LEGISLATION NOTES

CUSTOMS AMENDMENT ACT 1987

The Customs Amendment Act 1987 ("the Act") substituted a new Part VA (sections 186A to 186P) in the Customs Act 1966 – the source of New Zealand's anti-dumping and countervailing law.

For the unfamiliar, dumping occurs where foreign producers sell identical or similar goods under identical or similar circumstances for a lower price in the market of import than in the market of origin. The term "countervailing" refers to the situation where duty is imposed to offset the effects of subsidies or other incentives in the market of origin.

The Act was passed as a result of the decision taken by Cabinet in June 1986, that New Zealand should become a signatory to the GATT Anti-Dumping Code, Article 16 of which requires all the member nations to "ensure . . . the conformity of its laws, regulations and administrative procedures with the provisions of this agreement".

The decision to become a party to the Anti-Dumping Code was itself a response to the breaking down of import licensing and reduction in tariffs which, when in force, had combined to discourage dumped and subsidised imports.

Once a complaint has been made under the Act it becomes the task of the Comptroller of Customs to carry out an investigation, it is then the responsibility of the Minister of Customs to "make a preliminary determination, on the basis of the information made available during the investigation"; section 186J(i).

Probably the most significant change brought in with the Act concerns the initiation of an investigation. It is no longer possible, as it was under previous legislation, for the Comptroller of Customs to initiate an investigation merely on the grounds that the complaining industry has shown that dumping has in fact taken place. Section 186H now requires the Comptroller to be satisfied that dumping has occurred or is about to occur, that a New Zealand industry will be materially injured and that such injury has been or will be caused by the dumping. The threshold for initiating an investigation under the Act is now much higher than it has been in the past and the burden now falls upon the complaining industry to show clearly the existence of dumping, material injury and causation.

A further innovation in the Act is the use of the term "like goods". As can be seen from the definition above, a dumping investigation is essentially an exercise of comparison; that is between the allegedly dumped goods and goods of a like nature of domestic manufacture. The previous legislation was somewhat ambiguous in its terminology using the term "goods of a class or kind", alongside the term "like goods". In adopting the consistent use of the term "like goods" the Act uses a term which is known and understood by this country's major trading partners and conforms to the Anti-Dumping Code which has widespread international recognition.

As material injury to a domestic industry is one of the essential elements in a successful dumping complaint, the Act now gives some clear guide-lines in this matter. Section 186F sets out the matters that the Minister should examine (s 186F(1)), and matters to which the Minister shall have regard (s 186F(2)). As well as providing guidance to the Minister, section 186F now enables an industry to make out a complaint of injury in terms that are directly consistent with the Act.

The Act now makes the dumping investigation subject to specific time limits. Section 186J (in relation to preliminary determinations) and section 186K (final determinations) impose time limits of 60 and 90 days respectively from the date of initiation by the Comptroller. The intended effect of this is to give swift protection to domestic producers who are entitled to such protection. The previous legislation did not provide any time limits on the Comptroller's investigation of a complaint.

A good deal of the Act is devoted to the mechanics of applying anti-dumping and countervailing measures, including; calculation of export price and normal value (sections 186 B and 186C respectively) and the collection of dumping and counterveiling duty itself (section 186L).

One small area of deficiency in the Act in its present form is its failure to deal clearly with the problem of causation. There is an absence of guidance in assessing whether or not dumping is sufficiently causative of injury when there are multiple possible causes. The Anti-Dumping Code, in Article 3.4 adopts the approach that each possible cause is to be considered in isolation and if dumping is a material contributing factor then anti-dumping measures may be invoked. It is presumed that the Minister of Customs would adopt this course, though the Act does not say so.

Finally, a curious provision introduced for the first time by the Act is found in section 186P. This section provides for the situation where dumping of goods in New Zealand is materially injuring an industry in a third country. The Government of that third country may request that the Minister in New Zealand apply the provisions of the Act in relation to the dumped goods. This section effectively makes the third country a part of the New Zealand market for the purposes of the Act. It is most likely to be invoked, if at all, by a Pacific Forum Nation.

In conclusion there is little doubt that the Act is well placed to become the principal means of effective protection against dumping in the New Zealand market. The reasons for this are:

i. By following more closely the procedures set out in the GATT Anti-Dumping Code, New Zealand's major trading partners are more likely to understand and anticipate the likely consequences of dumping in New Zealand.
ii. By adopting internationally recognised principles the Act is likely to inspire the confidence of the industries that it is intended to protect. Industry will therefore more readily seek relief under the Act.
iii. The body of law already developed in other jurisdictions will now assist in the interpretation and application of anti-dumping measures in this country. This should result in greater efficiency at Departmental and Ministerial level and therefore better service to New Zealand industry.

- Paul N. Collins

CONSTITUTION ACT 1986

Introduction and Background

In July 1984, following the general election, unexpected difficulties arose over the transfer of power from the outgoing Government to the newly elected Government. Surprisingly, there appeared to be no means by which the successful party could immediately form a Government in order to recommend urgent measures to the Governor-General. Instead, the defeated Prime Minister had to accept the directions of the incoming Government and recommend such measures (none of which he was in favour of).

Although the issue was resolved, these events highlighted problems with present constitutional provisions. As a consequence Cabinet established an Officials Committee with three principal objectives:

i. to clarify the rules relating to the transfer of power after a general election;

ii. to terminate the residual power of the United Kingdom Parliament to make laws for New Zealand; and

iii. to carry out a general reorganization of the statutory constitutional provisions.

This note will consider the provisions that seek to satisfy the first two objectives, as this is the area where significant changes have been made in the law. The significance of the numerous other minor and procedural alterations that were a consequence of the rationalisation of the New Zealand constitu-

tional provisions, will be apparent from careful reading of the statute.

The Act, which became effective on 1 January 1987, is based on the reports of this committee, which were published in February 1986. It is in five parts; Parts I to IV deal with the Sovereign, while the final part contains repeals and consequential amendments to other statutes.

The Sovereign

Part I provides that the Sovereign in the right of New Zealand is the Head of the State, and expressly recognises the role of the Governor-General as the Sovereign's representative in New Zealand.

The Executive

The constitutional tool required to avoid a recurrence of the problems experienced during the 1984 change of government is contained in section 6 of the Act. In substance this section provides that a person may be appointed and may hold office as an Executive Councillor or as a Minister of the Crown if he or she:

i. is a member of Parliament, or;

ii. has been a candidate at a general election immediately preceding appointment, but in that case shall vacate office at the expiration of forty days from the date of appointment unless within that period he or she becomes a member of Parliament.

Now, as soon as the results of an election become clear, the Governor-General will be able to appoint new provisional Ministers to recommend urgent measures, before the writs have been fully returned. The elected Government need no longer rely on convention and expect the outgoing Government to agree to requests for recommendations. Significantly these changes received bipartisan support, both major political parties recognising their necessity.

The Legislature

Part III of the Act is in three divisions; the House of Representatives, Parliament and Parliament's powers in respect of public finance.

i. The House of Representatives

The continuance of the House of Representatives, as originally constituted by section 32 of the New Zealand Constitution Act 1852, is provided for in section 10.

ii. Parliament

The General Assembly is established by section 14, with the word

'Parliament' replacing 'General Assembly' to describe the legislative entity made up of the Head of State and the House of elected representatives. The assembled body of elected representatives will still be called the 'House of Representatives' and its members will continue to be known as 'Members of Parliament'.

The provisions of section 53 of the New Zealand Constitution Act 1852 empowering the New Zealand Parliament to make laws for the 'peace, order and good government of New Zealand' are embodied in section 15 of the new Act, with the exception that the territorial delimitations of the legislative competence of the New Zealand Parliament have been omitted. Over the years a number of legislative changes have widened the original powers provided in section 53 of the 1852 Act:

i. the adoption of the Statute of Westminister restricted the United Kingdom Parliament's power to make laws for New Zealand solely to where legislation had been expressly requested and consented to by the New Zealand Parliament, and empowered the New Zealand Parliament to enact legislation repugnant to any United Kingdom statute whose influence extended to New Zealand;

ii. the passing of the New Zealand Constitution (Amendment) Act 1947 (UK), gave the New Zealand Parliament the power to amend the provisions of the 1852 Constitution Act; and

iii. the New Zealand Constitution Act 1973 provided the General Assembly with full power to make laws having effect both within and outside New Zealand.

The new section seeks to both replace and consolidate these alterations while at the same time terminating the residual power of the United Kingdom Parliament to make laws for New Zealand. This residual power was seen as an anachronism by the Officials Committee, as use of the power in 1947, requesting the United Kingdom Parliament to pass the Constitution (Amendment) Act 1947 made it unnecessary ever to invoke it again. Certainly an on-going power of the United Kingdom Parliament to legislate for New Zealand, and the subsequent limiting of the New Zealand Parliament's absolute sovereignty, would appear to be incompatible with New Zealand's present independent status.

To implement these changes section 26 of the Act declares that the New Zealand Constitution Act 1852, the Statute of Westminister 1931, and the New Zealand Constitution (Amendment) Act 1947 cease to have effect as part of the law of New Zealand. As these Acts provide the basic grant and recognition of the New Zealand Parliament's legislative competence, the question arises: does New Zealand now have an autochthonous constitution?

Other constitutions recognised as being autochthonous are expressly and

deliberately declared to be self-sourced;[1]

> We, the people of India . . . do hereby adopt, enact, and give to ourselves this Constitution.

However, the source of New Zealand's legislative power still emanates from the New Zealand Constitution Acts passed by the United Kingdom Parliament, which were not repealed by the 1973 and 1986 New Zealand Constitution Acts, and can still be found on the United Kingdom statute books. As the New Zealand Parliament's legislative competence continues to be derived from Acts of the United Kingdom Parliament, the New Zealand Constitution is not self-sourced, and therefore cannot be described as autochthonous.

In a wider context, the exact extent of the powers of the New Zealand Parliament have not yet been fully tested. The ability of Parliament to place manner and form restraints on future Parliaments is as yet unresolved.[2]

Section 16 provides that a bill, which has been passed by the House of Representatives, becomes law when the Sovereign or the Governor-General assents to it. Notably there is no express provision allowing the Sovereign or Governor-General to refuse to assent to bills which have been passed by the House of Representatives, or to return bills to the House with suggested amendments; although the section does leave open the possibility that assent could be withheld.

The term of Parliament is set at three years by section 17, which incorporates section 12 of the Electoral Act 1956. This section, like the section it replaces, has been entrenched by way of section 189 of the Electoral Act, and requires any proposal to repeal or amend it to be passed by 75 percent of all the members of the House of Representatives or be approved by a majority of voters at a referendum.

The potential difficulties associated with repealing an entrenched provision did not eventuate, as the Electoral Act was expressly amended to account for these changes by the Electoral Amendment (No.2) Act 1986, which was read and passed concurrently with the Constitution Act 1986 by more than 75% of all the members of the House.

Section 19 is a new provision requiring that Parliament meet not later than six weeks after the date fixed for the return of the writs. The requirement that the General Assembly meet, rather than simply be summoned, mandates that the activities set out in Standing Orders 4-16 be performed, although no remedy is specified if these activities are not carried out. In light of the difficulties that arose during the 1984 change of government, and the relatively lengthy delay in the first meeting of Parliament in New Zealand (compared with other Commonwealth countries), inclusion of such a provision appears to be justified.

1 Indian Constitution having effect from 26 Jan 1950; see also the Constitutions of the Federal Republic of Germany, Western Samoa and Ireland.

2 See further Elkind and Shaw, *A Standard for Justice* (1986).

iii. Parliament and Public Finance

The principles relating to Parliamentary control of public finance inherent in Article 4 of the Bill of Rights of 1688, are embodied in section 21 of the new Act. The raising of revenue, the raising of loans and any public expenditure all require legislative authority. In addition, any appropriation or charge on the public revenue must be initiated by the Crown, pursuant to section 22.

The Judiciary

The Chief Justice and other High Court Judges may be removed from office only on the grounds of misbehaviour or incapacity to discharge the functions of office, as provided in section 23 of the Act. This redrafted section takes away the Governor-General's power to suspend, but empowers the Governor-General to remove Judges where previously it was solely the Sovereign's prerogative.

Furthermore, section 10 of the Judicature Act 1908, which directs that the salary of a High Court Judge is not to be reduced during the continuance of the Judge's commission, is embodied in section 24 of the new Act.

Conclusion

The New Zealand Constitution Act 1986 is not a constitution in the sense that it does not set out to provide a formal written document illustrating the whole of New Zealand's constitutional structure. Rather, it is an attempt to rationalize into one document important constitutional provisions that have previously been scattered through a number of New Zealand and United Kingdom enactments. In doing so, significant changes have been made to the New Zealand Constitution, including terminating the residual power of the United Kingdom Parliament to make laws for New Zealand, and making appropriate amendments to ensure future changes of government are not complicated by the constitutional problems experienced following the 1984 general election.

The Act is a consequence of taking advantage of the opportunities presented when the need for constitutional reform became apparent. As such, recognition for the timely clarification and overhaul of New Zealand's constitutional law is deserved for both the reports of the Officials Committee and the worthy objectives established by Cabinet.

— *Duncan Simester*

CRIMINAL JUSTICE AMENDMENT (NO.3) ACT 1987

I Changes To Sentencing Policy For Violent Behaviour

Overview

Before August 1987, an offender who used serious violence against or caused serious danger to the safety of any other person while committing an offence, would, if convicted, be subject to a full-time custodial sentence (s 5(1) Criminal Justice Act 1985). The provision would operate, however, only if the offence was punishable by imprisonment for a term of 5 years or more. The Criminal Justice Amendment (No.3) Act 1987 has reduced this threshold in s 5(1) to 2 years, thus considerably increasing the number of offences falling within the scope of s 5(1).

The Amendment Act inserts a new s 5(2) which reads:

> (2) Where -
>
> (a) An offender is convicted of an offence punishable by imprisonment for a term of 2 years or more; and
>
> (b) The offender has previously been convicted on at least 1 occasion within the preceding 2 years of such an offence; and
>
> (c) The court is satisfied that, in the course of committing the offence, and in the course of committing the previous offence, the offender used violence against, or caused danger to the safety of, any other person, -
>
> the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced."

This provision strikes directly at the repeat violent offender. It employs the same threshold of a maximum term of imprisonment of 2 years as in the amended s 5(1) and, like s 5(1), it allows a plea of special circumstances to rebutt the presumption of a mandatory prison sentence.

The amendment Act has also inserted a new s 5A which is drafted along the same lines as s 5(2) but creates a presumption in favour of imprisonment for violent offending "while on bail or remanded at large in respect of any other offence involving violence." Thus the Legislature imposes heavy sentences for violent behaviour during bail regardless of whether conviction follows the charge for which the offender is bailed.

Commentators have found the justifications for these changes rather elusive[1], the only light on the issue stemming from the fact that the amendments follow the recommendations of the Roper Committee.[2] At page 125 of its report the committee recognised the dramatic rise in the rate of recidivism, but in the absence of further reasoning, the report is a dim light indeed.[3]

1 See Brookbanks [1987] NZLJ 390, 393.
2 New Zealand Committee of Inquiry into Violence, 1987.
3 See supra at note 1, at 391.

The Two Year Threshold

By defining the threshold in terms of the length of the maximum prison sentences for convicted offenders, the legislators have provided a very clear line between offences included in and offences excluded from the scope of ss 5(1), 5(2), and 5A. On the other hand, the drafters, albeit unintentionally, have conferred an element of discretion upon the police. The choice of offence with which a police officer charges the offender may be the only factor influencing whether upon conviction the offender shall receive the rehabilitative effects of a community based sentence, or "the *final* sanction for imposing social discipline in our community,"[4] namely imprisonment. Certain cases since 1981 already show that this situation is causing inconsistencies in sentencing.[5]

Lowering the threshold from 5 years to 2 years necessarily increases the range of offences that fall within the scope of either s 5(1), s 5(2) or s 5A. Police discretion still exists but to a lesser extent. For example, the offence of assault with intent to injure (s 193 Crimes Act 1961) carries a maximum punishment of three years imprisonment. Prior to the 1987 amendment, an offender convicted under s 193 would not be subject to the violent offending provisions of the Criminal Justice Act. In cases of assault, the police are now limited to common assault (s 196 Crimes Act 1961) to avoid mandatory imprisonment, because that is the only offence of assault which carries a possible prison sentence of less than two years.

The maximum sentence attached to each offence is an indication by the Legislature of how it regards the relative severity of each offence. In accordance with the longstanding abhorrence of violence, the offences involving violence tend to carry a greater maximum sentence. Because nearly all those offences that are likely to involve violence in their commission carry a maximum sentence of imprisonment for a term in excess of two years, to lower the threshold for application of ss 5(1), 5(2) and 5A to two years would be to render the threshold itself all but redundant.

The Overlap Between Sections 5(1) and 5(2)

Sections 5(1) and 5(2) are identical except in the following ways:

(i) s 5(1) requires "serious violence" or "serious danger" in the course of committing the offence whereas s 5(2) requires only "violence" or "danger".

(ii) s 5(2) requires that the offender has been convicted within the preceding two years of an offence punishable by 2 years in prison, whereas s 5(1) does not.

One commentator states that the 1987 amendments[6]

4 Committee of Inquiry into the United Kingdom Prison Services *Report* (Cmnd. 7673) (1979). (emphasis added); see *Report of the Penal Policy Review Commiettee* (NZ) (1981) para. 121.

5 See e.g. *R v Tua* [1986] N.Z. Recent Law 123; *R v Spring* [1986] N.Z. Recent Law 122; Norris (1984-87) 5 AULR 371, 373-374.

6 Supra at note 1, at 393.

> will ensure that all offenders who use some violence in the course of committing most assaults, will go to jail regardless of the fact or degree of injury involved to the victim.

It would seem that the distinction between serious violence and violence *simpliciter* has been broken down to the extent that almost any kind of violent behaviour will fall within the scope of "serious violence." This leaves the only difference between ss 5(1) and (2) as the latter requiring a previous conviction involving violence. Therefore, every offender falling within the scope of s 5(2) will also fall within s 5(1). The only way in which the effect of s 5(2) can be different from s 5(1) is by having a different range of factors included in "special circumstances" for each provision.

Special Circumstances and Recidivism

The Criminal Justice Act 1985 had its genesis in the *Report by the New Zealand Penal Policy Review Committee* 1981[7] which was charged with considering how the prison population could be reduced while maintaining public safety.[8] Public safety, it said, was the justification for imprisonment of an offender.[9] The Report recommended that the following test be applied to determine whether an offender is a candidate for prison:[10]

> Is there the probability of the offender committing another crime which will endanger the life or personal security of others to the extent that imprisonment is the only sanction that can adequately promote the general feeling of personal security?

Clearly, then, no term of imprisonment would be imposed upon an offender who is unlikely to commit another violent crime.

For whatever reason, the courts have been reluctant to restrict the range of factors included in "special circumstances" to those factors that reveal a low probability of repeat offending. However, with the insertion of the new ss 5(2) and 5A in 1987, the courts will find it increasingly difficult to avoid the test recommended in the Casey Report.

Because, as mentioned earlier, the only difference between ss 5(1) and (2) is the requirement in s 5(2) of a recent previous conviction, "special circumstances" will differ on that basis. Special circumstances in s 5(2) will be more difficult to prove than in s 5(1) because s 5(2) expressly recognises that a history of violent offending is more likely to justify imprisonment; the offender is more likely to offend again. Section 7 of the Criminal Justice Act provides further legislative evidence of the Casey test by providing that the safety of the community should be a vital factor in considering a sentence of imprisonment.

It is also suggested that adherence to "promotion of community safety" as

7 "The Casey Report".
8 Ibid, para 6.
9 Ibid, para 121.
10 Ibid.

the test for special circumstances may afford some consistency to the seemingly irreconcilable cases concerning violent offending since 1985.

II Changes To Reparation Provisions

Overview

The Criminal Justice Act 1985 made the sentence of reparation a separate penalty to be used in every case where reparation may be imposed. Reparation is intended to be a sentence of first resort.[11] The scope of the reparation provisions was only so wide as to relate to offences causing physical damage to property. While the legislation still does not complement the role of the Accident Compensation Act 1982 in dealing with personal injury, the 1987 Amendment (No.3) Act has increased the scope of ss 22 and 23 to apply to offences causing emotional harm to the victim. In recognition of the difficulties in isolating emotional harm, there have been appropriate amendments to ss 22(2),(3),(4) and 23 (3). In effect, the court cannot escape an inquiry into the nature and extent of emotional harm to the victim and, in most cases, the court will commission a report from a probation officer to help with the inquiry.

Emotional Harm

Attaching a single monetary sum to the emotional harm suffered by any victim will be the most difficult task for the court in reparation cases. The extent of emotional harm suffered by each victim will vary widely according to the personality and make-up of the victim. The intention of the new legislation is to recognise that any person has the right to feel safe and happy, but the courts may not be willing to grant full redress to a victim who had an abnormal predisposition to emotional harm.

Accident Compensation Act 1982

Pursuant to s 79(1) of the Accident Compensation Act 1982, a person who suffers personal injury by accident may be awarded lump sum compensation in respect of loss of enjoyment of life, pain, and mental suffering including nervous shock and neurosis. Section 2 of that Act defines personal injury by accident as inclusive of:

> ... Actual bodily harm (including ... mental and nervous shock) arising by any act or omission of any other person which is within the description of any of the offences specified in sections 128, 132, and 201 of the Crimes Act 1961 ...

Section 128 defines the offence of sexual violation, s 132 defines the offence of sexual intercourse with any girl under the age of 12 years, and s 201 defines

11 Criminal Justice Act 1988, ss 11 and 22.

the offence of unlawfully infecting another with disease. It would seem that it is possible for a victim of any of these offences to have two possible means of redress for emotional harm: reparation, and Accident Compensation. The issue is whether such a victim would receive an award through both schemes. In the preparation of a report under s 22(3) of the Criminal Justice Act the Probation Service is not required to consider compensation already received by the victim. The Accident Compensation Act likewise does not provide for a reduction of an award in accordance with reparations made because s 27 of that Act bars any proceedings in a New Zealand court for damages in respect of personal injury. That provision, however, does not cover all methods of recovery in respect of personal injury. These observations seem to suggest that duplication of compensation for an emotionally harmed victim is possible in some specific offences.

Victims of Offences Act 1987

As a component of some block legislation, the Victims of Offences Act was passed "to make better provision for the treatment of victims of criminal offences." In it is contained a declaration of principles to act as guide-lines in the treatment of victims. Section 8 of this Act states that a sentencing judge should be informed about any physical or emotional harm or property loss suffered by the victim. Because this is ensured by "appropriate administrative arrangements," and that the communication should be by the prosecutor orally or in a written statement, it is likely that the task of preparing the information will fall to the police. There may be an unnecessary duplication of bureaucratic operation because the Probation Service may already be writing a report pursuant to the reparation provisions of the Criminal Justice Act. The question is also raised as to the qualifications of members of the Police to write victim impact statements, especially regarding any emotional harm.

Conclusion

In 1985 significant inroads were made in New Zealand's penal legislation to recognise the feelings of the victims of an offence, and the wider community as a whole. The Criminal Justice Amendment Act (No.3) 1987 has confirmed and strengthened the place of this principle in sentencing policy. Coming, as it did, on the heels of a much publicised public outburst against violence and the lack of redress, the new legislation may have been hastily conceived.

– *Martin Wright*

INTERNATIONAL TERRORISM (EMERGENCY POWERS) ACT 1987

Introduction

The primary thrust of the 1987 legislative package comprising the International Terrorism (Emergency Powers) Act, the Public Safety Conservation Act Repeal Act, and the Defence Amendment Act was the repeal of the Public Safety Conservation Act 1932, once described as "potentially the most dangerous and repressive piece of legislation on the New Zealand statute book". By creating a new set of emergency powers to replace the old statute, however, the New Zealand Government essentially signalled its acceptance of New Zealand's lack of immunity to the now endemic phenomenon of international terrorism.

Parts of the new Act received immense media scrutiny; others were ignored. The bill was modified substantially several times in response to heavy criticism of the original censorship provisions. As enacted, it is arguable that the legislation fills a psychological gap rather than a real one; the emergency powers are not new or unique, a cause for relief to civil libertarians, but may provide some measure of security for those in a position to exercise them.

The Public Safety Conservation Act 1932

Introduced, debated and enacted over a period of 48 hours in response to rioting unemployed in Auckland, the Act gave the Governor General power to proclaim a state of emergency if either the public safety or public order were imperilled or if the provision of the necessities of life for the community was in danger.

Once the emergency was proclaimed, the Governor-General could make regulations by Order-in-Council necessary in his opinion to prohibit acts which would be injurious to the public safety. Once made, the regulations had to be laid before Parliament as soon as possible and would expire after 14 days without a continuance resolution from the House.

The Act was used for the first time in 1939, as a useful piece of legislation to mobilise for war while the emergency regulations were promulgated. In 1951 however, the Act revealed its true potential for the abrogation of civil liberties when it was used to end the Waterfront Strike. Regulations were promulgated prohibiting processions, demonstrations, pickets and signs in support of the strike, giving the police extremely wide powers of arrest and entry, and essentially censoring the media by prohibiting publication of anything likely to encourage the strike.

Its use threatened in 1976 and again in 1982 to deal with industrial unrest, the Act was widely perceived as a dangerously open-ended licence; a blank cheque for the government with limitless funds once a state of emergency was declared. The Labour Government became committed to its repeal.

International Terrorism (Emergency Powers) Act 1987

1. Definition of International Terrorist Emergency

1.1 The Act provides a set of special emergency powers which may be exercised on the authorisation of three cabinet ministers in the event of an international terrorist emergency in New Zealand. An "international terrorist emergency" is defined in section 2 as a situation in which any person threatens, causes or attempts to cause, serious injury to people or destruction of property (which includes any national feature the preservation of which is in the national interest) in order to coerce, deter or intimidate the government of New Zealand (or of any other country) or any body or group of persons (inside or outside New Zealand) for the purpose of furthering outside New Zealand any political aim.

1.2 The definition drew widespread criticism from select committee submissions, particularly the Joint Media submission, and the Human Rights Commission. The primary objection to the definition was that it did not expressly exclude application of the Act to legitimate forms of domestic protest, traditionally within the existing powers of the police to control. These criticisms raised the issue of necessity; were the new emergency powers in the Act essential? The 1985 Rainbow Warrior bombing was used by the Minister of Justice to illustrate the need for the new powers, yet the New Zealand police dealt with that incident efficiently and satisfactorily using their ordinary existing powers. These powers of arrest in public disorder situations range from offences such as disorderly, offensive behaviour and obstruction[1] to breach of the peace, suppression of riot, unlawful assembly and sabotage in the Crimes Act.

1.3 The original definition was enacted without modification. Human Rights Commission observations that the definition could allow the exercise of emergency powers by the police where there is a threatened mass demonstration against the policies of a foreign government, for example, a war similar to Vietnam, or even the funding of counter revolutionaries in central America, remain valid. The definition remains one of the least satisfactory provisions of an otherwise carefully worded and limited piece of emergency legislation.

2. Authority to Exercise Emergency Powers

2.1 Section 5 of the Act provides for the Commissioner of Police to inform the Prime Minister of his subjective belief that a possible international terrorist emergency is occurring and that the exercise of emergency powers is or may be necessary to deal with that emergency. Upon being informed pur-

1 The Summary Offences Act 1981.

suant to section 5, the Prime Minister may call a meeting of at least three cabinet ministers to consider whether to authorise the use of emergency powers by the police. Before so authorising, they must believe on reasonable grounds that an emergency of an international terrorist nature is occurring and that the exercise of emergency powers is necessary to deal with it.

2.2 Section 6(4) provides for the expiry of the authority no later than 7 days after it was given, although it is expressed as subject to sections 7 and 8 whereby the House of Representatives may extend the authority to exercise emergency powers for an aggregate period not exceeding 14 days. There is, however, no provision requiring the House to reassemble if it is not sitting at the time of the emergency. This omission is worrying, given the wide authority to exercise emergency powers that the Act confers on the executive. Even the Public Safety Conservation Act required what was in effect the cabinet to declare an emergency and, amendments made to that Act in 1960 and 1986, specifically required parliament to be summoned within 7 days of the making of a proclamation of emergency if it was not already sitting.

2.3 Section 8 gives the House of Representatives power to revoke the authority to exercise emergency powers at any time. This goes some way towards filling the breach but the fact remains that an entire international terrorist emergency lasting for a maximum of 21 days may be dealt with using emergency powers authorised by only three cabinet ministers.

3. Emergency Powers

3.1 Under section 10 emergency powers can be exercised by any member of the police for the purpose of dealing with any emergency for which the use of powers has been authorised under section 6(2) or section 7 or of preserving life or property threatened by that emergency. The powers contained in section 10(2) are closely modelled on those found in the Civil Defence Act and deal with the evacuation of premises, entry onto premises, aircraft, ships and other vehicles, closing roads and restricting public access, and the requisition of property.

3.2 The emergency powers content of the Act was substantially modified from that in the original Bill. The Select Committee gradually eliminated the original censorship provisions which enabled any member of the police, for the purpose of dealing with the emergency, to prohibit or restrict publication or broadcast of any report or account of measures being taken to deal with the emergency. These provisions were justified on two grounds:

1. The safety of hostages and the general effectiveness of the security forces in dealing with the emergency;
2. That explicit definition of circumstances in which censorship could be exercised is better than blanket censorship of the type imposed under the Public Safety Conservation Act (of which the Waterfront Strike Regulations 1951 are a prime example).

3.3 The media presented a united front in objecting to these provisions, emphasising democratic tradition, a commitment to freedom of the press and freedom of expression, and labelling the bill a "South African style charter for suppression". The Joint Media submission to Select Committee stressed three grounds for its objections:

1. The provisions were severe and unwarranted restrictions on the freedom of the press in a free and democratic society;
2. In practical terms the provisions were cumbersome and unworkable and would result in an unecessarily divisive and confrontational relationship between the media and the police;
3. The police and the media had been parties to a voluntary agreement since 1984 expressly dealing with terrorist emergency situations in which police/media cooperation would be essential.

3.4 The "voluntary restraint" package appeared to be the clinching factor in the Select Committee's decision to remove the censorship provisions. The agreement gives a clear set of guide-lines to be followed during terrorist situations. While the voluntary, non-statutory nature of the agreement may give cause for concern it is encouraging that the police and the media have cooperated without any prompting from the legislature or the judiciary.

3.5 Section 10(3) of the Act provides that any member of the police may for the purpose of preserving life threatened by an international terrorist emergency intercept private telephonic communications. The power is carefully limited by section 10(4) which requires it to be exercised by or with the authority of a commissioned police officer only when that officer believes on reasonable grounds that it is necessary to facilitate preservation of life. In the words of the New Zealand Council for Civil Liberties, the power is "pragmatically acceptable."

3.6 Section 14 enables the Prime Minister to prohibit or restrict the publication or broadcasting of the identity of any person involved in dealing with a terrorist emergency and the publication of any picture or detail of the equipment that may be used. The Prime Minister must have belief on reasonable grounds that the publication or broadcast of such information would endanger the safety of the person involved. Similar provisions, justified along similar lines (in the interests of security) can be found in the New Zealand Security Intelligence Service Act 1969. While the interests of security may present a legitimate need for these provisions, they give cause for concern. A viable alternative, to giving such a far reaching power to one member of the executive, may be to allow an application for access to sensitive material under the Official Information Act which provides guidelines for the release of such material. A further advantahe is that any decision which denies access may be subject to the review procedures provided for in the Act.

Defence Amendment Act

The amendment essentially gives a specific statutory mandate for responsibilities that the military could be called upon to undertake in aid of the conventional civil powers in emergency situations. The repeal of the Public Safety Conservation Act would have left a gap in section 79 of the Defence Act which limited use of military power by the executive to circumstances in respect of which a proclamation of emergency had been issued under the Public Safety Conservation Act.

Conclusion

The repeal of the Public Safety Conservation Act must be seen as a progressive step in the constant struggle to prevent the accumulation of executive power. The new International Terrorism (Emergency Powers) Act was passed ostensibly to fill in the gaps left by the repeal of the Public Conservation Safety Act but as the foregoing discussion suggests, these gaps may be rather illusory. As it stands, the new Act contains very few extraordinary or even unique emergency powers. While some doubts have yet to be dispelled, it is clear that the new Act is not as capable of the degree of executive abuse as its predecessor. The emergency powers are carefully circumscribed, although possibly unnecessary. Perhaps the greatest achievement of the new legislation is its recognition of a certain loss of innocence in terms of New Zealand's lack of immunity to terrorism and its devastating effects.

– *Jennifer Caldwell*

CASE NOTES

Rowling v Takaro Properties Ltd [1988] 1 All ER 163, Privy Council; Lord Mackay of Clashfern LC, Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman and Lord Goff of Chieveley

Introduction

The decision by the Court of Appeal on 1 May 1986 in the case of *Takaro Properties Ltd v Rowling* was received with great interest, not to mention a little concern. In that case a minister exercising a statutory discretion was held to owe a duty to those likely to be affected by his exercise of discretion to ascertain its true extent and purpose, and for this purpose to take legal advice if necessary. This duty was held to have been breached, and damages of $300,000 were awarded against the Minister of Finance. The present decision, substantially over-ruling that of the Court of Appeal, seems likely to evoke similar interest and concern.

The Facts

Takaro Properties Limited (Takaro) was incorporated in 1969 with a capital of $250,000 for the purpose of constructing and operating a luxury tourist lodge in the Upukerora Valley in the south of the South Island. The tariffs were extremely expensive, the occupancy rate never exceeded 19.3%, and by January 1973 Takaro was in serious financial difficulties. Its owners proposed a rescue scheme under which a 90% holding in Takaro would be sold to Mitsubishi Rayon Co. (Mitsubishi), a company incorporated in Japan. The proposed transfer of shares to an overseas corporation required, under the Overseas Takeover Regulations 1964, the consent of the Minister of Finance, who at that time was Mr. Rowling, the appellant. This consent, after seven months of negotiations, was refused in August 1973. The appellant indicated at the time that he would prefer the tourist lodge and its land to revert to New Zealand ownership. Since consent to this first scheme was refused, a second rescue scheme for Takaro was proposed. Under this alternative scheme, 200,000 $1 shares in Takaro would be issued to Mitsibushi, and the proceeds would be used by Takaro to pay for improvements to the tourist lodge, together with other money to be lent to Takaro by New Zealand individuals. The proposed issue of shares to an overseas corporation under this scheme required the consent of the Minister of Finance under the Capital Issues (Overseas) Regulations 1965, which had been promulgated under the Reserve

Bank of New Zealand Act 1964. The appellant took the advice of the Cabinet Economic Committee, which considered that consent should be refused, and formally refused consent in March 1974.

Takaro then applied to the High Court for judicial review of the appellant's decision. Both in the High Court, before Wild CJ, and, on the appellant's appeal, in the Court of Appeal, it was held that the appellant's refusal of consent was invalid, and that he was obliged to reconsider it. The refusal was primarily motivated by his desire that Takaro's land should revert to indigenous New Zealand ownership, and this was a consideration which, on a proper construction of the 1965 regulations, he was not entitled to take into account. Before Takaro had a chance to ask the appellant to reconsider his decision, however, Mitsibushi decided that they would withdraw from the rescue scheme, as did the New Zealand individuals concerned, in view of the worsening international financial situation. As a result, the intended scheme for the rescue of Takaro collapsed, and a receiver was appointed in March 1975.

The Litigation

In June 1975, Takaro and its principal shareholder commenced proceedings against the appellant. The grounds of their claim were, among others, that in refusing consent, the appellant negligently allowed himself to be influenced by the "reversion factor" – i.e. his desire that Takaro's land should revert to indigenous New Zealand ownership – and had negligently failed to take legal advice on the question of whether he was entitled to take this factor into account. The appellant applied for the statement of claim to be struck out as disclosing no reasonable cause of action. In the High Court, Beattie J struck out all the causes of action based on allegations of negligence. On appeal by Takaro, the Court of Appeal restored the causes of action based on negligence.

In October 1982, in the High Court, the original claim was finally argued. In December 1982, Quilliam J gave judgment in favour of the appellant, on the grounds that, although he was under a prima facie duty of care towards Takaro, no breach of that duty had been established and, even assuming a breach of duty to have been established, no loss to Takaro had been shown to have resulted therefrom since, in the judge's opinion, the scheme to rescue Takaro would have failed anyway.

In May 1986, a Full Court of the Court of Appeal reversed Quilliam J's decision, assessing damages payable from the appellant to Takaro at $300,000 plus interest at 11% from March 1974 until the date of judgement. Woodhouse P, Richardson and McMullin JJ held that the appellant was negligent in taking the reversion factor into account, while Cooke and Somers JJ held that he was negligent in not taking legal advice as to whether he was entitled to take the reversion factor into account. Damages were calculated by reference to the loss of the chance that the lodge might have become prosperous, had

consent been granted instead of refused in March 1974.

The respondent appealed against the decision of the Court of Appeal. The principal issues considered in the Privy Council advice were whether a duty of care rested on the respondent; the proper construction of the relevant legislation; and whether the respondent had breached his duty of care, assuming any existed.

Duty of Care

Unlike the judges in the High Court and in the Court of Appeal, who unequivocally held that the respondent was under a duty of care to Takaro in interpreting the relevant legislation, the Privy Council declined to make any definitive pronouncement on the question of whether a duty of care should be held to rest upon persons exercising a statutory discretion towards those who are likely to be affected by their decisions. This reluctance was due partly to the fact that the question was not argued before the Privy Council as fully as it might have been, and partly to the fact that an answer to the question was not essential to a decision on the facts of the case.

The Privy Council did, however, make some observations on the subject. First they refused to accept Quilliam J's application of the distinction between policy decisions and operational decisions. Quilliam J in the High Court had, with some misgivings, held (following Lord Wilberforce in *Anns v Merton London Borough Council*) that the respondent would owe a duty of care if he were making an operational decision, but not if he were exercising a policy decision; and that the decision he was called upon to make was an operational decision, and that he did, therefore, owe Takaro a duty of care. The Privy Council held this to be a misinterpretation of Lord Wilberforce's remarks. The true import of the policy/operational distinction is that ministers should be completely free from liability in tort when exercising their discretion to determine policy, but that even when operational decisions are being made, the desirability of imposing a duty of care in the interpretation of the relevant legislation is debatable.

The Privy Council then referred to certain considerations which, in their opinion, argued against the imposition of such a duty. The first consideration is that, in general, the worst possible effect upon the victim of a negligent decision is delay, since the process of judicial review is available to have any such decision promptly rectified. Second, it is never easy to conclude, however wrong a particular interpretation of a statute may be, that it is a negligent interpretation. Anyone, even a judge, after all, is capable of misconstruing a statute. Third, the Privy Council considered that to cure the disease of negligent decision-making by imposing such a duty might have more serious effects than the disease of negligence itself could ever have. In particular, cautious civil servants and ministers might exercise extreme caution, and take legal advice, or even the opinion of the court, before making any decision on a

difficult case, thus leading to increased delay for everyone. Finally, it would be difficult to categorize the various decisions a minister needed to make as, on the one hand, decisions on which legal advice should be taken, and, on the other hand, those on which it need not. These considerations notwithstanding, the Privy Council declined, for the reasons already referred to, to express any opinion on the question of whether any duty of care should be held to exist.

Construction of the Relevant Legislation

In the judicial review proceedings, both before Wild CJ and in the Court of Appeal, a narrow view was taken of the matters which should have been taken into account by the appellant in considering Takaro's application for his consent. The Court of Appeal considered that "the ownership of land by overseas persons in the context of the present case is 'an entirely distinct and different matter relating to private ownership of land within New Zealand and not to New Zealand's resources outside this country'." According to this view, the reversion factor was an irrelevant consideration and should not have been taken into account by the appellant. In the present proceedings, before Quilliam J, the appellant stated that he had been led to decline consent by, in addition to the reversion factor, eight other considerations relating to the general development of New Zealand. According to the narrow view taken in the earlier proceedings, these other considerations were also irrelevant. The purpose of the present proceedings before the Privy Council was not to determine whether this narrow view was in fact correct, but to determine whether the appellant had acted negligently in holding the wider view that the reversion factor, and the eight other factors, could properly be considered in making his decision. Thus, although the Privy Council might be of the opinion that the narrow view was incorrect, it was not necessary for them to hold that it was, but merely to hold that the appellant was not unreasonable in holding a wider view.

The Privy Council examined the regulations and the legislation under which they were made, it being accepted that the appellant was under an obligation to be guided by both of these in making his decision. Section 28 (1) of the Reserve Bank of New Zealand Act 1964 read:

> In addition to any other power to make regulations conferred by this Act, the Governor-General may from time to time, by Order in Council, if he is satisfied that it is necessary to do so for the purpose of safeguarding in the public interest the credit, overseas resources, or development of New Zealand, make regulations providing for the prohibition, restriction, regulation, and control of overseas exchange transactions, and of other transactions affecting or likely to affect at any time the overseas resources of New Zealand.

The question at issue was essentially whether the word "development" in the above section should be interpreted in conjunction with the words "credit" and "overseas resources", so as to refer exclusively to economic and financial development and to the need to maintain overseas resources, which were not

going to be affected in the present case, or whether it should be given a wider interpretation, embracing every type of development whether economic, sociological or otherwise. In the review proceedings, the Court of Appeal noted that the regulatory power extended to all overseas transactions, but only to such other transactions as affected or were likely to affect the overseas resources of New Zealand. Given this qualification, the Court of Appeal concluded that the safeguarding of overseas resources was the sole aim of this section of the legislation, and hence that the ownership of land within New Zealand was an entirely distinct and irrelevant consideration.

The Privy Council took the view that the three matters "credit, overseas resources, and development" were sufficiently different in character for "development" not to require interpretation by strict reference to the others. The fact that only overseas transactions and other transactions affecting New Zealand's overseas resources might be controlled was, in the Privy Council's opinion, irrelevant to the purpose for which such control might be exercised. The Privy Council justified its wide interpretation of the word "development" by an analogy with s 28 (c) of the Act, which referred to the regulation of overseas companies wishing to commence business in New Zealand. Several hypothetical cases, including that of a company incorporated in a foreign country governed by a regime which was anathema to the elected representatives of New Zealand, proposing to commence business here, were considered, in order to demonstrate that this wider view of the purposes for which the regulatory power might be exercised, whether or not actually correct, was at least tenable. Assuming that the appellant did hold this view, he could reasonably regard the reversion factor, as well as the eight other factors in his decision, as a matter bearing on the safeguarding of the development of New Zealand, which could properly be taken into account.

Breach of Duty

In his judgment, Quilliam J rejected, first, the allegation that the respondent had acted negligently in allowing himself to be influenced by the reversion factor, and, second, the allegation that he had acted negligently in failing to take legal advice. These conclusions were accepted by the Privy Council.

Although it was accepted that the respondent was not in fact entitled to take the reversion factor into account, it was argued for the respondent that he believed at all times that he was entitled to do so, and some force was given to the respondent's evidence by the observation that he pursued this belief as far as the Court of Appeal (in appealing against Wild CJ's decision in the judicial review proceedings) before accepting that it was mistaken. Although the respondent conceded that he knew that he had no right to take the reversion factor into account to the exclusion of every other consideration, he asserted that he had allowed for other factors as well, and, moreover, that these other factors alone would have justified his refusal. The respondent also

pointed out that the application had been referred to the Cabinet Economic Committee, which had departmental officers in attendance on one occasion, and which had recommended that the respondent refuse consent. Quilliam J accepted all these arguments on behalf of the respondent, and concluded that he had not acted negligently in taking the reversion factor into account.

On the second allegation of negligence, Quilliam J saw no reason to impose an obligation on the respondent to take legal advice on the particular question of the relevance of the reversion factor than on any other of the many questions which he must have had to decide, and he refused to contemplate that the respondent could be under a duty to take advice in respect of every matter and application coming before him. He therefore concluded, taking into account also the honesty of the respondent's belief that he was entitled to consider the reversion factor, that he had not acted negligently in failing to take legal advice either.

The Privy Council concluded that Quilliam J was right in rejecting the two allegations of negligence, and that there were no grounds on which the Court of Appeal could properly have interfered with his decision in this respect.

The Decision

Since the Privy Council had reached the conclusion that, assuming that he was under a duty of care, the respondent had committed no breach of that duty, it followed that the issues of causation and damages were irrelevant. Although no damages were payable to Takaro by the respondent, the Privy Council thought it worthwhile to express its opinion on a disputed point concerning interest on damages. The effect of its opinion is that, if the Judicature Act interest rate is, say, 5% for five years on end, and is then increased to, say, 10% one year before a case comes on for trial, and the plaintiff recovers damages, he will only be able to claim interest at 5% for five years added to 10% for one year, rather than interest at 10% for six years, as was allowed by the Court of Appeal.

Comment

It is submitted the most significant observation to be made on this case concerns the Privy Council's reluctance to hold that there exists a duty of care upon ministers, and other persons exercising statutory discretions, towards those likely to be affected by their decisions. Although not positively rejecting the argument that there should exist such a duty, the Privy Council listed several considerations in the course of their advice, which taken together will certainly weigh against the likelihood of the Privy Council imposing such a duty if the question should come to be decided in the future. In addition, from a reading of the later part of the Privy Council advice, where the respondent's alleged breach of duty was considered, it would seem unlikely that any future

plaintiff will find it easy to establish a breach of duty in a case where normal governmental procedures have been followed. It is possible, therefore, that many a future case may be dealt with as the present case has been, namely by a decision that there may or may not have been a duty of care, but the defendant has not breached it anyway.

It should be noted that the Privy Council was of the opinion that the question of the existence of this duty of care was a question on which "no sensible distinction can be drawn . . . between the various countries and the social conditions existing in them." It is submitted that, laudable or otherwise as this desire for uniformity may be, it is likely to lead to an increase in the already considerable pressure for the link with the rest of the Commonwealth through the Privy Council to be cut, and for the Court of Appeal to be left free to develop New Zealand law along its own lines.

- Graham H. Coop

N.Z. Maori Council & Latimer v Attorney-General & Others [1987] 1 NZLR 641; (1987) 6 NZAR 353. Court of Appeal. Cooke P, Richardson, Somers, Casey, Blisson JJ.

This was an application for judicial review of the power to transfer Crown assets given to Ministers under section 23 of the State Owned Enterprises (SOE) Act 1987. In the High Court Heron J made an interim declaration preventing any such transfers, before removing the matter to the Court of Appeal for determination.

The SOE Act is the result of government policy to relinquish control of a variety of government departments, the purpose of this action being summarised in the Long Title to the Act:

> "An Act to promote improved performance in respect of Government trading activities and, to this end, to -
> . . . (b) Authorise the formation of companies to carry on certain Government activities and control the ownership thereof. . ."

During the Bill's passage through Parliament a recommendation by the Waitangi Tribunal led to the inclusion of sections 9 and 27. Section 9 is in the first part of the Act, headed Principles, and is as follows:

> 9. Treaty of Waitangi – Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

Section 27 (at that time) provided that land which was the subject of a claim to the Waitangi Tribunal when the Act came into force (18 December 1986) would remain subject to that claim even if transferred to an SOE under section 23.

The Maori Council saw several problems with land being transferred under the Act as it then stood, leading them to bring this application. One of the

most important was the effect this would have on claims lodged with the Tribunal after 18 December 1986 and claims that were still in the process of being prepared, as these were outside the scope of section 27. The number of claims and consequently the amount of land involved here was significant due to the 1985 amendment to the Treaty of Waitangi Act 1975 which allowed claims to be brought for matters dating back to 1840. (Of the 88 claims before the Tribunal at the time of those, 58 had been lodged since the amendment and of those, 32 had been lodged after 18 December 1986.) If land was involved in these claims was transferred out of Crown control, it was argued that the probability of recommendations by the Tribunal being implemented would be greatly reduced.

A general concern was the effect of land having been transferred to SOE's, (and possibly also transferred on to private ownership) on the actual recommendations of the Tribunal; it was feared that their willingness to recommend the return of such land or to grant compensation would be lessened. Tied in with this was the fear that the pool of land held by the Crown would be significantly depleted, thus further reducing the chances of claimants receiving land as compensation at all.

The arguments of the parties were based around section 9, the appellants submitting that, without more protection than was offered by section 27, any exercise of the powers contained in section 23 would be against the principles of the Treaty of Waitangi. They relied on the text of the Treaty itself as constituting the relevant principles, but in addition it was submitted that there were ten implicit principles which Richardson J summarised as follows:

> (i) the duty actively to protect to the fullest extent practicable; (ii) the jurisdiction of the Waitangi Tribunal to investigate omissions; (iii) a relationship analogous to fiduciary duty; (iv) the duty to consult; (v) the honour of the Crown; (vi) the duty to make good past breaches; (vii) of the duty to return land for land; (viii) that the Maori way of life would be protected; (ix) that the parties would be of equal status; and (x) where the Maori interest in their taonga is adversely affected, that priority would be given to Maori values.

The respondents contended that section 27 sufficed to keep the Act in accordance with the principles of the Treaty. They rejected any concept of implied principles and identified five principles from the Treaty itself:

> (i) that a settled form of civil Government was desirable and that the British Crown should exercise the power of Government; (ii) that the power of the British Crown to govern included the power to legislate for all matters relating to "peace and good order"; (iii) that Maori chieftainship owner their lands, forests, fisheries and other treasures was not extinguished and would be protected and guaranteed; (iv) that the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than the Crown; and (v) that the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it.

Although five independent judgements were given, all concurred in the orders proposed by Cooke P and the conclusions reached by each were (roughly) similar. As a matter of statutory interpretation the decision reached

was actually quite simple; it was held that section 9 was intended to be paramount within the confines of the SOE Act. Section 27 was found to be insufficient to protect the right of the Maori people to receive appropriate redress for past wrongs over land. An argument that section 27 constituted a code as regards land was rejected on the basis that such a construction would render section 9 virtually meaningless.

The Court declared that the transfer of assets to State enterprises, without a system to consider whether transferring particular assets would be inconsistent with the principles of the Treaty, would be unlawful and ordered the parties to consult and prepare a scheme of safeguards which would give reasonable assurance that all current and foreseeable claims to the Waitangi Tribunal would not be prejudiced by any proposed transfers.

Thus, legally, the decision itself is relatively straightforward; however, the ramifications of much of the discussion by the judges and the significance of the result reached are considerably less clear-cut. Although hailed as a victory for the Maori people, the case does also contain several negative elements.

Any recognition of Maori rights under the Treaty by such a high judicial authority is of course significant but no new ground has really been broken here as the situation falls within the ambit of the Privy Council decision in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308. There it was held that rights under the Treaty can be relied upon in Court if, and only if, the Treaty is specifically incorporated into a statute.

The decision demonstrates though, that if the legislature does include sections referring to the Treaty, the courts will attempt to give effective meaning to the provision. This is illustrated by their refusal to accept the interpretation proposed by the Crown which would have, in the words of Casey J, reduced section 9 to "a token gesture of goodwill."

Having found section 9 to be paramount, the Crown was then able to rule that section 27, although itself not inconsistent with the Treaty principles, was insufficient protection for the rights in question. Thus within the limits of a particular statute, it appears the Treaty may be given status analogous to that of a superior constitutional document. (Cooke P described section 9 as having "the impact of a constitutional guarantee within the field covered by the SOE Act.")

The case highlights several difficulties involved with including sections such as section 9. First, although it may not be viewed as practicable to give effect to the Treaty itself, given the vast changes to New Zealand over the last 150 years, the helpfulness of the phrase "the principles of the Treaty of Waitangi" is questionable. The phrase is vague and open to a wide variety of interpretations, as illustrated by the very different meanings attributed to section 9 by both the parties and the judiciary involved in this case. The Court attempted a definition of those principles, but given that this is contained in five separate judgements it is submitted that the scope for future argument has been nar-

rowed only slightly.

General guide-lines to be obtained are that it is the "spirit" of the Treaty which is to be considered; an approach which theoretically allows problems of textual differences and translation to be ignored. The Treaty should be interpreted "widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms", "unconstrained by technical rules of British law, or by English legal precedent, but on broad principles of general acceptation." Casey J saw the use of the phrase "the principle of the Treaty" as pointing to "an adoption in the legislation of the Treaty's actual terms understood in the light of the fundamental concepts underlying them."

As regards these "fundamental concepts", the focus tended to be on the fact that the parties to the Treaty were partners, allowing duties akin to fiduciary duties to be implied, that is, duties to act reasonably towards one another, and with the utmost good faith. It should be noted that a duty to consult is specifically excluded by several of the judges, and also that the inclusion of the concept of reasonableness has a significant limiting effect.

> "The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the court in the end in a realistic way."

Referring to the principles of the Treaty rather than the Treaty itself must inevitably allow for a weakening of the case for the Maori people. This practice redefines and possibly narrows the scope of the Treaty, allowing it to be watered down by the economic and political realities of 1987.

The appropriateness of having the Court of Appeal determining these principles must also be questioned, given that an expert body of law and knowledge has evolved under the jurisdiction of the Waitangi Tribunal. Although much attention was attached to the findings of the Tribunal in each of the judgements, the comments of Somers J are important to note on this point:

> While the Waitangi Tribunal has exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them for the purposes of that Act, this Court has the function and duty to decide, so far as is necessary for the case in hand, what those principles are. *Such a finding by this Court will of course be binding and to the extent that it is material in any case should be followed by the Waitangi Tribunal as a declaration of the highest judicial tribunal in New Zealand.* (Emphasis added.)

Looking at the practical results of the decision, although this case may be viewed as a victory for the appellants in terms of the theories of constitutional law, in fact the effects of the decision may be minimal. It is submitted that the agreement eventually reached by the parties (recorded in the Treaty of Waitangi (State Enterprises) Bill) does not provide safeguards to the degree en-

visaged by the Court of Appeal and, with current plans by the government now to privatise some SOE's, the situation is made even more complex. It is questionable whether provisions such as paragraph (g)(ii) of the preamble to the Treaty of Waitangi (State Enterprises) Bill, which requires the Tribunal to hear claims relating to transferred land as if it had not been so transferred, will in fact prevent the Tribunal from being swayed in its recommendations as to appropriate remedies and forms of compensation when land has been transferred out of Crown control and a complicated procedure must be gone through to transfer it back. This can only be worsened if land has in addition been sold to a third party or if the enterprise itself (and therefore its assets also) is no longer owned by the State.

Thus, although this decision is important to the development of the constitutional law of New Zealand and adds considerable weight to the growing legal recognition of the importance of the Treaty and traditional Maori rights, it should be viewed with caution as it is by no means a straightforward endorsement of those rights.

- Nicola White

Day v Mead Court of Appeal 31 July 1987 (CA 90/36)
Cooke P, Somers, Casey, Hillyer JJ.

This is an important Court of Appeal decision. Viewed narrowly it simply involves a breach of the fiduciary duty owed by a solicitor to his or her client. Dicta of Cooke P and Somers J give it a broader significance. It marks another step in the dissolution of the traditional boundaries between contract, tort and equity and the development of a general law of obligations.

The Facts

The plaintiff, Mr Day, was an experienced surveyor. He had undertaken a number of successful business ventures. Mr Mead had been his friend and solicitor for some twenty-five years. On Mr Mead's advice, Mr Day invested $20,000 in a paper mill company of which Mr Mead was a director and shareholder. Some months later Mr Mead approached Mr Day to take up some more shares in the company. Mr Day invested a further $80,000. The advice was unsound. The company foundered and went into receivership. Mr Day lost all his money. He sued Mr Mead for both amounts plus interest. He alleged that Mr Mead had failed to exercise proper care and skill or was otherwise in breach of fiduciary obligations that he owed to Mr Day.

Concurrent Liability in Contract and Tort

The case ostensibly involves elements of contract, fiduciary duty and negli-

gence under the *Hedley Byrne & Co Ltd v Heller & Partners'* head.[1] Unfortunately, counsel for both parties declined to submit arguments on the issue of concurrent liability in contract and tort, an issue which, in turn, raises questions involving limitation periods and the assessment of damages. Thus *McLaren Maycroft & Co v Fletcher Development Co Ltd*[2] is still authority for the rule that, where there is a contractual relationship between two parties, the proper action for damages caused by lack of proper professional care and skill is an action in contract alone. This is anomalous among common law jurisdictions. Cooke P and Somers J gave a clear indication that, in an appropriate case, the Court would be willing to reconsider *McLaren Maycroft*. Cooke P suggested that a possible solution "is to recognize that, subject to special contractual terms, the same duty of care arises in both tort and contract and has the same incidents . . . and a cause of action for negligence does not arise in either tort or contract unless and until damage accrues."

Breach of Fiduciary Obligation

Both Gallen J, at first instance, and the Court of Appeal saw the case as more naturally turning on breach of fiduciary obligation rather than on a failure to exercise reasonable care. The relationship between solicitor and client is one that has traditionally been supervised by equity.[3] The case, on its facts, does not involve an extension of the doctrine of fiduciary duties.

Gallen J and the Court of Appeal held that Mr Mead had a conflict of interests. He failed to disclose fully the company's financial difficulties. He did not advise Mr Day to seek independent advice. He ought to have informed Mr Day that his $80,000 investment was being used, not as working capital, but to discharge a debenture held by Mr Mead's nominee company. Mr Day was awarded $60,000 which comprised the full amount of the first $20,000 invested, and half of the second investment of $80,000. The Court of Appeal agreed with Gallen J that, as regards the second investment, Mr Day was equally to blame for the loss he suffered and damages were assessed accordingly.

Equitable Damages

Mr Mead contended that damages cannot be given for the infraction of an equitable obligation. The Court rejected this claim and went to some lengths to set out the basis of equitable damages. Usually, where property or profit is obtained in breach of fiduciary duty, relief is given in the form of orders for restitution of account. When this method is inadequate or inappropriate the

1 [1962] AC 465.
2 [1973] 2 NZLR 100.
3 *Nocton v Lord Ashburton* [1914] AC 932; *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83.

Court has jurisdiction, independent of Lord Cairns' Act, to award monetary compensation.[4] The essential difference between common law and equitable damages is in the method of assessment. Tests of forseeability and remoteness are not relevant to compensation in equity. Equitable remedies are entirely discretionary. "The assessment will reflect that which the justice of the case requires according to considerations of conscience, fairness and hardship and other equitable features such as laches and acquiescence" (per Somers J). These considerations will also determine whether or not the Court will award interest under s 87 (1) of the Judicature Act 1908.

Because the case was characterised as one involving fiduciary duty rather than the tort of negligence per se, the Contributory Negligence Act 1947 was held not to apply. However, the principle of apportionment according to blame is inherent in the equitable considerations mentioned above.

Relationship Between Equitable and Tortious Duties

Perhaps the most interesting aspect of this case is the analogy drawn by Somers J between a fiduciary duty and a tortious duty of care. His Honour referred to *Nocton v Lord Ashburton* and *Robinson v National Bank of Scotland*[5], and Lord Haldane's dicta on fiduciary duties, and noted that these two cases are at the heart of the decision in *Hedley Byrne*. He added "I am disposed to think that the equitable and common law obligations as to disclosure, use of confidential information and want of care discernible in the cases are now but particular instances of duties imposed by reason of the circumstances in which each party stands to the other and that while the particular remedy for breach of duty may depend upon the way the case has developed, equity and law are set upon the same course." Classification of the duty no longer matters.

The effect of merging the vocabulary and concepts of tort with the law of fiduciaries is to resurrect the old equitable doctrine of making representations good – albeit in a modified form. Under this doctrine, if a party makes a statement of fact or intention and the other party acts to his detriment in reliance on that statement, then an equity is raised against the maker of the statement and he is bound to make good the representation[6]. After *Jordan v Money*,[7] the doctrine fell into desuetude until revived under the guise of promissory estoppel.

What is significant in the modern conflation of tort and equity, is that the amorphous tort of negligence under *Hedley Byrne* throws open the door for greater judicial intervention on equitable grounds. Equity will play an increasing role in commercial transactions and relationships hitherto governed

4 *Seagar v Copydex* [1967] 1 WLR 923; [1969] 1 WLR 809.
5 [1916] SC (HL) 154.
6 See Dawson (1982) 1 Canter LR 329.
7 (1845) 5 HLC 185; 10 ER 868.

by common law, and, in particular, by contract. In some areas equity fills a void such as in relation to directors' duties. In other areas equity is threatening to squeeze out the common law – for example, in the Court of Appeal's liberal formulation of the doctrine of unconscionable bargains in *Nichols v Jessup*.[8]

The Court will impose a duty when it is just to do so. It will no longer be important whether the duty is characterised as tortious or fiduciary. Once the vocabulary is the same, the conceptual distinctions are fudged. It is a short step from saying that a person owes a duty to give sound advice, to saying that he owes a fiduciary duty. From there, the measure of damages for breach of that duty is almost entirely a matter for the judge's discretion. It is difficult for parties to regulate their commercial relationships if the extent of their potential liability is determined ex post facto by the Court on an ad hoc basis, and not according to more predictable established principles.

At the heart of equity's ascent over common law is the dichotomous view that equity is justice, common law is certainty, and the two are mutually exclusive. Historically, and jurisprudentially, this view may be too simplistic. In the nineteenth century, for example, when classical contract theory reached its rhetorical zenith, the equitable doctrine of unconscionable bargains flourished[9] and the doctrine of making representations good survived at least half the century.[10] Thus strong common law and strong equity jurisdictions can coexist. This apparent paradox can be explained. As Maitland wrote, "We ought not to think of common law and equity as of two rival systems. equity was not a self-sufficient system, at every point it presupposed the existence of common law".[11] Perhaps, then, a strong Equity jurisdiction can only provide justice if the common law itself is robust. Certainty and justice are not opposed but are facets of the same goal.

Comment

Expanding equity at the expense of common law may lead to less certainty and less justice. The law will become more uncertain as cases become less predictable. Cases will be decided not on principle but according to broad discretionary guidelines. Decisions will be hard to appeal. If the established boundaries of contract, tort and equity break down it may become difficult for parties to appreciate the legal ramifications of their commercial, professional and even personal relationships.

- David Chan

8 [1986] 1 NZLR 226.
9 e.g. *Fry v Lane* (1888) 40 ChD 312.
10 e.g. *Loftus v Maw* (1862) 66 ER 544.
11 Maitland, *Equity* (1936) 19.

BOOK REVIEWS

SENTENCING IN NEW ZEALAND by Geoffrey G. Hall. Butterworths, Wellington, 1987. 446pp.

This book is the first to deal exclusively with the law of sentencing in New Zealand. It is an invaluable guide as it considers not only the principles of sentencing, but also the procedural aspects involved, including jurisdictions of individual courts, rights of appeal and financial penalties. The main body of the book contains a fully annotated text of the Criminal Justice Act 1985.

The reader seeking commentary on current issues causing public debate and concern will, however, be disappointed. This book does not attempt to address the wider social and philosophical issues which mould the sentencing process. Rather, as the author notes in his preface, it is intended primarily to be an analysis of the New Zealand law of sentencing as it stands – not as it is suggested it should be.

As the first text to consider the question of sentencing in New Zealand, it succeeds in providing a comprehensive outline of the principles by which sentencing discretions are exercised. It provides, in its introduction to the Criminal Justice Act 1985, a discussion of the increasing importance of legislative and judicial guide-lines to sentencing. As well as an examination of the basic aims and objectives of sentencing, there is extensive analysis of the various determinants affecting a well-balanced judicial decision – such as the characteristics of the offender and the prevalence of offending.

This work is highly recommended for its annotation of the Criminal Justice Act 1985. However, to appreciate its true value, the reader must already be familiar with aspects of the 1985 Act. The Act promotes New Zealand as a pioneer in the field of penal policy, and emphasises our ready acceptance of innovative alternatives to custodial sentences. The book provides useful commentaries on the development of our Criminal Justice system and the new statutory provisions contained within the Criminal Justice Act.

The 1985 Act introduced a new provision aimed at incapacitating violent offenders (s 5), which juxtaposed with statutory provisions which create presumptions against imposing custodial sentences (s 6 – s 8 incl.). The Act seeks to achieve these aims by introducing new alternatives to custodial sentences. These alternatives include reparation (s 22), supervision (s 46), and

community care (s 53) – all of which are discussed in individual commentaries to the various sections. This work is essential reading, not only for the law student seeking a basic and thorough understanding of our penal system, but also to the practitioner with a need to recognise sentencing alternatives. The reader will be assisted by references to the case law in each area discussed.

The single drawback, as with any other book which annotates a statute, is that it becomes dated with each amendment to the principal Act. Since the book was published last year, there have been marked changes to important provisions within the Act concerning violent offending and reparation – see the Criminal Justice Amendment Act (No.3) 1987 which repeals s 5 and s 22. Readers should be aware of these changes when referring to the text.

Conclusion

This book should be regarded as a prime source of practical guidance for those involved in the sentencing process. It is concise, yet covers all aspects of sentencing, is well presented, and is easy to read.

- Angeline Dang

CONTEMPORARY ISSUES IN COMPANY LAW edited by Professor John H. Farrar. Commerce Clearing House (N.Z.), 1987. 293 pp.

The world is undergoing a financial revolution. The changes it will bring to the corporate environment are many and far-reaching. New Zealand must keep up with the pace of such change. This book, a collection of essays by some of this country's foremost commercial law specialists, discusses many of the areas in need of reform, and indicates the direction in which our company law should be heading over the next decade and beyond. Thus, it is a very significant book.

Sian Elias, in the opening essay of the collection, stresses the need for a full reform of the Companies Act 1955, the oldest in the developed Commonwealth. She cautions that such important reforms should only be embarked upon after full consideration of the interests of the wider community and the current context of the New Zealand economy in light of its liberalisation and deregulation. These words very much set the theme for the other contributions, as each writer considers the issues and suggests possible directions for reform.

In an analysis of constitutional issues, Peter Watts considers the extent to which the Companies Amendment Acts of 1983 and 1985 serve to rectify the

problems associated with the ultra vires rule and the rules relating to directors' authority. He concludes that, while the amendments go some way towards clearing up previous inadequacies, more reform in this area is vital.

Lindsey Trotman examines the articles of association and their relationship to contracts. In a detailed legal discussion, he examines the many situations involved and suggests applicable solutions.

The fourth article, written by Andrew Beck, discusses the future application of the 'corporate veil principle', established in *Salomon v Salomon*[1] and looks at the opposing schools of thought on the matter. Interestingly, he concludes that the preferable approach, and one which the courts seem willing to accept, is to do what justice requires in each case, often by applying the rules of equity.

The case for abolishing the rule in *Trevor v Whitworth*[2], which forbids companies from purchasing their own shares their own shares is examined by Robert Dugan. He concludes that it should be abolished, but cautions that its abolition will need to be accompanied by an appropriate regulatory regime to counter the many abuses that can be precipitated in the absence of the rule.

New innovations in debt financing are now being used in New Zealand. Authors David Stock and John Farrar recognise the impact that the global financial revolution has had in New Zealand and our Companies Act's increasing inability to deal with it. The debt financing techniques discussed by both authors – such as negative pledges, debt defeasance and debt subordination – were never contemplated by the framers of our Companies Act and hence, these practices expose considerable deficiencies in the law. As a result, David Stock outlines the need for a neutral tax regime, while John Farrar, after a detailed discussion of the legal implications of certain forms of debt financing, expresses the need for company law to accommodate more flexible financing methods.

Leigh Thomson canvasses the conflict faced by nominee directors between their fiduciary duty as a director and their access to important information which would benefit the company they represent. Thomson reasons that present uncertainties in this area should be resolved by the legislature's laying down clear rules on disclosure in such circumstances.

In the first of his two contributions, an essay entitled 'Insider trading and the director', Colin Patterson strongly asserts that despite the lack of directly relevant legislation, insider trading is not 'legal' in New Zealand. He then examines existing law with respect to directors and highlights its present effectiveness in this area, while pointing out aspects in need of legislative attention.

John Farrar, in "The duties of controlling shareholders", considers the nature of the company organisation with respect to the relative positions of the majority and minorities, highlighting the essential tension between the two

1 [1897] AC 22.
2 (1887) 12 App Cas 409 (HL).

groups. He suggests that, while majority shareholders are no fiduciaries, they should follow a duty of fairness and good faith in their actions.

The effectiveness of section 209 of the Companies Act 1955 is the subject of Giora Shapira's essay, "Statutory protection of minority shareholders". After a full and interesting discussion of the underlying principles of minority protection, the ways in which the minority can be oppressed, and the ways in which s 209 can rectify oppression, Shapira concludes by stressing the effectiveness of the section, and its potential for growth as the major source of relief for minorities.

In a concise and clear-sighted discussion, Andrew Borrowdale examines the "Settlement of Stock Exchange Bargains". He looks at the present system and its many inadequacies and considers alternatives, including computer-based scripless trading.

The final contribution is from Colin Patterson. Entitled "Efficiency and equity in the regulation of takeovers", it provides an excellent summary of the issues involved, stressing the need to consider the wider interests of all members of society. The discussion deliberately attempts to be non-legalistic, highlighting the need to consider the considerable economic and social implications of the takeover process.

It is interesting to note that this collection is not concerned solely with legal matters. Many of the contributions consider other factors, especially the role of economics, in the formulation of directions in company law. It is important to recognise this theme, as too often the focus of the law is extremely narrow. Perhaps the main theme arising from this book is the need for reform. Many of the contributors are critical of the present company law regime, suggesting perhaps that our current system is little more than an atavistic relic, wholly inadequate in the present environment. With such change necessary, this book provides important guidance for the route ahead.

- Nicholas T. Brainsby