implied terms where the goods are new goods that are sold on hire purchase (see s. 51 Hire Purchase Act 1971), a seller can by way of an exclusion clause contract out of having to comply with the implied terms laid down in the Sale of Goods Act when the goods are sold other than on hire purchase. The 1973 Act has remedied this defect in the United Kingdom and has provided that in a "consumer sale" (which is basically a sale where the goods are normally and also appear to be in fact bought for the buyer's private use or consumption) a seller cannot contract out of the implied terms, and that in a "non-consumer sale" it is open for the buyer to argue that it is not fair or reasonable in the circumstances for the seller to be able to rely on an exclusion clause. It can be seen even from this brief resume that the British buyer is now considerably better off than his New Zealand counterpart if the latter pays cash for his goods rather than buying them on hire purchase. It is to be hoped that our Parliament will follow the British lead and remedy this situation in the near future.

L. A. Andersen.

COMPANY LAW

Powers and liability of a company

In *In re Wellington Publishing Company Ltd.* [1973] 1 N.Z.L.R. 133 it was held that the purpose of s. 62 Companies Act 1955 is the protection of minority shareholders and creditors. In this case the Wellington Publishing Company financed a takeover of Blundell Brothers Ltd. by acquiring all the shares in Blundells and using the capital reserves in Blundells to pay a dividend on that company's shares which would then be payable to the Wellington Publishing Company as sole shareholder. The former shareholders in Blundells would then be paid an amount on each share from this amount. A declaration was sought as to whether such method was lawful in terms of s. 62 of the Act as giving directly or indirectly "financial assistance" for the purpose of or in connection with the purchase or subscription made or to be made by any person of or for any shares in the company.

Quilliam J. in his judgment noted that the payment of a dividend is not something which will ordinarily be regarded as giving financial assistance. In looking further into the substance of the above transaction His Honour found that the declaration of the dividend by Blundells was out of money properly available for dividends and the payments by Wellington Publishing Company out of the moneys it had so received to the former shareholders of Blundells was not the giving of "financial assistance" by Blundells for the purchase of its own shares. It was also found that, having regard to the purpose of s. 62, there were no minority shareholders and that the

existing shareholders were amply protected by the substantial excess of assets over liabilities.

Directors

Westminster Chemical N.Z. Ltd. v. *McKinley and Tasman Machinery and Services Ltd.* [1973] 1 N.Z.L.R. 659 involved an application of the equitable principle that a company director cannot allow his private interests to conflict with his fiduciary duty to the company of which he is a director. The case also discusses the restraints imposed on a managing director in using knowledge acquired during his employment with the company. McKinley was a director and manager of the plaintiff company whose main source of business was as agent for overseas suppliers. McKinley, prior to giving notice to terminate his contract, negotiated with a number of the plaintiff's principal overseas suppliers for their agencies to be transferred to McKinley's own company.

On the first issue regarding McKinley's fiduciary relationship the Supreme Court followed the reasoning of the recent English decision of *Industrial Development Consultants Ltd.* v. *Cooley* [1972] 1 W.L.R. 443 that as a director of a company is akin to a trustee he is restrained from conducting himself in a manner adverse to the company's interests — irrespective of whether or not he had deprived the company of its benefit. On the further issue of restraints as to knowledge, Speight J. drew a distinction between knowledge acquired during employment and knowledge that might be acquired in the trade generally. The law will restrain the employee in the former instance but not the latter. For the restraint to operate His Honour noted that the cases require the information, if used, to be: ". . . so particularly within the knowledge of the former employer that the former employee cannot avail himself of it without ipso facto demonstrating that he is using knowledge which had been the special property of his employer." (ibid. 665.)

Section 102 Companies Act 1955

In *Automobile Association (Canterbury) Inc.* v. *Australasian Secured Deposits Ltd. (In Liquidation)* [1973] 1 N.Z.L.R. 417 the Court of Appeal had to decide whether certain deposits constituted mortgages of stock and thereby were "charges" within s. 102 Companies Act 1955. On deciding this question the Court, in applying *Beckett* v. *Tower Assets Co. Ltd.* [1891] 1 Q.B. 1, held that whether a transaction is a true sale and repurchase depends upon the intention of the parties and a court must have regard to the form of the transaction, but more particularly to the substance, the position of the parties, and the whole of the circumstances under which the transaction came about. Their Honours also held that the word "issue" in s. 102 (2) (d) must be construed as referring in a collective sense to the aggregate of a number of individual debentures issued by a company.

Auditor's Negligence

The recent English decision of *Arenson* v. *Arenson* [1973] 2 W.L.R. 553 is a case of some significance particularly due to the possible application of the dissenting judgment of Lord Denning M.R. in future cases of this type. In this case the plaintiff agreed to sell his shares in the company at their "fair value" which was defined as meaning the value "as determined by the auditors for the time being of the company whose valuation acting as experts and not arbitrators shall be final and binding on all parties". The "fair value" arrived at by the auditors was alleged to be a gross under-valuation and the plaintiff attempted to bring an action in negligence against the auditors. The majority of the Court of Appeal held that since the auditors were performing a quasi-judical function in fixing a fair value for the shares they were immune on the ground of public policy from any action for negligence (although not for fraud or collusion) in respect of anything done in that role. Lord Denning M.R. in his dissenting judgment stressed that the auditors were expressly engaged to act "as experts and arbitrators". Lord Denning was of the opinion that the principles of *Hedley Byrne & Co. Ltd.* v. *Heller and Partners Ltd.* [1964] A.C. 465 were applicable to the present fact situation and for that reason the plaintiff ought to be able to continue with his action in order to be compensated for the alleged serious under-valuation. Lord Denning's judgment may well be seen as an indication of a future application of the *Hedley Byrne* principle.

Legislation

The special Committee set up to review the Companies Act 1955, chaired by Mr Justice Macarthur, recently submitted its Final Report. This Report, which will presumably form the basis of new company legislation, reiterates its Interim Report finding that ". . . we do not think there is any need to make fundamental changes in the framework of the Act". The Committee however makes a number of important recommendations which would significantly raise the standard of investor/creditor protection. As regards the ultra vires doctrine the Committee has adopted the view that the doctrine should be retained as between the company and its shareholders and debenture holders but it should be abrogated as against outside contractors (paras. 96-99). This proposal would obviously remedy such a situation as occurred in *In re Jon Beauforte (London) Ltd.* [1953] Ch. 131 where an outsider was left with no effective remedy against the company. An important recommendation is made with a view to modify the principle in *Percival* v. *Wright* [1902] 2 Ch. 421 which decided that a director's fiduciary duty is owed only to the company and not to the individual members or outsiders. The Committee proposed that an officer who, in dealing with his company's securities, uses confidential information acquired by virtue of his position, and which if generally known might reasonably have affected the transaction with another person, will be liable to compensate that party for any loss that he suffers as a result (paras. 312-315). The problem of the future

of the private company in New Zealand was considered at some length. Proposals in this direction were governed by two objectives of the Committee: first to reduce the number of registrations; and secondly to increase financial disclosure. Other important recommendations were made including making a prospectus a more meaningful guide to the potential investor; improving the disclosure of financial information regarding companies' accounts; and stream-lining the winding-up of companies.

G. R. J. Thornton

CONSTITUTIONAL LAW

Race relations — discriminaton

On appeal from the decision of the English Court of Appeal in *Race Relations Board* v. *Charter* [1973] A.C. 868, (noted in (1973) 3 Otago L.R. 108) the House of Lords (Lord Morris of Borth-y-Gest dissenting) rejected Lord Denning M.R.'s distinction between personal and impersonal qualifications for membership as a test for determining whether a club is involved in "providing goods, facilities or services to the public, or a section of the public" for the purposes of s. 2 Race Relations Act 1968 (U.K.), and so therefore acting unlawfully in England if it practises discrimination in approving the applicants for membership.

Their Lordships maintained that the test should be whether the procedure prescribed in the rules for personal approval of applicants for membership was genuine or not. It seems that the mere existence of a procedure for personal approval of applicants was regarded as raising a presumption that a group is of a private nature rather than a public nature, and this can be rebutted only by showing that the procedure was neglected, or was a mere formality, or a sham. Their Lordships held that there were rules in the club providing machinery for personal acceptability that were adhered to, and therefore the club membership constituted a private group and not a section of the public.

Lord Morris, dissenting, claimed that the distinction between "a section of the public" and a private group is whether there is provision for application to join. If there is entry only by invitation then it is not public, but if there is provision for application then there would be an offering of facilities to a section of the public and the Act would apply irrespective of whether the approval procedure is automatic.

In *Race Relations Board* v. *Applin* [1973] Q.B. 815 the English Court of Appeal purported to apply the test of the majority in *Charter's* case but the decision itself appears to be more in keping with the dissenting judgment of Lord Morris. A married couple was registered with three local authorities as foster parents, and over a twenty-three year period they had fostered three hundred children of which sixty per cent had been