins, however, with an assessment of what is claimed at the present time has the fundamental advantage of allowing adaptations and evolution to be seen for what they are and, in some instances, to be recognised at all.

The Chief Justice preferred to commence with a presumption as to the traditional quality of proven present-day practice, including group constitution and membership. That presumption might be disproved by evidence but it gave more credibility to contemporary Aboriginal evidence and lessened reliance upon (and Eurocentric preference for) the evidence of nineteenth century writers whose cultural disposition could hardly be described as neutral.

"It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title"

The Court's division on what will be regarded as "traditional" for the purposes of proving aboriginal title will probably be resolved in the High Court of Australia. The approach of the Chief Justice gives more integrity to the trial hearing by relying upon the evidence of living persons. Olney J had relied heavily upon the written observations of a pastoralist, Curr, who had written in the early nineteenth century of the "disintegration" of local Aboriginal culture, a view confirmed by a missionary Daniel Matthews who had settled in the area in 1864. Yet, to the Chief Justice's obvious discomfort (at para 20), Olney J had concluded that oral testimony "was a further source of evidence, but being based upon oral tradition passed down over a period of 200 years, less weight should be accorded to it than to the information recorded by Curr". Olney J found that there was no written evidence of any further Aboriginal dominion over the land subsequent to that time. He added that the petition of the Aboriginal residents at Maloga in 1881 for a land grant was itself proof that this discontinuance of traditional association had occurred. On appeal the Chief Justice was clearly unnerved by the trial Judge's reliance upon these three sources, none of which might be described as disinterested, and in the face of strong oral evidence. One sympathises. Aboriginal peoples are hardly likely to have faith in a process designed to recognise their rights if the application of the law is confounded at trial by restrictive approaches to findings of fact. This is particularly so where those approaches rely upon settler sources and display scepticism towards the aboriginal. Such judicial approaches would appear to perpetuate and pour into a legal mould the historical experience from which native peoples are trying to escape.

Membership of the aboriginal group

So far as the identity of the claimant group was concerned, Brennan J in *Mabo (No 2)* said:

> Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

Claimants to an aboriginal title must establish juridical identity through those core elements of biological descent and mutual recognition. It is plain, however, that these requirements are questions of fact determined by reference to customary law. In *Western Australia v Ward* [2000] FCA 191 the Federal Court indicated that biological descent did not necessitate strict patrilineality (para 232). Those individuals who had by custom been adopted in or otherwise opted in through other blood lines would be regarded as part of the community. The Court endorsed the trial Judge's willingness to include those with a "broad spread of links with ancestors" (at para 234) who were recognised by the community. In short, the criterion for juridical identity was not one of strict hypo-descent, so much as the self-identifying activity of the group itself. In *Yorta Yorta* the trial Judge emphasised (at para 129) that though there was a descent group (from the two Aboriginal ancestors) they had not displayed any continuity in the exercise of tradition to receive juridical identification.

Association with the land

The question of the degree of continuing association that must be made out in relation to the land itself has become more problematic. In *Mabo (No 2)* Toohey J said:

> The requirements of proof of traditional title are a function of the protection the title provides. It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connexion with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of the title and which attracts protection, and it is that which must be proved to establish title. Thus traditional title is rooted in physical presence. That the use of land was meaningful must be proved but it is to be understood from the point of view of the members of the society.

Actual physical presence, then, seems to be an indispensable element of a claim to aboriginal title.

This raises the question as to what type of physical presence will be sufficient factual matrix. In *Yorta Yorta* the majority of the Federal Court was not prepared to dislodge the trial Judge's view that contemporary activity was not traditional in character (see Black CJ at para 25). Olney J found that the "main thrust of contemporary activity by members of the claimant group has to do with the protection of what are regarded as sacred sites and the proper management of the land". He referred to oven mounds, shell middens and scarred trees, but concluded that whilst these provided evidence of indigenous occupation and use of land, there was no evidence to suggest "that they were of any significance to the original inhabitants other than for the utilitarian value, nor that any traditional law and custom require them to be preserved". Likewise, he considered that the contemporary practice of conservation of food resources should not be regarded as the continuation of a traditional custom. Fishing was currently engaged in as a recreational activity, rather than as a means of sustaining life. The Judge also referred to the evidence of witnesses to the effect that, consistent with traditional laws and customs, it was their practice to take from the land and waters only such food as was necessary for immediate consumption. His Honour's observation about this practice was that it was not one which, according to Curr's observations, was adopted by the Aboriginal people with whom he came into contact and it could not be regarded as the continuation of a traditional custom. He observed, too, that the applicants readily conceded that they and their forbears had long since ceased to observe traditional practices in relation to initiation or to perform other ceremonial activities, indicative of spiritual attachment to the land. Moreover, whilst the preservation of Aboriginal heritage and conservation of the natural environment were worthy objectives, "the absence of a continuous link back to the laws and customs of the original inhabitants" deprived those activities of the character of traditional laws acknowledged and traditional customs observed in relation to land and waters.

These findings take a reductive approach towards the nature of contemporary Aboriginal use. They seem to work against those tribal societies that have become more absorbed into a western lifestyle.

Meanwhile eleven months earlier, in *Ward v Western Australia* a differently constituted Federal Court had taken a different position, relied upon heavily by Black CJ in his dissent in *Yorta Yorta*. The Court said:

> In some areas of concentrated settler activity the reasonable inference is that Aboriginal presence became impracticable, save as people employed in the pastoral enterprises that had moved on to their lands. The evidence paints a clear picture of it being impracticable after European settlement for members of the indigenous population to maintain a traditional presence on substantial parts of the determination area. However, it does not follow that the surviving members of the indigenous population have not substantially maintained their connection with the land. (at para 241.)

A continuing connection might be proven in relation to land over which no actual presence is maintained (at para 244):

> Actual physical presence upon the land in pursuit of traditional rights to live and forage there, and for the performance of traditional ceremonies and customs, would provide clear evidence of the maintenance of a connection with the land. However, the spiritual connection, and the performance of responsibility for the land can be maintained even where physical presence has ceased, either because the indigenous people have been hunted off the land, or because their numbers have become so thinned that it is impracticable to visit the area. The connection can be maintained by the continued acknowledgment of traditional laws, and by the observance of traditional customs. Acknowledgment and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, in so far as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation. Evidence of present members of the community, which demonstrates a knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.

Proof of this connection of responsibility and spirituality will be a question of fact determined at trial.

The claim to native title in *Ward* had encompassed Lake Kununurra and Lake Argyle which had been flooded in 1962 and 1977 respectively. However, the Court commented:

> The inundation of the areas by water makes it impracticable to enjoy native title rights and interests in so far as they involve activities ordinarily carried out by physical presence on the land. However, by continuing to acknowledge and observe traditional laws and customs involving ritual knowledge, ceremony and customary practices, the spiritual relationship with the land can be maintained. In our opinion it was open on the evidence for the Judge to hold that this was the case in respect of the areas covered by the lakes. (at para 252.)

There is now clear authority for the proposition that a common law aboriginal title does not require actual physical presence, but can be shown by proof of retention of cultural responsibility and spiritual association over land. However, there remains the problem of squaring *Ward* and *Yorta Yorta*. That might only be possible by the dubious and culturally-loaded explanation that the Aboriginal peoples in the latter case had been so overwhelmed by settler society that all sense of "tradition" had disappeared.

It is possible, therefore, for aboriginal rights to exist in relation to land despite the apparent absence of actual remnant use. The Australian test is one of association with the land rather than actual exploitation or proprietary-like conduct.

Beyond aboriginal title – the fiduciary duty of the Crown

It does not follow that there is no aboriginal redress where there is no factual matrix for an aboriginal title. The doctrine of Crown fiduciary duty has not yet been fully argued in contexts where thorough displacement has occurred, although during the 1980s it seemed the obvious line for judicial exploration. At present the Crown fiduciary doctrine remains notably unformed. The doctrine holds that the Crown has fiduciary duties in relation to aboriginal peoples and that it is accountable before the Courts for its performance of those duties, particularly in relation to its protection of their land rights. Like common law aboriginal title this doctrine is not historical truth, for until the changed sense of the scope of public law of the past quarter-century, it was inconceivable that the Crown might be sued for breach of its protective duties towards aboriginal peoples. However, in certain conditions actions against fiduciaries are not subject to limitations, although this position has been modified in the Maori context by s 361 of Te Ture Whenua Maori Act 1993. This provision applies the limitation rule to actions against the Crown on Maori customary title, but its actual scope remains unexplored by the Courts. It is established in Canadian law that the Crown can be held liable for breach of fiduciary duty in the management of the common law aboriginal title. There would seem also to be no reason why the doctrine could not be extended into situations where that title has expired as a result of Crown mis-management as fiduciary. The crucial element in this cause of action is that it is not dependent upon maintenance of some relation with land (as in common law aboriginal title) but proof of its involuntary loss. Damages or some financial remedy will be the object of litigation.

Which brings us finally to the *Chippewa Indians of Sarnia* case (Ontario Court of Appeal, 21 December 2000). In November 1839, Malcolm Cameron, a politician and land speculator, purported to purchase the disputed lands from the Chippewas. The lands were eventually conveyed to him by Crown patent in 1853 ("the Cameron patent"). The present occupants of the disputed lands included much of urban and industrial Sarnia and traced their title to the Cameron patent. The Chippewas claimed that their ancestors never surrendered the disputed lands according to the procedure of the Royal Proclamation of 1763 and that their interest in the land remained as it was in 1827. They commenced an action for an unextinguished aboriginal title, claiming restoration of the land, as well as an action in damages against the Crown. The action on the aboriginal title was dismissed. The Court found that regardless of the legal status of the Proclamation of 1763, the Chippewas had consented to the sale and that their aboriginal title had therefore been extinguished. More simply, however, the Court could have held that there was no factual matrix upon which any claim to a subsisting aboriginal title could proceed. However, the Court did not strike out the action for damages, ruling that limitations or laches did not bar the claim. There was evidence of major infirmities in the way the Crown had handled the transaction, including conflict of interest in its representatives. These issues will be heard when the case comes to full trial.

The *Chippewas of Sarnia* case suggests that action will lie in damages against the Crown for historical injustices that have resulted in the physical displacement or loss of land by aboriginal peoples where no express statutory authority can be found. Just as there is a presumption against the legislative extinguishment of aboriginal title, there may also be a presumption of compensation or entitlement to damages (a legal right) unless it can be shown that that also has been extinguished completely by plain and clear statutory words. A notorious New Zealand example of such complete statutory extinguishment would be the *raupatu* (confiscation) legislation passed during the late nineteenth century. Thus the two related questions of the extinguishment of aboriginal title and the extinguishment of the right to compensation or damages (for Crown breach of fiduciary duty) would use a virtually identical test and remain questions of law.

CONCLUSION

The flurry of Commonwealth case law on common law aboriginal rights indicates that the Courts will recognise and protect those traditional rights according to their proven character. A jurisprudence is emerging of the evidentiary and factual elements necessary to attract this legal recognition. Once that is established, judicial attention should then turn to the separate issue of legal extinguishment and, if that has occurred, the right to compensation. When New Zealand Courts are called upon to recognise a claim to customary rights the case law in Australia and Canada will be informative. ❑

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Policy: Checking the Balance (1995), 224.) It is beyond the scope of this article to comprehensively canvass the debate on this topic. (For an exposition on the historical and philosophical bases of legislative supremacy, see Goldsworthy, *The Sovereignty of Parliament* (1999).)

A combination of repugnance towards this undesirable legislation and disdain for the doctrine of legislative supremacy is, in our opinion, evident in the judgments of members of the Court of Appeal. Elias CJ, Tipping and Thomas JJ publicly affirm Parliament's supremacy, but their judgments effectively nullify the problematic amending section. The fact this judicial invalidation is exercised in the name of Parliament's intention does not render it legally valid; it merely makes it harder to see. The Court of Appeal could have resurrected Lord Cooke's famous dicta and struck down the amendment for violation of deep-seated common law rights. If it had done so we would now be embroiled in a full-blown constitutional crisis.

In our view, while the Judges were certainly obliged to give effect to s 2(4), they could also have canvassed the possibility of a declaration of inconsistency with the NZBORA. In *Moonen*, [2000] 2 NZLR 9, the Court of Appeal discussed the possibility of a new remedy of a declaration of inconsistency. This had been foreshadowed soon after the passage of the Act. (See Brookfield "Constitutional Law" [1992] *NZ Recent Law Review* 231; Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] *NZ Law Review* 43.) Such a declaration is a pronouncement by the Court that, having gone through its NZBORA analysis, the legislation in question is, in the Court's view, an unreasonable limit on a right or rights contained in the NZBORA.

Pora would have been a paradigmatic case for declaring inconsistency. An explicit declaration could prompt Parliament to reconsider the issue and possibly repeal the offensive amendments. Then again, it might not. If Parliament ignores the declaration, the Judge remains under a duty to apply the law, personal opinion on its merits notwithstanding.

Any politico-legal system that purports to offer its citizens the security of the rule of law must be structured around transparent, determinate lines of authority. The locus of power in the system must be clear and there must be a predictable and explicable connection between the corpus of legal rules and principles and any particular legal conclusion. If that nexus does not exist, and if it is unclear who exercises ultimate authority, then the law is neither supreme nor certain. Law does not govern; officials who purport to act legally govern. Whether one likes or loathes the idea of parliamentary sovereignty, it is the doctrine that underpins the legal system – what Parliament enacts is law and the Courts must apply it.

When the Courts abandon that doctrine, or attempt to erode it, they undercut the democratic legitimacy of the legal system. The entire point of having a representative legislative assembly elected by the populace is not that it will necessarily make better law than would a clique of Judges or academics, but that it gives the people an avenue to control what is or is not law. When Judges use "rights talk" as justification for refusing to implement the clear intention of Parliament, they eviscerate the rule of law and democracy by asserting an authority they do not possess. The peril of such judicial activism was best stated by Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, at 157:

> It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if Judges, under the guise of interpretation, provide their own preferred amendments to statutes. ❑