CASE NOTES

Millar v Ministry of Transport (1986) 2 CRNZ 216, Court of Appeal. Cooke P, Casey, McMullin, Richardson, Somers J.J.

Introduction

The ramifications of the judgment of the Court of Appeal in *Civil Aviation Department v MacKenzie* [1983] NZLR 78; 1 CRNZ 38, have not been fully appreciated, perhaps even understood. In this case a full bench of the Court of Appeal has sought to clarify the issue of primary significance raised by *MacKenzie* namely the classification of statutory offences which are silent as to the mental element involved in the offence.

The Facts

On 29 April 1982, on different charges, Millar (the appellant) was disqualified from driving for twelve months and six months — these disqualifications were to run concurrently. On 18 August 1982 on another disqualified driving conviction the appellant was disqualified for twelve months from 29 April 1983. However, on the same day on a breath alcohol conviction the appellant was disqualified for two years from 29 April 1984. On 3 June 1985 the appellant drove while disqualified.

The Charge

The appellant was charged under section 35 of the Transport Act 1962.

35. Driving while disqualified or contrary to the term of a limited licence —
(1) Every person commits an offence who —
(a) Drives a motor vehicle on any road while he is disqualified from holding or obtaining a driver's licence authorising him to drive that vehicle; or
(b) . . ..
(2) Every person who commits an offence against this section is liable —
(a) for a first offence to imprisonment for a term not exceeding 3 months or to a fine not exceeding $1,000 or to both, and the court shall make an order under section 31 of this Act as if the offence for which the person is convicted is an offence which renders him liable to be disqualified from holding or obtaining a driver's licence;
(b) for a second or subsequent offence, to the penalties specified in subsection (1) of section 30 of this Act.

Section 30(1) provides for a second or subsequent offences under section 35(1) liability on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding $4,000 or both; with a minimum period of disqualification of one year unless the court for special reasons relating to the offence thinks fit to order otherwise.

In The District Court

At the hearing before Judge Willy the appellant defended the charge and adduced evidence to the effect that he had misunderstood what the District Court Judge had said on 18 August 1982, and that he believed

the period of disqualification (three years in all) ran retrospectively from 29 April 1982. The appellant stated that he had received no written notice from the Court of the orders made on 18 August 1982.

Judge Willy found as a fact that the appellant did have an honest belief that he was not disqualified. However, as he had not made any enquiries of the Court office or of the Ministry of Transport, the appellant could not satisfy the Court as to the further element of reasonable grounds for his honest belief. Judge Willy rejected the application of *MacKenzie* because he took the view that driving while disqualified was not a public welfare offence. The appellant appealed from his conviction to the High Court where the matter was heard by Williamson J.

In The High Court

Williamson J applied *MacKenzie,* with reservations, and concurred with the finding of Quilliam J in *Peka v Police* (unrep., M145/85 Napier Registry) that driving while disqualified was a public welfare regulatory offence. The onus was, therefore, upon the appellant to prove an absence of fault to the standard of the balance of probabilities. On the facts, Williamson J was satisfied that the appellant failed to establish an honestly held belief that his disqualification had ceased as he had made no enquiry of either the Ministry of Transport or the Court concerning the term of his disqualification.

Leave was granted to the appellant to appeal to the Court of Appeal on questions of law as to the mental element in the offence.

In The Court Of Appeal

A full bench heard submissions and was unanimous in holding that mens rea is an ingredient of the offence. If there is evidence suggesting the defendant did not know of the disqualification, the prosecution must affirmatively prove knowledge beyond reasonable doubt. The appeal was allowed as the prosecution had failed to discharge its onus.

In arriving at its decision the Court took two discernable paths. Cooke P, Richardson J, Somers J, and Casey J one, McMullin J another.

In a joint judgment (Cooke P and Richardson J — Richardson J delivered the majority judgment in *MacKenzie* on behalf of Davison CJ, and Cooke J) by Cooke P, an examination of Commonwealth decisions dealing with what are described as "indistinguishable provisions" is undertaken. Cases from Canada, New South Wales, South Australia, England and New Zealand are assembled for analysis. From these Cooke P distills a "non-exhaustive list" of seven approaches to the classification of statutory offences which are silent as to mens rea.

1. Simple mens rea where the prosecution must prove every element of the offence.
2. Mens rea (in the sense of guilty knowledge) is assumed. If evidence is adduced by the defendant which casts doubt upon that assumption, the prosecution must prove guilty knowledge affirmatively.

3. The *"Strawbridge* [[1970] NZLR 909] approach". In addition to adducing evidence which points to an honest belief in facts which would make the defendant's act lawful, the defendant must provide evidence which indicates that the belief was on reasonable grounds. Once this is done, the onus is upon the prosecution to disprove the honest belief on reasonable grounds.
4. Dixon J in *Maher v Musson* (1934) 52 CLR 100, with reference to English authorities pre-dating *Woolmington v D.P.P.* [1935] AC 462, held that an honest and reasonable mistake was a defence. A defendant availing himself/herself of this defence would have the burden of proof to the standard of the balance of probabilities thrust upon him/her.
5. The *MacKenzie* public welfare regulatory offence approach: once the prosecution has proved the existence of the prohibited act the defendant must show a total absence of fault to the standard of the balance of probabilities in order to escape liability.
6. The solution of Day J in *Sherras v De Rutzen* [1895] QB 915, 921, was that the defendant had the onus of proving on the balance of probabilities that s/he did not do the act knowing of its wrongfulness.
7. Absolute liability — called strict liability in England. The prosecution proves the existence of the prohibited act and conviction is incurred thereon, independent of fault.

Cooke P proceeds to collapse the seven into three. The distinction between classes 1 and 2 "seem so narrow as not to be worth preserving".

> Class 3 can be seen as a troublesome anomaly, probably best done away with or severely confined . . . [as] it amounts to reading into a statute a mixed subjective and objective mens rea formula for which there is little if any warrant.

If the Legislature wishes to produce such a test, Cooke P argues that it can so do expressly as has been done with the New Zealand rape legislation. Cooke P asserts that the objectives of justice aimed at by classes 4, 5, and 6, "can often be best achieved by class 5". Once it is accepted that class 5 is available "there is a good deal less room for class 7". However, Cooke P does concede that where there is clear legislative intent the Courts should rightly impose the rigours of absolute liability. As an example Cooke P refers to the unreported judgment of Heron J in *AHI Operations Ltd v Dept. of Labour* Auckland High Court M 1736/84; judgment 31 May 1985. Cooke P holds that the offence of driving while disqualified is one which requires guilty knowledge as an ingredient of the offence. Why?

The application of class 5 is rejected because the offence was not created to regulate public safety but rather to ensure enforcement of the orders of the Court. Section 35 of the Transport Act is punitive and not regulatory. Absolute liability is likewise rejected as being inconsistent with the Court's general approach to contempt issues. Therefore, with reference

to Lord Reid's universal principle propounded in *Sweet v Parsley* [1970] AC 132 it is held that driving while disqualified is a mens rea offence.

Of great significance to practitioners and officers of the Courts is a restatement of principle which appears in the last paragraph of Cooke P's judgment. Three classes of statutory offences which are silent as to mens are identified. First, offences which require guilty knowledge (such as driving while disqualified). Second, public welfare regulatory offences which require the prosecution to prove the existence of the prohibited act and the defendant then has the onus thrust upon him/her to prove total absence of fault to the standard of the balance of probabilities. Third, dealing again with offences like the second category which are essentially regulatory in nature, if the narrow escape route provided in the second class is inconsistent with the object of the legislation, absolute liability should be imposed.

Somers J in a short judgment indicates his complete agreement as to the three classes identified and as to the appropriate classification of the offence of driving while disqualified. The same can be said of Casey J who provides a philosophical basis for the threefold classification. With reference to the second and third classes Casey J does though sound a cautionary note;

> . . . it must always be remembered that such an enquiry will not be called for unless it has been decided that the normal presumption of mens rea was not intended to apply to the particular offence.

McMullin J concurs with the finding of the majority that driving while disqualified is an offence which requires mens rea. He takes the opportunity afforded him by this appeal to repeat the opinion he expressed in *MacKenzie* that, *Woolmington* is of general application in criminal trials and that further exceptions to it should not be created. McMullin J views the *MacKenzie* public welfare regulatory offence with reverse onus provisions as being a further exception. McMullin J's thesis is that the threefold classification of the majority is uncertain, due to definitional problems associated with the term public welfare regulatory offence, and is tantamount to judicial legislation. He is strongly of the view that the onus of proof in criminal trials should never be reversed — the effect of the majority's second class. With the exception of offences of absolute liability, all criminal offences should have a common burden and that should be on the prosecution.

Comment

The majority judgment of *MacKenzie* is confirmed and clarified. Richardson J's judgment in *McKenzie* did not clearly identify the three classes of offences and so it is hoped in so doing

> Judges and practitioners called on to consider new questions will find some help in the principles just summarised.

The majority has done a great service to those who practice on a regular basis in the District Court. In a logical and readable manner Cooke—

P and Richardson J have laid down clear guidelines to assist in the interpretation and classification of statutory offences which are silent as to mens rea. Into an area of the law fraught with inconsistency and difficulty (something upon which the full bench readily agrees) the majority has brought clarity.

I would add that the majority has shown that it is less than enthusiastic about offences of absolute liability. It may be suggested that such offences will be held to be appropriate with less frequency considering the availability of the reverse onus provisions of class two.

— *Grant D. Poulton*

Bond & Bond v Fisher & Paykel (Unreported, High Court, Auckland CP 1435/86, 8 December 1986, Barker J.)

This was an application for an interim injunction under section 88 of the Commerce Act 1986 after the defendant, the only whiteware manufacturer in New Zealand, refused supply to the plaintiff.

The plaintiff had opened "Electric City", described as "a supermarket for electrical goods of every description". The stock offered for sale included both the defendant's goods and imported whiteware goods. The defendant objected on the basis that this retail outlet was a breach of the plaintiff's contractual obligation to supply only the defendant's products.

The defendant has, for some 40 years, distributed its manufactured goods throughout New Zealand on the basis of "exclusive dealership agreements". These agreements ban retailers, selling the defendant's goods, from stocking any other brand of whiteware.

The plaintiff, in seeking return of full supply, alleged that these "exclusive dealership agreements" contravened section 27 and section 36 of the Commerce Act 1986.

Section 27 deals with contracts, arrangements, or understandings substantially lessening competition; section 36 deals with the use of a dominant position in a market.

In answer to section 27, the defendant successfully argued that section III provided a period of grace until 1 March 1987, before the full impact of sections 27 to 29 applied to legally enforceable agreements and covenants entered into prior to 11 June 1985, which would be otherwise subject to these sections.

The intention behind section III was to provide parties to agreements and covenants now falling within sections 27 to 29 time to make the necessary adjustments and/or to apply for authorisation under the Act. Given the major changes in policy which lie behind the legislation it is reasonable to provide this time. The penalties for contravention of

a provision in Part II of the Act are substantial — up to $100,000 for a person and up to $300,000 for a body corporate. There would be no justice in making, overnight, a possibly long-standing business arrangement open to such a penalty. However, to go on to interpret this permitted period for change as a statutory authorisation to continue blindly until 1 March 1987, and to ignore any consideration as to whether such an arrangement is one which the Act is designed to stop, appears to be misapplication of the spirit and intent of section III.

It is questionable that section III was applicable in this hearing. At an interim injunction hearing the primary consideration is whether the plaintiff has shown that there is a serious question to be tried. It is at the later substantive heaving that the *application* of the provision is argued. The Court was not being asked to apply section 27 before 1 March 1987. The Court was being asked to consider it as a ground of action for the plaintiff at the later heaving. On page 20 of the judgment His Honour Mr Justice Barker stated; "Realistically, the substantive hearing cannot be before 1 March 1987". Given this situation the refusal to consider the applicability of section 27 at this time was arguably an unnecessary handicap to the plaintiff's attempt of establishing the grounds for the issuing of an interim injunction.

The plaintiff's second ground for application was under section 36. This was the first New Zealand consideration of this section. Section 36 prohibits a person in a dominant position in a market from using that market power for the purpose of restricting entry into a market, deterring competitive conduct in a market or eliminating a person from a market. His Honour found that it was a reasonable inference that the insistence by the defendant on the exclusive dealing position was a manifestation of the purposive use of market power and that the plaintiff had shown a reasonable case to answer.

Once it has been established that there is a serous question to be tried, the applicant for an interim injunction must show that the balance of convenience lies in granting the injunction. The legislation has added a new factor for consideration in the exercise of judicial discretion. The equitable principles applicable in respect of injunctions are now to be viewed as subject to the overriding "public interest" objectives of the Act. The Act requires that the public interest, meaning the interests of consumers and competitors, be given particular consideration in determining whether an injunction should be granted or not.

During this hearing the defendant indicated its willingness to resume supply to the plaintiff's stores other than Electric City. On the basis of this undertaking the public interest was narrowly construed to be the prejudice to the public in not being able to sample a variety of whiteware at Electric City for a few months pending the substantive hearing. On the basis of this interpretation the Court held that, on the balance, it would be better not to grant the interim injunction sought but maintain the status quo until the issues could be resolved at the full hearing.

This interpretation of the public interest does not appear to address itself to the importance the Act places on the promotion of effective

competition. The Act assumes that behaviour which has the effect of substantially lessening competition is not in the public interest. This can be demonstrated by a consideration of section 61. Under section 61 any application to the Commerce Commission to continue a practice which could be seen as a restrictive trade practice must be assessed in regard to its benefits to the public. Any practice which results in a lessening of competition is seen prima facie as against the public interest. Evidence must be aduced that the practice proposed has a *greater* public benefit to overcome this prima facie assumption. It is arguable that the Court can be said to have given due weight to the public interest factor by just considering how shoppers in one or two shops would be effected by a limitation in choice for several months.

This Act, and the changes in economic policy which resulted in its implementation, will invariably result in major changes in the practices of the business community. The Courts, and indeed all concerned with the enforcement of this Act, must be prepared to adapt too. New policies and provisions demand new procedures and approaches. In the end the Act will only be as effective as its enforcement. A failure by the Courts to give due weight to the public interest in the promotion of effective competition, seen as desirable in this Act for our economic wellbeing, will result in the failure of the Act.

— *L. C. Langridge*

TAX AVOIDANCE: THE SCOPE OF SECTION 99 OF THE INCOME TAX ACT 1976. *CIR v Challenge Corporation Limited* (1986) 8 NZTC 5, 219 Privy Council; Lord Keith of Kinkel, Lord Brightman, Lord Templeman, Lord Goff of Chieveley and, in dissent, Lord Oliver of Aylmerton.

The decision of the Privy Council in this case is notable in two respects. It is most important as a decision in favour of the wide scope and application of section 99, the general anti-avoidance provision of the Income Tax Act 1976. It is also noteworthy as a case where the Privy Council overturned a decision of the majority of the New Zealand Court of Appeal with little apparent reference to the case law and doctrines cited in that decision.

The facts of the case before the Privy Council were as follows. Challenge Corporation Limited (Challenge) purchased from Merbank Corporation Limited all the issued share capital of one of its subsidiaries, Perth Property Developments Limited (Perth). Perth had suffered a loss of around $5.8 million and Challenge hoped to deduct this loss from the profits of the Challenge group using the provisions of section 191 of the Income Tax Act 1976. The consideration for the transfer of

shares was to be the greater of $10,000 or 22 percent of the tax benefit obtained.

The simplicity of the facts made the case ideal for the analysis of the relationship between section 99 and section 191. Challenge admitted that the only purpose behind the transaction was to reduce its liability to tax, and at every level the Courts found that the transaction was prima facie within the scope of section 99. Furthermore the Commissioner, the High Court and the Court of Appeal found that the requirements of section 191 had been fulfilled. The only question was which section was dominant; could the general section 99 operate to invalidate a transaction allowed under the specific provisions of section 191?

The majority of the Privy Council held that section 99 did have this effect. The decision on the facts of the case is of little interest as section 191 has since been amended so that a transaction of this nature would not now be permitted. What is important is the approach taken by the Courts to the role of section 99.

In support of its decision that section 99 is dominant the Privy Council examined the history of the two sections. From this they inferred that the Legislature must have intended the general anti-avoidance section to apply unless expressly excluded. The narrower anti-avoidance provisions present in section 191 did not negate this presumption: they could be simply precautionary, or due to indifference toward the overlap. This line was adopted by Woodhouse P who dissented in the Court of Appeal, but Cooke J found it "unconvincing". Lord Oliver of Aylmerton, dissenting from the majority of the Privy Council, found that the history of the sections strongly supported the view that sections 191 and 188 provide a statutory code unaffected by section 99.

The major problem in the interpretation of section 99 is to find a balance between giving effect to provisions which "clearly allow for the deliberate pursuit of tax advantage" and still giving effect to the legislative intent expressed in section 99 (see Richardson J (1986) 8 NZTC 5,001 at 5,020). In the Court of Appeal this problem was approached with reference to New Zealand and Privy Council authority on the predecessor of section 99. Reference was also made to Australian and Canadian decisions on equivalent sections. The result of this analysis was a tentative approval of a modified "choice principle". The doctrine of choice has been developed primarily in the Australian courts following the case of *WP Keighery v FCT* (1957) 100 CLR 66. In essence the doctrine holds that when a taxing act contemplates and allows a particular course of action a taxpayer who reduces his laibility to tax by taking advantage of those provisions will not fall foul of a general anti-avoidance section. Such a section cannot be intended "to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them". Some support for this doctrine was given by the Privy Council in the case of *Europe Oil (NZ) Ltd v CIR (No. 2)* (1976) 2 NZTC 61, 066.

The Privy Council approached this problem of construction by in-

troducing a distinction between tax avoidance and tax mitigation. Tax avoidance is when:

> . . . a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. Tax mitigation, on the other hand, occurs when a taxpayer reduces his income or incurs expenditure which either entitles him to a deduction or reduces his assessable income.

In the opinion of the majority of the Privy Council, section 99 will apply to invalidate transactions allowed under other provisions of the Act when those transactions involve tax avoidance. The balance will be maintained since arrangements which only involve tax mitigation will be left alone. The Privy Council supported this distinction by reference to English cases.

This approach is similar to the doctrine of fiscal nullity as outlined by the House of Lords in *WT Ramsay Ltd v IRC* [1981] 1 All ER 865, and in *Furniss v Dawson* [1985] BTC 71. This doctrine has been held not to apply in Australia and Canada where the legislation contains specific anti-avoidance provisions. Further, in the Court of Appeal the Commissioner had conceded that the doctrine of fiscal nullity "has no specific application in the instant case" and "makes no submission in this case as to the potential application of the doctrine in New Zealand" (see Cooke J at 5,014). Thus the Court of Appeal did not examine this doctrine.

Given the Privy Council was divided in its decision, and since the majority did not consider other authorities referred to by the Court of Appeal, the impact of this decision is uncertain. It is possible that the case will be distinguished on its facts; a further decision by the Court of Appeal is required before the role of the doctrine of fiscal nullity in New Zealand law may be determined.

— *V. Casey*

Mayfair Ltd v Pears 17 December 1986 (C.A. 175/85). Cooke P, McMullin, Somers J.J..

This case was principally concerned with the tort of intentional trespass to land, where the resultant damage was unintentional and unforeseen. The unique feature of this case was that it was unprecedented. It is also notable for the consideration given to the appropriate test for liability in the intentional torts. The appellant's main submission contended that the respondent should bear the loss, particularly if loss could be seen to be direct. The appellant's alternative submission ar-

gued for strict liability at common law for the escape of fire. However, no authority could be produced dealing with the escape of fire from the trespasser's chattel. The court was nevertheless unanimous that responsibility should not rest with the respondent.

The respondent and his wife had spent an evening at a Wellington Tavern. They had parked their car unlawfully in Aurora House, a private parking building owned by the appellant company. In their absence, the car caught fire, the cause of which was never ascertained. The fire spread to the building, causing damage totalling $8,475. The appellant sought this amount as compensatory damages for the cost of repairs to the premises. The action proved unsuccessful in both the District Court and the High Court.

In the High Court, Casey J adopted "reasonable foreseeability" as the appropriate test for damage caused by trespass. In the Court of Appeal, McMullin and Somers JJ were not so certain that foreseeability was applicable to the intentional torts. Some support was drawn from the earlier trespass cases. At common law, it was no defence for the owner to prove that he had taken reasonable care to avoid the trespass. However, whether liability in such cases is limited by the principle of foreseeability or whether liability extends to damage linked directly with the trespass is uncertain.

McMullin J contends that the results of the cattle trespass cases would not have differed if the test of foreseeability had been applied. The cited references to consequences that are "direct and natural", and "reasonable and natural" His Honour finds synonymous with notions of foreseeability. While recent Canadian case law would appear ex facie to impose strict liability, again the foreseeability test would not have altered the results. Somers J finds it "self-evident" that the intentional trespasser will be liable for the intended and foreseeable consequnces of his or her acts. Nevertheless, neither McMullin J nor Somers J are certain that liability will not extend in some cases to damage linked directly with a trespass. It may be that the cattle trespass cases form a special category of their own.

Finally, McMullin and Somers JJ prefer to reconcile the divergent authorities with policy considerations. Strict liability for damage arising directly from the trespass may prove a harsh and dangerous rule; in the same light, "foreseeability" may prove "too benevolent". In any event, in the case at hand, the damage was neither foreseeable nor direct. It was reasonable for the appellant to bear the loss, "having regard to [the nature of the trespass] and the interests of the parties and society" (Somers J).

The judgment of Cooke P is a practical application of ideas expressed extra-judicially — [1978] C.L.J. 288. His Honour is wary of ready-made tests and rigid doctrines, when dealing with questions of remoteness in contract or tort. True justice will be achieved, it is argued, if some degree of flexibility is reserved for judicial decision making. As this case perfectly illustrates, the rules will not apply to every case. Although the casual link may be established, an evaluation of policy, akin to the se-

cond aspect of the test in *Anns v London Borough of Merton* [1977] 3 All ER 492 is then required. This requires the main considerations, which may or may not impose liability, to be balanced.

In this case, six policy factors were nominated by Cooke P. First, while the trespass was intentional, the same could not be said for the damage. Secondly, at first instance, Judge Barber ruled that the fire was not reasonably foreseeable and rejected allegations of negligence. Thirdly, the trespass could not be said to be the immediate, direct cause of the damage. Fourthly, the damage was for economic loss occasioned to property. Had there been personal injury, compensation may have been awarded at common law; however such a question is unlikely to arise in New Zealand because of the Accident Compensation Act. Fifthly, weight was attached to the consesus of the lower courts in rejecting the claim. Finally, Cooke P reasoned that the likelihood of commercial building insurance being held by the Respondent was greater than the likelihood of the vehicle owner possessing third party insurance. Overall, the balance favoured the respondent.

Cooke P's judgment departs from orthodox intellectual theory and contrasts markedly with the more conservative judgments of his brethren. It is appealing for its clarity and simplicity. His Honour's dissatisfaction with the confusion engendered by remoteness cases in both contract and tort is evident. It is suggested that as new cases arise in the future, the rationale explained in this case will be the preferred approach of counsel. In essence, the appeal for greater discretion suggests equitable notions of fairness and justice. Whether the approach will result in uncertainty in litigation is a moot point. It will be interesting to note whether Cooke P's initiative will be adopted by the full Court of Appeal in the future. This may depend on the initiative of counsel to take up the challenge.

— *Debra Murphy*

Mid-Northern Fertilisers Ltd and Mid-Northern Transport Ltd v Connell, Lamb, Gerard & Co. (Unreported High Court, Auckland, A151/86, 18 September 1986, Thorp J.).

Introduction

When a firm of solicitors acts for more than one party in a vendor and purchaser transaction, there is obvious potential for conflict of interests.

The growth of professional negligence as a field of law directly affecting the legal profession has, in the words of Thorp J,

> . . . tended to obscure the continuing existence and significance of solicitors' fiduciary obligations to their clients.

Mid Northern Fertilisers Ltd provides a timely reminder.

This case is of interest from an ethical point of view, offering a comprehensive and up-to-date survey of the law concerning such obligations.

The Facts

The plaintiff companies owned and operated a lime quarry near Whangarei and a trucking business. All voting shares were owned by a Mr Vitali.

The defendant firm had acted for the companies and Mr Vitali for approximately 15 years.

Mr Vitali sold the assets of both companies to a Mr Horsford for $520,000. Mr Vitali left in $450,000 owing as a second security over the assets sold, his security ranking afters a first charge to a finance company.

Mr Horsford defaulted under both securities. He was adjudicated bankrupt, owing the plaintiff more than $500,000.

At all material times, Mr Shepherd of the defendant firm acted for the plaintiff, and Mr Webb of the same firm acted for Mr Horsford.

The plaintiff commenced proceedings against the defendant in both negligence and breach of fiduciary duty.

The plaintiff alleged negligence on the basis of inadequate advice given as to the significance of the security's lack of priority. The claim failed. Thorp J found that Mr Vitali would have proceeded with the contract "even if he had received appropriate advice about the prior securities".

It is on the second question of breach of fiduciary obligations that the case is of greatest interest. His Honour was satisfied there was a conflict of interest which was apparent at the time of execution of the contract.

Three Areas Of Breach Alleged

The plaintiff submitted that the defendant breached his fiduciary obligations in three ways:—

1. The contract disclosed such grave conflicts of interest between vendor and purchaser that the defendant was under a duty to refuse to act for both parties and should have sent one of them away.
2. The defendant was obliged to disclose to the plaintiff all information it held relevant to the contract, and it failed to do so.
3. The defendant had not advised, or had not adequately advised the plaintiff of its need for independent advice.

Fiduciary Obligations — Solicitor and Client

Just what is the nature of the fiduciary obligation owed by a solicitor to his or her client? In considering this question, Thorp J discussed

at some length the judgments of McMullin and Richardson JJ in the recent New Zealand Court of Appeal case *Farrington v Rowe McBride and Partners* [1985] 1 NZLR 83 (counsel for both parties considered *Farrington* to be the leading modern authority in this area of law).

Having considered those two judgments, Thorp J had this to say about the nature of a solicitor's fiduciary obligations,

> I believe that so long as it is recognised that the rules must be interpreted having regard to the circumstances of the particular case . . . it is both possible and desirable to identify the nature of the basic obligations arising from the solicitor/client relationship, and that these are correctly identified as the obligations of confidentiality and loyalty.

Such obligations may only be derogated from when the fully informed consent of the client is given.

After considering *Farrington* and several other case Thorp J advanced six propositions of law in respect of solicitor's fiduciary obligations to a client:

1. A solicitor must not be in a position where his or her duty and interest conflict.
2. A solicitors' fiduciary obligations to one client are not reduced because of like obligations to another client.
3. A solicitor should not act for two parties if their interests conflict, without the informed consent of both parties. This presupposes full disclosure of all information relevant to the client's business.
4. A breach of such obligations will entitle the client to relief whether or not disclosure, had it been made, was likely to have altered the client's mind.
5. A multiple engagement situation does not of itself constitute a breach of fiduciary obligation. There is no objection to acting for parties whose interests do not conflict.
6. A conflict of interest must be real, and not simply theoretical, to constitute a breach.

The Decision

On the facts, Thorp J found that there was a breach of fiduciary obligation owed by the defendant to the plaintiff.

An award of damages was made on the basis that the plaintiff was entitled to be placed back in the position it would have been in had the contract not proceeded.

Comment

The case is illustrative of the characteristics in a conflict of interest problem. Typically, there will be two well-established clients, neither of whom the firm wants to turn away. Their transactions will proceed at arm's length. Then, all too quickly, relations break down and the soli-

citor can no longer insure that both clients' best interests are effectively represented.

The difficulty facing the solicitor who has not protected his or her position from the outset is to recognise the breakdown in time to avoid a conflict. That did not happen in this case. Events overtook the defendant.

The Law Society's Code of Ethics states, at paragraph 1.13 (1),

> A practitioner acting in any matter shall not act for any other party in the same matter without the prior consent of both parties.

Notwithstanding this, the pressure to accept multiple engagements has been a common occurrence in rural practices. The same will be increasingly true of city practices as they continue to grow in size.

It is clear from this judgment that acceptance of multiple engagements does not of itself constitute a breach of fiduciary obligation. But the message from this case is plain — a firm of solicitors acting for two or more parties in the same transaction does so at its own peril. Should the courts find that there has been a real conflict of interets, they will not shrink from finding the solicitors liable in damages.

The solution is deceptively simple, solicitors should declare the potential for conflict to both clients from the outset, and seek their consent to continue to act. Unfortunately, given the pressures of modern legal practice, this simple precaution is too often overlooked with expensive consequences, as shown by this decision.

— *Paul Collins*