CASE COMMENT

COOK ISLANDS ELECTION PETITIONS (NO. 2) (As yet unreported)

> . . . I have been involved in extensive research into the law apposite to these matters before me and I have been unable to find any reported instance in the history of electoral laws of New Zealand, Australia or the United Kingdom where the corruption was of the magnitude as is evidenced here (p.64)

Thus, the Chief Justice of the Cook Islands in the second of two judgments delivered on election petitions which challenged the election of a total of ten members of the Cook Islands Legislative Assembly. The consequence of these determinations was the unseating, in each case, of the sitting member and with respect to nine of the seats, the substitution of candidates who had been unsuccessful on election day. Petitions challenging the election in the constituency of Mitiaro (not further discussed in this note) which relied on different facts from those forming the basis of all the other petitions, were successful to the extent of securing a by-election. In political terms, the result was a change of government. This latter fact was what gave the decision of Donne C.J. its momentous and unique aspect. As far as the underlying law was concerned however, little new ground was covered. The Cook Islands Party members who lost their seats did so for infringing electoral law which had long been established in the common law before finding expression in statute throughout the Commonwealth, including the Cook Islands Electoral Act 1966.

The facts on which the petitions were based are widely known. Donne C.J. found that a scheme had been devised by a former Cabinet Minister, Dr J. Williams, which involved the flying-in of Cook Islanders living in New Zealand to vote at the election. Apart from a charge of $20 per head towards food and drink to be supplied on the journey, the transport was to be free. To finance the scheme, Sir Albert Henry sought the assistance of a Mr Finbar Kenny whose Cook Islands Development Company is the partner of the Cook Islands Government in the joint venture project known as the Cook Islands Philatelic and Numismatic Bureau. On 6 March 1978 a private company called the Cook Islands Government New Project Company Limited was incorporated in Rarotonga, with a capital of $1,000 divided into 1,000 shares of $1.00 each, 999 of which were subscribed by a Government Statutory Corporation. The directors of this company were all members of the Cabinet. Sir Albert then wrote on 13 March to the Director of the Philatelic Bureau, requesting $327,000 "to assist in the financing of a major project for the Cook Islands". This sum was to be "regarded by the Philatelic Bureau as an advance to the Government of the Cook Islands against 1978 philatelic revenue that [would] become payable

to the Government", (p. 8) and to be made payable to the Cook Islands Government New Projects Co. Ltd. After a series of banking transactions which need not be detailed here, the money was eventually paid into the A.N.Z. Bank account of Ansett Airlines. As a result, six flights brought 445 carefully screened voters to Raratonga to vote in the election and swing it in favour of the Cook Islands Party.

In the nineteenth century, election petitions were far more common than they are today. One reason for this was the fact that until the Ballot Act 1872 there was no secret ballot. After 1872 however, a steady stream of cases continued to come before the courts which had taken over the adjudication of election petitions, from Parliament, with the passing of the Parliamentary Elections Act 1868. Corrupt practices may have no longer been "rampant" (*Morgan* v. *Simpson* [1975] 1 Q.B. 151, 162 per Lord Denning M.R.) but they were still frequent enough to produce a large body of case law, as evidenced by the seven volumes of O'Malley and Hardcastle's reports on election cases covering the period 1869-1929 (not included in the English Reports). In the result, the modern petitioner has a fertile body of precedent on which to draw, which even in the extraordinary circumstances of the instant case, yielded up old cases of direct relevance.

It was in the nineteenth century too, that the first attempts were made to reduce the substantive law of corrupt practices to statutory form. The Corrupt Practices Prevention Act 1854 (U.K.) was the predecessor and in many respects the model of statutes at present in force both in the United Kingdom, New Zealand and the Cook Islands. As far as the definition of bribery is concerned there is little difference between sections 2 and 3 of the 1854 Act, section 99 of the Representation of the People Act 1949 (U.K.), section 141 of the Electoral Act 1956 (N.Z.) and section 69 of the Electoral Act 1966 (Cook Islands). In the last-mentioned statute the law is stated as follows:

> *Bribery* – Every person commits the offence of bribery who, in connection with any election – (a) Directly or indirectly gives or offers to any elector any money or valuable consideration or any office or employment in order to induce the elector to vote or refrain from voting. . .

There have been several cases in which the provision of travelling expenses to voters has been found by the courts to amount to bribery. The effect of these cases has been summarised in *Halsbury's Laws of England* (4th ed., Vol. 15, para. 770 at p. 421):

> The unconditional payment, or promise of payment, to a voter of his travelling expenses is not bribery but the payment or promise of payment to a voter of his travelling expenses on the condition, express or implied, that he would vote for a particular candidate is bribery.

Thus, in *Cooper* v. *Slade* ((1858) 6 H.L. Cas 746) a candidate's agent had published a circular exhorting people to vote for that candidate, with the words "your railway expenses will be paid", endorsed on it. Money was paid to one voter on the basis of this promise and the court held that this

was evidence of bribery. The payment of travelling expenses was seen as indemnifying the voter "for something which, but for giving the money, he would have to pay out of his own pocket" (*ibid.*, 786, per Lord Cransworth).

In the *Nottingham Case* (1886) 15 L.T. 89, two voters were each paid £5.10s. as travelling expenses for a journey from Calais to Nottingham after they had agreed to vote in a particular way. This was found to be an inducement to vote and illegal as bribery in terms of section 2 of the Corrupt Practices Prevention Act 1854 (U.K.). In the *Wellington City Election Petition* ((1897) 15 N.Z.L.R. 454) it was alleged, *inter alia,* that taxi-cabs had been provided to transport Liberal Party supporters to the polls. The allegation was unsuccessful only for want of proof that the cabs were exclusively for the use of Liberal Party supporters. Thus, in appropriate circumstances, even where the payment is in kind and no money ever changes hands, there may be bribery in the provision of free transport to the polling booth.

In the present case, as already noted, each voter had paid only $20.00 for the flight. Chartered flights would have cost around $245.00, the price in fact paid by supporters of the Democratic Party in validly exercising their right to vote. There was then, clearly a gift of valuable consideration as contemplated by section 69 of the Electoral Act. Donne C.J. was equally clear that the consideration given was an inducement to vote. In so deciding, he relied both on the evidence of witnesses, who said they had been induced to undertake the trip to vote because of the free flight, and also on the "transaction itself" which, "emanating from the Cook Islands Party, by its very nature supports the contention that it was intended to induce the elector who benefited from it to vote" (p. 20). Thus, it was an inducement because it offered a very cheap trip to the voter's homeland, "the prospect of seeing friends and relatives, the eating of traditional food and the participation in the festivities that go with it. It added up to a day of excitement for $20.00" (p. 20). Although he cited no cases as authority for this approach, Donne C.J. was here inferring an inducement to vote from the nature of the consideration itself. This is an approach long followed by the courts in cases of both bribery and treating and involves looking at the magnitude of the consideration (*Bradford Election Petition No. 1* (1869) 19 L.T. 718), the circumstances of the person receiving the consideration (*Re Wairau Election Petition* (1912) 31 N.Z.L.R. 321), whether the consideration was given in a covert or open way (though the fact that it was openly done is not an absolute defence: *Eden Election Petition* [1923] N.Z.L.R. 644), whether the consideration was given to voters only or to voters and non-voters indiscriminately (*idem*). The cases in fact establish that in deciding the intention with which the consideration has been given, the courts will look at all the circumstances surrounding the transaction; this enquiry is an objective one and it will be

assumed that the person allegedly guilty of bribery has intended the natural consequences of his acts. (*Norwich Case, Birkbech* v. *Bullard* (1886) 54 L.T. 625). Donne C.J. embarked on just such an enquiry.

The evidence further satisfied the Chief Justice that the inducement to vote carried with it an express or implied condition that the electors who were given the free flight would vote for Cook Islands Party candidates. In fact there was a careful scrutiny of voters leaving from both Auckland and Wellington Airports; only known party supporters were allowed on the flights. There was thus the giving of consideration to induce electors to vote for the Cook Islands Party, and a clear case of bribery amply supported by the authorities. Moreover, the bribery was participated in by all the respondent candidates, who were as a result all liable.

Agency in electoral law is a much wider concept than in other fields. A candidate may have his election avoided for corrupt practices committed by his proven agent, even where he has not in any way authorised the act, or indeed where he has expressly forbidden it, as was held in the *Taunton Election Petition* (1874) 30 L.T. 125. In that case, Grove J. observed that in electoral law "the relation is not the common one of principal and agent, but . . . the candidate may be responsible for the acts of one acting on his behalf, though the acts go beyond the scope of the authority given, or indeed in violation of his express injunctions". (*ibid.*, 127.) In the same case it was stated that to establish agency it was necessary to show that the candidate had employed the persons whose conduct is impugned to act in his behalf, or had put himself in their hands to some extent, or had "made common cause with them" (*idem*) for the purposes of promoting his election. In the *Bay of Islands Election Petition* (1915) 34 N.Z.L.R. 578, 585, Hosking J. observed that to establish agency in electoral law, what has to be shown is that "the candidate entrusted the person alleged to be his agent with the doing of some work to promote the election, or consciously adopted the acts of such person to that end". In the present case the scheme had been put to the Cook Islands caucus who knew of it from the outset, left its implementation to Sir Albert Henry and the party organisation, and never disassociated themselves from it. All the respondent candidates had thus committed the offence of bribery.

In conjunction with this finding, Donne C.J. held that the monetary transactions by which the sum of over $300,000 had been paid to Ansett Airlines from a government-owned company, was a misuse of public monies involving a clear breach of the Public Monies Act 1969 (Cook Islands). Section 79(1) of the Electoral Act 1966 (Cook Islands) directs the judge hearing an election petition to determine inter alia "whether the candidate whose election is complained of or any and what other candidate, was duly elected". His Honour found that a candidate was not duly elected if he had been elected through the misuse of public monies and that this was an independent ground which, standing alone, would

justify the unseating of the successful candidate. This was a novel point, and His Honour did not cite authority for the proposition; he relied solely on a close examination of the wording of the Act.

Section 155(1) of the Electoral Act 1956 (N.Z.) enacts that "No election and no return to Parliament shall be questioned except by a petition complaining of an unlawful election or unlawful return ... presented in accordance with this Part of this Act". Section 156(3) states that "The petition shall be in such form and state such matters as are prescribed by rules of court ..." Rule 4(d) of the Election Petition Rules 1957 (S.R. 1957/265) merely directs that "Every petition shall state – (d) The specific grounds on which the complaint is founded". As with its Cook Islands counterpart, the New Zealand Act, in section 169 directs the court to "determine whether the member whose election or return is complained of, or any and what other person, was duly elected or returned, or whether the election was void". Since the term "unlawful election" in section 155(1) is nowhere defined, there is nothing in the Act which says that only corrupt or illegal practices, as these terms are defined in the Act, may form the basis of an election petition. Section 163 states that a candidate proved at the trial of an election petition to have been guilty of a corrupt practice at the election, shall have his election avoided, but this cannot affect the power given in section 169 to decide if a candidate has been duly elected.

Allegations of a misuse of public monies will *almost* invariably (as i this case) be associated with a specific charge of corrupt or illegal practice as defined in the Act. However a political party which for example, expended public monies on a lavish advertising campaign would not appear to have been guilty of a corrupt or illegal practice (in terms of the Electoral Act) and election petitions based on such misuse could only proceed if the approach of Donne C.J. is correct. An elected candidate who was guilty of such an action could not be removed under section 32(e) of the Electoral Act 1956, since the relevant provision of the Public Finance Act 1977, section 109(g), attracts a maximum term of imprisonment of only 12 months: section 32(e) of the Electoral Act provides for the creation of a vacancy where a Member of Parliament is convicted of a crime punishable by death or by imprisonment for a term of 2 years or upwards. It is surely undesirable that such an offence should have no ramifications in terms of the Electoral Act. In this aspect of his determination Donne C.J. it is suggested, has made a valuable point which is prima facie valid in New Zealand law, and has not previously been determined.

In deciding to replace those candidates who had been elected with candidates unsuccessful on election day, Donne C.J. was following the direction contained in section 79(1) of the Electoral Act 1966. The votes of the fly-in voters had been isolated and so it was possible, by subtracting

those votes from the total number of votes, to produce figures which accurately stated the number of valid votes cast. The Chief Justice opted for this substitution approach, rather than the alternative of ordering by-elections, for a number of reasons: in a case such as this where the petitions attacked such a large proportion of the seats in the Legislative Assembly, it would mean an extended period of uncertainty if by-elections were ordered; the enormity of the misconduct of the Cook Islands Party; the fact that those responsible for the malpractices were Ministers of the Crown who "were well alerted to the possible dangers of pursuing the course they did" (p. 65); the principle that no guilty candidate should profit from his wrongdoing. Moreover, supporters of the Democratic Party who had paid the full fare to fly to the Cook Islands to vote might not be able to afford a second trip. Against these considerations was the fact that votes of Cook Islands Party supporters, who were probably unaware that they were participating in an illegal scheme, would be disallowed – these people would in effect be disenfranchised.

On the facts of the case however, there could be little quarrel with the Chief Justice's decision to exercise his discretion in favour of the Democratic Party candidates and so give "an unequivocal denunciation of the misdeeds of the offending candidates and their agents", (p. 65) rather than order by-elections "which may allow the transgressors indirectly to profit from their misconduct which, especially in the case of the main perpetrators of the whole scheme, was of vast dimensions" *idem.*

MARK COOPER

LEVISON v. *PATENT CARPET CLEANING CO.*

Lord Denning M.R. has never been one to belie the potency of the Common Law, so his judgment in *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd* [1978] 1 Q.B. 69 will come as no surprise. The facts of the case are straightforward. Mrs Levison telephoned the defendant cleaners and asked them to collect a carpet for cleaning, which they did. The carpet was described by the Master of the Rolls as "a fine Chinese carpet worth £900". Mr Levison, signed his name in the space provided on the printed form without reading the "many lines of small print" which, *inter alia,* deemed the value of any carpet to be no more than £2 per square foot. Another clause stipulated that all merchandise was accepted at the "owner's risk" with a recommendation that the owner insure. The carpet was never returned. After some prevarication the defendant admitted that the carpet could not be traced but purported to limit its liability to the sum of £44 which was calculated in accordance with the clause mentioned above.

The Court of Appeal (Lord Denning M.R., Orr L.J. and Sir David Cairns) unanimously held that the defendant had failed to discharge the onus of proof that it was not guilty of a fundamental breach, so that it could not rely on the limitation clause. It is not the purpose of this note to pick up that gauntlet, but rather to examine the alternative ground proposed by Lord Denning alone, that an unreasonable exception clause has no legal effect. His Lordship said (at p.79):

> In such circumstances as here the Law Commission in 1975 recommended that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable: see The Law Commission and the Scottish Law Commission Report, Exemption Clauses, Second Report, (1975) (August 5, 1975) Law Com. No. 69 (H.C. 605), pp. 62, 174; and there is a bill now before Parliament which gives effect to the test of reasonableness. This is a gratifying piece of law reform: but I do not think we need wait for that Bill to be passed into law. You never know what may happen to a bill. Meanwhile the common law has its own principles ready to hand. In *Gillespie Bros & Co. Ltd* v.*Roy Bowles Transport Ltd* [1973] Q.B. 400, 416, I suggested that an exemption or limitation clause should not be given effect if it was unreasonable, or if it would be unreasonable to apply it in the circumstances of the case. I see no reason why this should not be applied today, at any rate in contracts in standard forms where there is inequality of bargaining power. In this case I would apply it in this way: take the limitation clause 2 (a). In some circumstances that clause might be reasonable. But it would not in the present case be reasonable to allow the cleaning company to rely on it. They knew that they were to collect a heavy Chinese carpet which was worth a lot of money. To limit liability to £40 (without a word of warning) would, I think, be most unreasonable.
>
> So also with clause 5. It was not reasonable for the cleaning company to stipulate that all the merchandise should be "at the owner's risk" unless they did a great deal more to see that the customer was protected. At the very least they ought to have drawn the clause specifically to the customer's attention, and made it clear that he ought to insure against loss or damage to it. But they did nothing at all to protect him, or warn him. I do not think the cleaning company can rely on this clause. They ought to have insured themselves, and not leave it to the customer to do so.

Several points worthy of comment arise from this part of Lord Denning's judgment.

The most obvious one is this: can the proposition that an unreasonable exception clause has no legal effect be supported in law? Lord Denning, in the passage cited above, modestly referred to only one of several of his own *dicta* to support this proposition (see also *John Lee and Son (Grantham) Ltd* v. *Railway Executive* [1949] 2 All E.R. 581, 584; *McCallum* v. *Hicks* [1950] 2 K.B. 271, 275; *Bonsor* v. *Musicians' Union* [1954] 1 Ch. 479, 485-486; *Thornton* v.*Shoe Lane Parking* [1971] 2 Q.B. 163, 170). That this has been the view of Lord Denning for some time is clear from his comment made in 1955 (*The Road to Injustice*, p.91):

> The only way I can see to remedy this state of the law is for the courts to treat these conditions as they would by-laws: and to hold them valid if they are reasonable but invalid if they are unreasonable.

The only support for such a proposition, apart from *dicta* of Lord Denning's, appears in *Parker* v. *The South Eastern Railway Company* (1877) 2 C.P.D. 416 where Bramwell L.J. said that an unreasonable term would not be contractually binding (at p.428). This approach was noted

with approval by Sankey and Lawrence JJ. in *Thompson* v. *London, Midland and Scottish Railway Company* [1930] 1 K.B. 41, 53, 56. These cases all involved unsigned documents where special rules prevail for the incorporation of terms into the contract and, as Scrutton L.J. pointed out in *L'Estrange* v. *F. Graucob Ltd* [1934] 2 K.B. 394, 403, "have no application when the document has been signed".

The authority against such a proposition is immense and one need only cite the unshaken authority of *L'Estrange* v. *F. Graucob Ltd* to see that the proposition is unsupportable in principle. As Judge Richards said when confronted with an "unreasonableness" attack on an exception clause:

> . . .does not this conflict with the fundamental concept of our law that the parties may freely contract on terms which may be extremely onerous to one side or the other? (*Blake* v. *Richards and Wallington Industries Ltd* [1974] K.I.R. 151, 155.)

Nor does it make any difference that the exception clause is contained in a printed form of contract between parties of unequal bargaining power for, as Donaldson J. commented, it may ". . .be socially most undesirable, but of no less legal validity". (*Kenyon, Son and Craven Ltd* v. *Baxter Hoare and Co. Ltd* [1971] 1 W.L.R. 519, 533). However, it would be to fly in the face of past experience to suggest, because there is no support in contractual principle or precedent for Lord Denning's view (other than his own), that this will hinder its acceptance.

The other feature of this part of Lord Denning's judgment which calls for comment, is the influence that the proposed bill had on his conclusion that the common law had developed to the stage where the Courts could refuse to give effect to unreasonable exception clauses. The bill, after much amendment, was enacted as the Unfair Contract Terms Act 1977 on 26 October of that year. Section 3 subjects all exception clauses contained in standard form contracts to a test of reasonableness, to be applied as at the time of contracting. At first sight it appears that Lord Denning has judicially anticipated the enactment of the provisions contained in the Bill, as he did in *Hill* v. *Parsons and Co. Ltd* [1972] Ch. 305 and in *Wilson* v. *Dagnall* [1972] 1 Q.B. 509. (Both were cases where the statue was enacted but not yet in force.) A judge can usually take into account the provisions of a statute not yet in force, or of a bill not yet enacted, as a factor influencing him in reaching a more common sense or just decision in a particular case, without thereby changing the common law position. (See generally, J.F. Burrows, "Judicial Anticipation of Statutes", (1976-77) 7 N.Z.U.L.R. 169). It is however unprecedented to judicially anticipate the enactment of legislation so as to effect a substantive development in the common law. Lord Denning did just this in *Levison,* where, by anticipating the enactment of the bill, he developed the common law independently of the statute, but to similar effect.

One might well ask why it was necessary in *Levison* to take this step, when there was an alternative ground for finding in the plaintiff's favour

with which the other members of the Court of Appeal agreed. The more charitable among us might say that Lord Denning took the opportunity to develop the common law in case the bill was never enacted or was enacted in a different form. Others might say that he seized an opportunity to plant another seed of his judicial imagination in the fertile ground of the common law, which is more likely to bear fruit in other common law jurisdictions than in England, where such development was unnecessary in the light of imminent legislative reform. *Levison's* case has already been followed in Canada by the Supreme Court of British Columbia (*Davidson* v. *Three Spruces Realty Ltd* (1977) 79 D.L.R. (3d) 481).

If Lord Denning had merely anticipated the provisions of the Unfair Contract Terms Act, his alternative *ratio* in *Levison* could be distinguished away in Commonwealth Courts, on the ground that there is no impending statutory reform in those jurisdictions. However, it is my submission that by developing the common law independently of the statutory reform, but to similar effect, Lord Denning precluded such a course. Lawyers in common law jurisdictions who deprecate such a development must attack this part of Lord Denning's judgment for what it is – a blatant piece of judicial legislation.

It is interesting to note that Lord Denning has not only caused problems for Commonwealth courts but may in all likelihood cause problems for those in England. It appears from his judgments in both *Levison* and *Gillespie Bros* that the common law reasonableness test may be applied at one of two times; i.e. at the time of contracting or at the time when the exception clause is applied (or relied on). These different times at which the test ought to be applied to exception clauses caused a difference of opinion between the English and Scottish Law Commissions whose recommendations culminated in the Unfair Contract Terms Act (see, *Second Report on Exemption Clauses* (1975) Law Com. No. 69 pp. 65-74). The Legislature resolved the conflict by opting for the time of contracting as the material time. Thus, should an English Court apply the common law test of reasonableness at the later time, it could hold unreasonable an exception clause that might have satisfied the statutory test of reasonableness at the time of contracting.

M.B. TAGGART

BRADLEY v. *ATTORNEY-GENERAL AND OTHER*

This case, ([1978] 1 N.Z.L.R. 36), has been the subject of careful study by practitioners since the day judgment was given in March 1977, but does not seem to have resulted in the major changes to conveyancing practice which might have been expected. The decision of O'Regan J. is important in two areas; first, that of professional negligence, and secondly, that of

the Land Transfer system. This note will deal with the second of those points.

The plaintiff brought an action for damages against the Crown pursuant to section 172 of the Land Transfer Act 1952 and against his solicitors for professional negligence in failing to search the journal book kept by the District Land Registrar. On 19 March 1974 the plaintiff had contracted to purchase a piece of land from Mr and Mrs Wharekura. At that date the Wharekuras had a fee simple estate in the land, but not until the beginning of May 1974 would the title to the land have shown this to be the case. The Wharekuras had originally acquired the land under section 54 of the Land Act 1948 which entitled them to a deferred payment licence in respect of the land, upon payment of a deposit. The Commissioner of Crown Lands filed a certificate in the Land Transfer Office pursuant to section 116 of the Land Act on payment of the purchase money and interest. Under that section the date fixed as the ante-vesting date was 5 March 1974. The Court held that as a certificate under section 116 had the same effect as a warrant issued under section 12 of the Land Transfer Act 1952 and that such a warrant by its very nature and source was not a document required to be registered, then the certificate filed by the commissioner was not required to be entered in the journal. The result was that between 5 March 1974 and the date the certificate of title was signed, neither a search of the register nor of the journal book would have revealed that the Wharekuras had acquired the fee simple estate in the land – a disturbing gap for those dealing with the fee simple estate during that period.

Returning to the facts, the title disclosed the existence of three mortgages. However on 2 July 1973 the Wharekuras had executed a further mortgage, but which was not lodged for registration until 22 April 1974. At this time the South Auckland land registry was behind in its work. The entering of memorials in the register was at least four weeks behind and the writing up of the journal book was possibly up to a week behind. On 29 April 1974 the plaintiff's solicitors wrote to their Hamilton agents requesting a search of the land. The title was not available to them for searching until 10 May 1974 when the agents obtained a photocopy search of the title and forwarded it to their principal. The agents did not search the journal book which by that time would have revealed the fourth mortgage. Evidence showed that the journal book was infrequently searched unless there was present the threat of a charge such as a lien or what would now be a notice of claim under section 42 of the Matrimonial Property Act 1976.

The memorandum of transfer and settlement were then completed, based on the situation as revealed in the photocopied search title. Eleven days before settlement the plaintiff's solititors were advised that the second mortgage was being discharged in the land registry. On settlement

the executed transfer together with discharges of the first and third mortgages was delivered to the plaintiff's solicitors. However no title was delivered and this omission does not seem to have been questioned by the plaintiff's solicitors, presumably because they believed it to be in the Land Transfer Office with the discharge of the second mortgage. The Hamilton agents reported that the documents were registered on 7 June 1974 – possibly they meant lodged for registration. The result was that the discharge of the second mortgage and the documents dealing with the transfer to the plaintiff were all presented without the duplicate certificate of title as is required by Regulation 18 of the Land Transfer Regulations 1966, so that the dealings were unable to be registered until the duplicate title appeared. Sometime before 2 August 1974 it reached the Wharekura's solicitor who forwarded it to the plaintiff's solicitor.

On 7 August 1974 a search of the title revealed the following: the transfer to the plaintiff and a mortgage from him had been entered in the register but not signed as required by section 39; the discharge of the Wharekura's second mortgage was registered but the discharges of their first and third mortgages were not; nor was there any note of the Wharekura's fourth mortgage which was still not registered. These later dealings should all have been registered before the transfer and mortgage from the plaintiff. The journal recorded all these dealings.

The District Land Registrar then took steps to sort out the mess. He ascertained the whereabouts of the duplicate title and requisitioned the Hamilton agents to have the title reference corrected from that allotted to the deferred payment licence, to that of the fee simple in the fourth mortgage. He then advised the Hamilton agents that all the memorials had been correctly entered on the register. Yet this was not true as a search on 20 August 1974 showed that the memorials of the discharge of the Wharekura's first and third mortgages had been written up but not signed. Further, the previous unsigned memorials had been struck out and three unsigned memorials had been added, noting the fourth mortgage from the Wharekura's, their transfer to the plaintiff and the mortgage from the plaintiff.

The day following his advice that the memorials had been correctly entered, the District Land Registrar requisitioned the Hamilton agents either to discharge the fourth mortgage or to make the subsequent dealings subject to it, so that registration of them could be completed. (O'Regan J. remarked that this ineptitude could not be ascribed to the shortage or lack of training of staff in the land registry).

The Wharekura's fourth mortgage was finally registered on or about 14 November 1974, but its priority was determined as at 22 April 1974, the date it had originally been presented for registration pursuant to section 37(1). The discharges of the first and third mortgages were finally registered on 16 July 1975. The plaintiff now had to clear the fourth

mortgage to put himself in the position he had originally contemplated and contracted for when purchasing. The Wharekuras were not in a position to repay the fourth mortgage, so that the plaintiff was left to seek remedies from the Crown, and from his solicitors.

The plaintiff first submitted that the Registrar omitted to perform his duty in that he failed to reject the fourth mortgage, as it had incorrectly described the land and should not therefore have been received for registration, (applying Regulation 16). This was so because the fourth mortgage probably bore a reference to the deferred payment licence and was later altered to refer to the reference allocated to the fee simple. O'Regan J. held that reference to the deferred payment licence was correct as at the time the mortgage was lodged, that the licence existed and it was not until later, when the title was signed, that the ante-vesting provision in section 116(4) Land Act 1948 operated. The mortgage should have been registered against the licence and brought down on the fee simple title when it was signed. O'Regan J. did not think that the Registrar should be obliged to reject a document because the reference number was wrong under Regulation 16, and there was no other statutory requirement that such documents should be rejected.

The plaintiff then submitted that the Registrar was guilty of an "omission" under section 172(a) in not exercising his powers of requisition conferred by section 43. The Registrar did requisition in terms of section 43(1)(b) some four months after the fourth mortgage had been lodged. Since the plaintiff's solicitors had not searched the register after 10 May 1974, the period to be referred to if there was an omission was the delay from 22 April to 10 May 1974. O'Regan J. held that there had been no omission. The alternative method of requisition under section 43(1) was at the Registrar's discretion. Any notice of a requisition would be to the mortgagee and so would not give the plaintiff notice of the existence of the fourth mortgage. The failure of the Registrar to requisition during that 18 day period was not a cause of the plaintiff's loss.

Earlier in his judgment, O'Regan J. commented on whether the issue of a requisition upon a document deprived it of its priority from the date of its presentation for registration (see section 37(1)). He discussed the view of Adams in his book *The Land Transfer Act* (2nd ed.) that when an instrument was not in order for registration when first presented, registration would not date back to the time of presentation. It was suggested by the Court of Appeal in *Farrier-Waimak Ltd* v. *Bank of New Zealand* [1964] N.Z.L.R. 9, 15-16, that a mortgage which was "taken out" after presentation to be altered, amounted to a withdrawal followed by a new registration. Subsequently, section 43 has been amended by section 5 Land Transfer Amendment Act 1966 and subsection 6 provides that any instrument returned shall be deemed not to have been presented for registration. Presumably those instruments which are retained under

section 43(1)(b) do not lose their priority, although O'Regan J. thought otherwise. (As the point was not contended, his suggestion is in any event, obiter dictum.)

The plaintiff next submitted that section 33(1) required the Registrar to have recorded the fourth mortgage on the register. It was presented on 22 April but not recorded on 10 May and as a result the plaintiff had no notice of it and so suffered loss. The submission was that although there was no duty to provide instant registration, if a dealing had not been recorded and as a result a person had suffered loss, then section 172 was designed to assist that person. O'Regan J. rejected this on the grounds that section 172 could not be construed as imposing absolute liability.

The plaintiff's final submission in respect of damages against the Crown under section 172 was that because there had been a four month delay in the issue of a requisition upon the fourth mortgage, and that because it was not recorded on 10 May 1974, there was raised the irresistible inference that the mortgage was lost in the land registry. O'Regan J. would not draw this inference. A temporary loss of a title in the registry may be the result of something other than the "omission, mistake, or misfeasance of any Registrar" (p.48) or his staff. The case against the Crown failed.

The plaintiff succeeded in his action against his solicitors. Applying *Re Jackson* (1890) 10 N.Z.L.R., 148, a solicitor cannot rely on the register book alone when searching a title. If he does not search the journal he will be guilty of negligence and liable for any loss that results. (See D.F. Dugdale, "Hard to Convey" [1977] N.Z. Recent Law, 151.)

O'Regan J. confirmed that, subject to section 43, registration of an instrument was effected once its memorial was entered on the register and signed (section 34). Its priority in relation to other instruments, either existing or contemplated, is determined by the instruments' time and date of presentation (section 37).

Although the duty imposed on solicitors is difficult and perhaps time consuming, it is not impossible. Be that as it may, O'Regan J. thought that "it [was] high time those charged with the administration of the Torrens System devised some modern and more effective method of giving notice of instruments accepted for registration and not registered. . . The present provision as to such notice is grossly inadequate" (p.51). This "gap" – the searching gap – and the gap between settlement and registration are at present being investigated by the Property Law and Equity Reform Committee which, in its working paper, has suggested a number of solutions. However, any system will only be as good as those who administer it. Its inherent protections should only be offered to those who diligently use it.

PHILIP MURFIELD

COLEMAN v. *MYERS* – A STRONG CASE FOR RESTITUTION?

As one can hardly do justice to all the ramifications of the recent Court of Appeal decision in *Coleman* v. *Myers* [1977] 2 N.Z.L.R. 298, within the confines of a short case note, the writer restricts himself here to the question of the remedy which was awarded.

The facts of the case are somewhat complicated, but briefly it concerned the takeover of a prosperous family company by one of its directors, A.D. Myers. The claim made against Mr Myers was that in carrying out the takeover he failed to inform the shareholders of the company of details which were important in determining whether his purchase offer was fair or not. The Court of Appeal, reversing the decision of Mahon J. at first instance ([1977] 2 N.Z.L.R. 225) held that A.D. Myers had in fact breached the fiduciary duty owed the shareholders of the company, and that he wrongly withheld details which would have had an important bearing on assessing the value of the appellant's shares at the time the takeover was made.

Notably however, the Court went somewhat further. In a robust judgment Woodhouse J. said (at pp. 322-323):

> In my opinion, that is the true significance of the misrepresentations which are the subject of complaint in this area of the case. I think the misrepresentation had that actual effect [i.e. to mislead the shareholders]. Accordingly, in so far as fraudulent misrepresentation is concerned, I must hold that the appellants have made out their case against Mr Douglas Myers and I would allow the appeal against him on that ground if for no other.

Casey J. displayed the same rigorous attitude when he said (at p.370):

> I have approached this issue of fraud with a full appreciation of the reluctance which an appellate court must feel about differing from the findings of a trial judge on such a matter; I also bear in mind the seriousness of the allegation, especially against the background of this transaction. However I am satisfied that no doubt about the appellant's credibility has been raised on any material part of their evidence and it has not been answered by any evidence from Mr Myers. On any other aspects the primary evidence is established by the admitted documents. In my view the facts and the necessary inferences to be drawn from them clearly support the allegations of fraud. . . .

Cooke J. preferred to base his judgment on other grounds but nevertheless he still expressed a measure of guarded sympathy for a finding of fraud (at p.352):

> In relation to the allegation [of fraud] against the first respondent it is enough to say that, with the greatest respect to the learned trial judge, I do not agree that it was irresponsible.

Having reached a finding of fraud the question arises as to the remedy that is available to the plaintiff. It would appear that where the fraudulent misrepresentation leads the representee to alter his position by entering into a binding contract or transaction with the representor (as was the situation in the present case) then:

> the representee may either maintain an action for damages, or repudiate the contract or transaction; and, in the latter event, unless the representor accepts the repudication, the representee may institute proceedings for the recission of

> the contract or transaction... (*Halsbury's Laws of England* (3rd ed.), Vol. 26, para. 1593).

As to which form of relief is sought, damages or recission and restitution, this is a matter solely for the representee (*ibid.*, para. 1627).

In their argument before the Court of Appeal counsel for the appellant argued strongly that it was recission and restitution which they sought in preference to damages. To support their argument they relied heavily on a number of English authorities. *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218, was cited first. In that case Lord Blackburn had said:

> And I think the practice has always been for a court of equity to give this relief [recission and restitution] whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.

This passage was cited with approval by Rigby L.J. in *Lagunas Nitrate* v. *Lagunas Syndicate* [1889] 2 E.R. 392 when he stated (at p.457):

> This important passage is, in my opinion, fully supported by the allowance for deterioration and permanent improvements made by Lord Eldon and other great equity judges in similar cases... If substantial compensation can be made, recision with compensation is ex debito justitae.

The capstone of these statements of the law relating to recission are to be found in the later English case of *Spence* v. *Crawford* [1939] 3 All E.R. 271. This case also dealt specifically with the difficulties of restitution in relation to shares and it was held that restitution was a suitable remedy as long as other monetary adjustments were made so that neither party was improperly advantaged or disadvantaged. Lord Thankerton said (at p.283):

> ... the court will be doing what is practically just by making it a condition of restitution that the respondent should be compensated ... and such payment along with payment of the price of the shares, with interest, will, in my opinion, satisfy the doctrine of restitutio in integrum.

And later (at p.284):

> ... it seems clear that the appellant would be entitled to have an accounting from the respondent for all dividends, or other payments in respect of the shares by the company since the date of the contract.

Thus, it was considered by the Court that the difficulties inherent in the restitution of shares could be overcome by additional monetary payments which would compensate for certain disadvantages.

In delivering his judgment in *Coleman* v. *Myers* Woodhouse J. was prepared to accept these arguments and he concluded that recission along with restitution and suitable compensatory adjustments was the suitable remedy. As A.D. Myers had been found guilty of fraud, the appellants should be entitled if at all possible to the relief they sought.

This view did not find favour with the majority of the Court of Appeal however. Cooke J. was of the opinion that damages was a more appropriate remedy, and in delivering this conclusion he relied on the speech delivered by Lord Wright in *Spence* v. *Crawford* (which had been couched in somewhat different terms to that of Lord Thankerton). Referring to Lord Blackburn's statement in *Erlanger's case* (supra) Lord

Wright had said ([1939] 3 All E.R. 271, 288):

> In that case, Lord Blackburn is careful not to seek to tie the hands of the court by attempting to form any rigid rules. The court must fix its eyes on the goal of doing "what is practically just". How that goal is reached must depend on the circumstances of the case, but the court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation.

Lord Wright was thus prepared to do his best "... to unravel the complexities of any particular case, which may in some cases involve adjustment on both sides" (*ibid.*, p.289). However the theme of his judgment is that the court must still have as its guiding star the concept of what is "practically just". It was this theme which impressed Cooke J. and lead him to a finding that restitution on the present facts was not practically just. Lord Wright had said that "... the court can go a long way in ordering restitution if the substantial identity of the subject matter of the contract remains" (*idem.*). In the present case Cooke J. considered that "only in a formal sense would the shares revested be the same as the shares sold ... [T]he advantages attaching to them could be much greater" ((1977) 2 N.Z.L.R. 298, 361). In short, the company was now totally restructured and the tenor of its business had been substantially altered. Therefore, the shares were not the same as they had been when originally sold and no amount of monetary adjustment could make them so.

Casey J. preferred this approach to that adopted by Woodhouse J., and so the majority held that damages were the appropriate remedy, for they were "practically just".

Under normal circumstances the writer considers that the case for restitution would have been a strong one. Their Lordships in *Spence* v. *Crawford* all expressed the view that in a case of fraud the court will go to great lengths to allow recission and restitution. However as Lord Wright pointed out, "Restoration... is essential to the idea of restitution" ([1939] 3 All E.R. 271, 288). In the present case the company had gone through so many changes and alterations that the shares in the company were of a substantially different nature than they were when sold by the appellant. This made restoration an inappropriate remedy so that the Court had to resort to quantifying the detriment suffered by the appellants in terms of damages.

Coleman v. *Myers* is not to be read as authority for the proposition that restitution is not the proper remedy in the case of share transfers. Rather, it goes to show that restitution cannot be a practical remedy in certain circumstances and the limitation of this remedy must be recognised. It would therefore appear that A.D. Myers was fortunate that the tenor of his company changed so dramatically from the time he purchased the appellants' shares to the time of the Court of Appeal's judgement.

ALISTAIR S. BROWN