City Corporation [1953] N.Z.L.R. 115, and *Perpetual Trustees* v. *Dunedin City* [1968] N.Z.L.R. 19. The facts in both these cases were similar to those of the present case in that all were concerned with the receipt by City Councils of specialised engineers' reports upon the arguments of objectors against proposed construction work. In none of the three cases were the objectors provided with a copy of the relevant report, nor were they permitted to make representations based upon the reports. *Connelly's* case held that in these circumstances, the rules of natural justice had been violated: in the *Perpetual Trustees'* case, Henry J. was unable to arrive at a similar conclusion. The learned Judge there took the view that the matters upon which the Engineer was commenting were merely collateral to the main issue involved, and were concerned with the alternatives raised by the objectors, which the City as a matter of policy might wish to adopt:

> In dealing with this question, the learned Judge appears to be of the opinion that the City Council was then no longer discharging its quasi-judicial function, but considering a matter of policy (*per* Speight J., *ibid.*, 261).

Speight J. was able to distinguish the *Perpetual Trustees'* case with little difficulty, since in this case it was apparent that the report "covered the merits of the very matter put in issue by the objectors". (*ibid.* 262)

A further important feature of the case lies in the importance placed by Speight J. on the expertise and knowledge of the members of the committee, usually one of their qualifications for appointment. That such expertise and knowledge should be used and taken into account is highly desirable, but nevertheless, principles of natural justice must be followed:

> . . . it is proper that these matters should be taken into account, but to do so is far removed from receiving and acting on confidential information in relation to the matter in issue given by a person whose face is not seen and whose voice is not heard by the parties whose rights are affected. (*ibid.*, 263).

M. J. Grant

COMMERCIAL LAW

Arbitration

Wilson v. *Glover* [1969] N.Z.L.R. 365 was concerned with an appeal from an arbitrator's decision, that was founded upon the abitrator's own knowledge—rather than evidence adduced at the arbitration hearing. The appellant relied upon *Trevor Bros. Ltd.* v. *Westerman* [1933] G.L.R. 822, and similar decisions where an award was set aside because the arbitrator acted upon evidence not produced at the arbitration. Moller J. however preferred the approach of Lord Goddard C.J. in *Mediterranean and Eastern Export Company Ltd.* v. *Fortress Fabrics (Manchester) Ltd.* [1948] 2 All E.R. 186 (at page 188) where it was decided that if an arbitrator was appointed because of his special knowledge and experience of the trade in question, he was then entitled to fix damages without hearing expert evidence in respect of them. In the instant case the arbitrator was a building consultant. The learned judge recognised that some minor mistakes may have occurred with regard to the allowances to be made on some items but he was of the opinion

that he should not interfere with the award merely on the ground that he might have come to a different decision from that which the arbitrator arrived. The test in such cases would appear to be whether there may have been a substantial miscarriage of justice.

Two issues will be evident from this decision. First, an arbitrator is permitted to base his decision upon his own knowledge (as opposed to evidence adduced at the arbitration hearing) if he has been appointed because of his knowledge and experience of the trade in question. Secondly, an award on appeal will not be upset unless the applicant can show that there may have been a substantial miscarriage of justice.

Bailment

Mendelssohn v. *Normand Ltd.* [1969] 3 W.L.R. 139 was a decision of the English Court of Appeal dealing with the distinction between performance and non-performance of a contract, and indicates that the courts may be now giving increasing recognition to an old approach. The facts are simple. The plaintiff frequently garaged his car in a garage owned by Normand Ltd. In doing so, he always obtained a ticket containing some conditions of the bailment, including a condition that Normand Ltd. would not accept responsibility for any losses sustained by the vehicle, its accessories or contents. The plaintiff wished to leave his car at the garage on the day in question, but was informed by an attendant that he could not lock his car. This was contrary to normal practice. However the attendant promised to lock the car. On his return, the plaintiff found some valuable luggage missing.

Prima facie therefore, Normand Ltd. were liable, unless they could rely upon the exemption clause on the ticket. The Court of Appeal recognised that the exemption clause covered just such facts as occurred, but held that the respondents could not rely upon this clause because the attendant's oral promise formed part of the contract and took priority over the printed condition on the ticket, and Normand Ltd. had therefore carried out their contract in a way other than the parties envisaged. Normand Ltd. had, in effect, breached the "Four Corner Rule". That is, if a man deviates from the agreed manner of performance of a contract, he cannot rely on an exemption clause that may in performance protect; but outside performance offers no protection.

The significance of this decision is that it illustrates the courts' readiness to technically seek out the exact contract, and ascertain if performance has been strictly adhered to—in this case by implying the oral promise as part of the contract, a breach of which gave rise to damages. Future litigants will no doubt closely examine the relevant actions and then decide if this is within performance. Once the court has decided what the contract is, if it feels a remedy lies, it will appraise the defendant's actions to ascertain if these can be regarded as performance or non-performance of that contract. If the actions fall outside performance, a remedy for breach of contract may be available.

Cheques

The judgments in *Marfani and Co. Ltd.* v. *Midland Bank Ltd.* [1968] 1 W.L.R. 956 examined both the liability and duty of a collecting banker to the true owner of a converted cheque, and the protection

given to that banker by s. 4 Cheques Act 1957 (New Zealand equivalent s. 5 Cheques Act 1960). Briefly the facts were that M. directed his office manager, K., to draw a cheque for £3,000 in favour of E. K. misappropriated this cheque by opening an account in the assumed name of E. at the defendant bank, there depositing the crossed cheque and subsequently drawing nearly the value of the cheque, and leaving the country. M. alleged that the bank had at tort converted the cheque. The Bank sought to rely upon s. 4 Cheques Act, alleging they had not been negligent. The question at issue here is involved and it is necessary to examine both the bank's duties to the true owner and also the defence of s. 4.

As to the bank's duties to the true owner of a converted cheque, it seems that at common law the bank commits the tort of conversion upon dealing with the cheque in such a manner as to deny the true owner's title. This is strict liability and contains no moral concept of fault.

But s. 5 of the Cheques Act offers some defence. That section provides:

> Where a banker, in good faith and without negligence—
> (a) Receives payment for a customer of a [cheque] . . .
> or
> (b) Having credited a customer's account with the amount of any such instrument, receives payment thereof for himself—
> and the customer has no title, or a defective title . . . the banker shall not incur any liability to the true owner . . . by reason only of having received payment thereof.

The requirements of this section are twofold.

(a) That the banker did act in good faith
(b) That the collecting banker discharges the onus of proving that he did act with reasonable care, or, without negligence.

Good faith is interpreted as meaning that a banker acts in good faith where he acts honestly, whether negligently or not. As to the requirement of good faith embodied in s. 4 it is apparent that a banker is entitled to assume that his customer is the true owner of a cheque, where he is a 'holder'—unless there are facts which would cause a reasonable banker to suspect that the customer was not the true owner. What facts may arouse a banker's suspicion again depend upon current banking practice.

To determine if the bank had acted without negligence, the court examined the circumstances surrounding the deposit and payment on the cheque, and suffice to say here, that if the bank is acting in accordance with ordinary banking practice, they are acting without negligence. Significantly, the Court of Appeal decided that the collecting banker's duty to the true owner commenced as at the time when the bank started paying out on the cheque, and this was the relevant time to examine any negligence—not, as may be imagined, at the time of collecting the cheque. If the duty had arisen as at the time of collection of the cheque, the bank here would undoubtedly have been negligent, as at this stage they had not received a reference for their new client, and were therefore, acting outside the ordinary practice of bankers. However, here, the necessary reference was obtained before the new client had the opportunity of drawing on the cheque. Therefore the Court of Appeal accepted that the bank had acted reasonably and without negligence.

The bank was therefore, able to rely upon the defence offered by s. 4. Several principles are evident from this decision.

(1) The standard of care required of a banker is that to be derived from the ordinary practice of careful bankers.
(2) This standard of care does not include the duty to subject an account to microscopic examination.
(3) s. 4 Cheques Act 1957 is a defence to the bank, and it is therefore upon the bank to show they acted without negligence; also
(4) Antecedent transactions (i.e. prior to duty arising) are only relevant insofar as they may contravene the practice of ordinary bankers.

The conclusions to be drawn from this case are that the Cheques Act offers almost as broad a defence to a banker as the Common Law imposes by the strict liability tort of conversion.

The banker must merely act in accordance with current banking practice to invoke s. 4. This of course changes, and a negligent act (say) forty years ago may nowadays be within current practice, and therefore not amount to negligence.

Sale of Goods

Vacwell Engineering Co. Ltd. v. *B.D.H. Chemicals Ltd.* [1969] 3 W.L.R. 927 discussed the effect of a breach of s. 16 Sale of Goods Act 1908 (s. 14 English equivalent) upon a contract for the sale and purchase of a chemical known as "Boron Tribromide". This chemical as supplied had an unknown explosive characteristic on contact with water, though it was thought to create harmful vapours in such circumstances, and was so labelled on sale. The chemical came into contact with water to devastating effect. One chemist died, and damage to a building amounted to £74,689. The buyers also claimed $300,000 loss of profits. The buyers relied upon a breach of s. 16, and also alleged a breach of the common law duty of care. The court here held that there was a breach of the implied condition as to fitness, and that the sellers were negligent in failing to fulfil their duty of care by not maintaining an adequate system of research. It was accepted that the buyers relied on the sellers' skill to warn of dangers in use of the chemical. Without the necessary warning, the Court decided that the chemical was unfit for the notified purpose, as there was a foreseeable risk that the chemical would come in contact with water in the ordinary course of industrial use. As to remoteness of damage, the learned judge was of the opinion that although an explosion of that magnitude was not foreseeable, an explosion (albeit minor) was in fact foreseeable, and therefore the damages were not too remote.

This case would seem to go further than *Henry Kendall and Sons* v. *William Lillico and Sons Ltd.* [1968] 3 W.L.R. 110 in that here, the reliance as to fitness for purpose includes reliance to warn of possible hazards that may occur. Here, the chemical exploded while the containers were being washed, not necessarily in the notified manufacturing process. Rees J. justified this by acknowledging that the chemical may in its ordinary industrial use come into contact with water. Therefore it may be assumed that s. 16 now contains the added concept of a duty to warn of hazards—embodied in the reliance placed upon the seller.

Had the chemical been marked indicating its explosive nature, this would have been in compliance with s. 16, but without this marking it was unfit.

This adds an additional factor to a consideration of s. 16 (a) of the Sale of Goods Act 1908. The case appears to offer a remedy that may be more suitably defined under negligence, rather than a breach of the Sale of Goods Act. Such a common law defence was applied in *Clarke* v. *Army and Navy Co-operative Society Ltd.* [1903] 1 K.B. 155 (C.A.). This case was decided on the basis that a duty between the vendor and buyer existed, and independently of any warranty, negligence as to this duty gave a cause of action. In a more recent decision, that of *Harbutt's Plasticine Ltd.* v. *Wayne Tank and Pump Company Ltd.* [1970] 1 Lloyds. Rep. 15 (C.A.) the court also relied on negligence.

Healing Sales (Pty.) Ltd. v. *Inglis Electrix Pty. Ltd.* (1968) 42 A.L.J.R. 280 deals with a contract for the purchase of certain electrical goods on terms that property should pass upon delivery, and payment should be made within sixty days thereafter. Within this sixty days, and while the price was still unpaid the seller entered the buyer's premises and wrongfully retook possession of the goods. The High Court accepted that such seizure was a breach of the implied warranty of quiet possestion, embodied in the equivalent of s. 14 (b) of the Sale of Goods Act 1908. It might be noted that the learned judge here criticises Sutton in his work *The Law of Sale of Goods in Australia and New Zealand,* where at page 177 he asserts that s. 14 (b) is no more than an assurance to the buyer against the consequences of a defective title, and of any disturbances due to such.

The High Court's interpretation of s. 14 (b) is in line with the earlier decision in *Niblett Ltd.* v. *Confectioners Materials Co. Ltd.,* [1921] 3 K.B. 387 and confirms that s. 14 (b) protects a purchaser against the lawful acts of third persons and against breaches of contract—*and tortious acts of the vendor himself.*

The Court in this case also considered the equivalent of s. 54 of the Sale of Goods Act. The seller alleged that the buyer had a right of set-off for the price of the goods, and therefore this should be taken into account in assessing the damages. This was accepted at first instance, and exemplary damages only were allowed. But the High Court affirmed the Court of Appeal's view that the seizure did not rescind the contract, and therefore the buyer remained liable to pay the price, and, the buyer should therefore be granted the price of the goods as compensatory damages.

As was emphasised in this case, s. 54 offers a choice to a buyer. He may:

(1) Maintain an action for the price of the goods; or
(2) Wait until the seller sues him for the price, then set up the breach of warranty in diminution of the price.

If the buyer elects the first alternative, then he must be granted damages for the loss directly and naturally resulting from the breach; in this case, the full purchase price. However the buyer still remains liable on the contract for the purchase price. Once selecting the first alternative, the buyer has exhausted his option, and cannot then set up the breach in diminution, that is, as a defence to an action to pay the contract price.

Procedurally, therefore, in like circumstance it is not a defence to

an action for compensatory damages that the plaintiff has a right of set-off available, and that therefore, the purchase price should be taken into account in assessing those compensatory damages. The buyer therefore received exemplary damages for the tortious seizure, and also the value of the goods seized as compensatory damages, and it remained for the seller to subsequently recover this contract price in another action.

Mercantile Agency

R. and E. Tingey and Co. Ltd. v. *John Chambers and Co. Ltd.* [1967] N.Z.L.R. 785. This case seems to indicate that by interpreting a relationship as one of apparent principal and not mercantile agency the courts may obviate many of the difficulties of mercantile agency. The case revolved around a marine engine which the owner sent to an "agent" who sold to the buyer. The buyer bought the engine without notice of the true owner's title. At first instance the learned magistrate interpreted the relationship as one of mercantile agency, and because the agent sold other than for cash, he was acting outside the ordinary course of business of a mercantile agent. However, on appeal to the Supreme Court, the learned judge took the view that there were no terms of sale arranged between the owner and agent. There was nothing therefore to preclude the agent from selling to the buyer in its own name—which it did. Gresson J. then came to the conclusion that the supposed agent was in fact an apparent principal, and the owner was therefore precluded as against the buyer from denying that it had so clothed the agent with such authority to sell as apparent principal.

In so finding the learned judge avoided deciding if the sale was within the ordinary course of business, itself a moot point, and held that as the owner had by necessary implication conferred on the agent the right to sell as apparent principal, so misleading the buyer, the owner must take the consequences, and could not deny the buyer's title.

It is interesting to note that in the 1968 volume of the *Annual Survey of Commonwealth Law*, at page 502, *Tingey's* case is cited for the proposition that there is an implied warranty for a mercantile agent to sell otherwise than for cash. However, it appears that Gresson J. decided this case without relying on this aspect; it not being necessary so to do, as the learned judge found the relevant relationship to be one of principal/buyer, not mercantile agent/buyer: see page 788 of the judgment, where the learned judge says:

> I need express no concluded opinion as to whether the agent, in selling on the basis of set-off, was acting in its ordinary course of business . . .

R. P. Harris

COMPANY LAW

The Position of the Minority

It was held by the Court of Appeal in *Black White and Grey Cabs Ltd.* v. *Fox* [1969] N.Z.L.R. 824 that where the directors are given powers by the articles of association they cannot be controlled in the exercise of these powers by the company in general meeting. An ordinary resolution intra vires the company had been passed by a majority of the members at a special general meeting. By the articles of association full