



MAY 2005



Court of Appeal Report for 2004

JUSTICE HAMMOND - MALCOLM BIRDLING



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1 INTRODUCTION

The Court

The Court of Appeal, located in Wellington, has existed as a separate court since 1862. Until 1957 it was composed of Judges of the then Supreme Court (now the High Court) sitting periodically in panels. In that year the Court of Appeal was reconstituted as a permanent court separate from the Supreme Court. The Court now consists of the President and six other permanent members. Before the entry into force of the Supreme Court Act 2003 on 1 January 2004, the Court also included the Chief Justice by virtue of office.

The Court deals with civil and criminal appeals from matters heard in the High Court, and criminal matters on indictment in District Courts. As well, matters appealed to the High Court from District Courts and certain tribunals can be taken to the Court of Appeal with leave if they are considered to be of sufficient significance to warrant a second appeal. The Court may, if it grants leave, hear appeals against pre-trial rulings in criminal cases. Finally, the Court, again with its leave, hears appeals on questions of law from the Employment Court.

Before the Supreme Court was established, civil decisions of the Court on first appeal from the High Court could in general be appealed to the Judicial Committee of the Privy Council, in some cases as of right, in others with the leave either of the Court of Appeal or the Committee. Criminal decisions could be appealed with the leave of the Judicial Committee. Appeals in cases heard after 1 January 2004 lie to the Supreme Court with the leave of that Court. Savings provisions in the Supreme Court Act leave appellants whose appeals were heard by the Court of Appeal before January 2004 with whatever rights they had to appeal to the Privy Council.

Caseload

The number of cases dealt with by the Court in its criminal jurisdiction rose slightly for the third year in a row, however there was a decline in civil cases dealt with in 2004. The Court dealt with 506 criminal cases and 113 civil cases. In 2003 the Court dealt with 482 criminal and 148 civil cases. Sixteen criminal and 22 civil cases awaited judgment at the end of the year.

In addition to the 113 substantive civil appeals mentioned above, the Court dealt with 192 miscellaneous motions, compared with 235 in 2003. As mentioned above, the Supreme Court Act allows for appeals heard before January 2004, even if determined after that date, to be further appealed to the Privy Council. Included in the miscellaneous motions were seven conditional leave applications, three of which were granted and four dismissed. A further 10 appeals were granted final leave to appeal to the Privy Council. At the end of 2004 there were 14 matters to be listed for hearing at the Privy Council in 2005, some of which have confirmed dates. Notices of discontinuance received in 2004 decreased considerably with only 57 such applications being processed. In 2004 77 were received. A further 20 appeals were abandoned under Rules 10 and 11 of the Court of Appeal (Civil) Rules 1997 with the same number abandoned in 2003.



The number of civil appeals filed rose in 2004 with 273 appeals accepted compared with 247 in 2003. However, the number of applications for fixture declined again this year with 129 received in 2004 compared with 149 in 2003. A comparison of figures capturing details of civil appeals over the past six years has been included with the attached statistics. At the end of 2004 in the civil jurisdiction 44 appeals had fixture dates and 13 were waiting to have a date confirmed.

In the criminal jurisdiction there were a total of 528 appeals filed, with an increase from 2003 of 42 appeals. Of the 392 matters which received an oral hearing in 2004, nearly 24% (93 matters) were listed in the permanent court, compared to 21% (62 matters) in 2003. A number of the hearings were pre-trial matters which required an urgent hearing due to the closeness of the allocated trial date. The Court is finding it more difficult to deal with these requests as the numbers increase, and not all requests for urgency could be met during 2004.

A further 22 applications for rehearing were received in 2004 bringing the total filed since June 2003 to 63.

At the end of 2004, 218 criminal appeals remained on the hearing status list; of those 98 had a fixture date. The caseload position at the same time in 2003 was 191 appeals with 117 having a confirmed fixture date. The 218 appeals on the status list are made up of 49 against conviction and sentence, 42 against conviction, 65 against sentence, 17 by the Solicitor-General against sentence, 22 against pre-trial rulings, and 11 applications for re-hearing. The balance of 12 is made up of special leave applications, appeals by way of case stated and a Governor-General's reference. Approximately 86 court days (just over one year of divisional court time) would be required to hear these appeals.

Programme for Court sittings

The Court sat in benches of three and five Judges and continued to benefit from the contribution of some 82 High Court Judge weeks in the divisional Courts. The benefit includes the immediate experience of the trial process brought by those Judges to the appellate process.

The monthly cycle followed allowed for three or five permanent Judge matters to be set down in the first two weeks of the month, followed by a fortnight for three-Judge Courts and divisional sittings in either Wellington or Auckland. One sitting was also held in Christchurch during May. Included in the divisional courts were 12 weeks for civil work. It became apparent early in the year that the Court did not have a sufficient number of appropriate cases for this division, with the civil cases then before the Court being of a more complex nature. These weeks were used to deal with criminal matters, which assisted in dealing with the increased number of appeals.

The 2005 programme for appeal hearings is in place and will follow the same pattern as that set for 2004.



Procedural developments

The Court of Appeal's statutory functions in the criminal and civil jurisdictions remained unchanged throughout the year.

In the Court's 2003 *Annual Report* mention was made regarding the number of late adjournment requests and last minute notices of discontinuance which impacted on the judicial resource and throughput of cases. To ensure the same pattern did not continue in 2004 new case management procedures were put into place for criminal appeals to ensure counsel complied with timelines in respect of delivery of written submissions. This practice has seen an addition in the number of telephone conferences required prior to hearings, but has resulted in fewer court days being affected by last minute cancellations.

Accommodation

During 2004 the Court building has undergone extensive refurbishment while continuing business as usual. Those who used the court during 2004 have been extremely understanding and accommodating of the conditions. This was appreciated.

The building now offers three counsel rooms; two on the ground level and one outside the courtrooms on level one. Courtroom two has been upgraded and both courtrooms have had the lighting enhanced.

We also now have the ability to accommodate up to three visiting Judges.

Of singular importance, the permanent members of the Court are now all located on one level.

Members of the Court of Appeal

The members of the Court of Appeal in the year under review were the President, Hon Justice Anderson, and six permanent Judges: Hon Justice McGrath, Hon Justice Glazebrook, Hon Justice Hammond, Hon Justice William Young, Hon Justice Chambers and Hon Justice O'Regan.

Justice Anderson graduated from the University of Auckland in 1967 and was a partner in the Auckland firm Martelli, McKegg & Adams-Smith until commencing practice solely as a barrister in January 1972. He was appointed a Queen's Counsel in May 1986, to the High Court in May 1987, and to the Court of Appeal in September 2001. He became President as from January 2004 and, in June 2004, was awarded the DCNZM for services to the judiciary.

Justice McGrath graduated from Victoria University of Wellington in 1968. He was in private practice as a partner in the law firm Buddle Findlay, in Wellington, until he moved to the separate bar in 1984. He became a Queen's Counsel in 1987 and he was Solicitor-General between 1989 and 2000. In July 2000 he was appointed to the Court of Appeal.



Justice Glazebrook graduated from Auckland University and Oxford University. Before being appointed to the High Court in May 2000 she was a partner in law firm Simpson Grierson and a member of various commercial Boards and government advisory committees. She served as President of the Inter-Pacific Bar Association in 1998, was appointed to the High Court in May 2000 and to the Court of Appeal in May 2002.

Justice Hammond graduated from the University of Auckland and the University of Illinois. He was a partner in the Hamilton law firm Tompkins Wake & Co. He taught for some years as a Law Professor in law faculties in the United States and Canada, and was the permanent head of a Canadian law reform agency. He then returned to New Zealand and was a Professor and Dean of Law at the University of Auckland. He was appointed a Judge of the High Court in 1992 and to the Court of Appeal in January 2004.

Justice William Young graduated from the University of Canterbury and Cambridge University. He joined the Christchurch firm of R A Young Hunter and Co in 1978, leaving in 1988 to practise as a barrister. He was appointed a Queen's Counsel in 1991, to the High Court in 1997 and to the Court of Appeal in January 2004.

Justice Chambers graduated from the University of Auckland and Oxford University. He commenced practice as a barrister in 1981 and was appointed a Queen's Counsel in 1992. He was appointed to the High Court in 1999 and to the Court of Appeal in January 2004.

Justice O'Regan graduated from Victoria University of Wellington. He was admitted as a barrister and solicitor of the High Court in 1977 and became a partner with the firm Chapman Tripp in 1984. He was appointed to the High Court in 2001 and to the Court of Appeal in January 2004.



2 STATISTICS

Criminal Appeals

	Hearing	Allowed	Dismissed	Allowed On The Papers	Dismissed On the Papers
Conviction & Sentence	87	22	69	1	6
Conviction	92	25	61	0	3
Sentence	103	26	72	1	8
Solicitor-General Appeals	17	11	5	0	0
Pre Trial	68	10	54	0	0
Other	25	3	23	0	2
Sub total	392				
Abandonments/No jurisdiction	93				
Total	485	97	284	2	19

NOTE: The number of cases heard does not equal the number allowed and dismissed. Six cases heard in 2003 were decided in 2004 and seventeen judgments for 2004 cases are reserved.

Of the appeals allowed, 19 were allowed in part.

The following table shows comparisons with earlier years

Year	Appeals or applications for leave filed	Oral Hearing	OTP	Allowed	Dismissed/abandoned/ no jurisdiction
1993	550	368	151	110	405
1994	538	305	194	82	417
1995	582	380	226	125	481
1996	512	354	217	98	473
1997	508	-	157	98	415
1998	459	304	117	108	366
1999	565	320	152	118	423
2000	478	330	123	126	386
2001	428	372	34	123	288
2002	457	321	47	122	293
2003	486	370	29	128	324
2004	528	392	21	99	396

*Criminal caseload*

	2001	2002	2003	2004
Permanent Court – seven judges	1	Nil	Nil	N/A
Permanent Court – five judges	17	5	3	2
Permanent Court – three judges	24	51	59	91
Criminal Appeal Division	285	265	309	299
On the papers	34	47	29	21

Civil Appeals

	1999	2000	2001	2002	2003	2004
Motions filed	308	301	296	276	247	273
Appeals set down	185	149	203	163	146	129
Appeals heard	193	160	185	153	148	113
Appeals allowed	58	64	76	60	56	34
Appeals dismissed	131	95	107	83	91	69

NOTE: the number of cases does not equal the number allowed and dismissed. Judgments in 22 cases were reserved at the end of the year, and 12 judgments came from cases heard in the previous year.

Civil caseload

	2001	2002	2003	2004
Permanent Court – seven judges	Nil	Nil	Nil	Nil
Permanent Court – five judges	25	18	14	8
Permanent Court – three judges	79	71	92	96
Civil Appeal Division	58	62	42	8
Discontinued	70	50	77	56
Abandonments	49	58	20	42

Year end workflow

	2000	2001	2002	2003	2004
Criminal appeals awaiting hearing as at 31 December	109	134	168	191	218
Civil appeals awaiting hearing as at 31 December	47	55	59	55	57

*Privy Council appeals and petitions for leave to appeal*

Date PC judgment	Parties	Result	Whether NZ Judge sat
25.02.04	Latimer & Ors v Commissioner of Inland Revenue	Allowed	Keith J
20.05.04	Tasman Orient Line CV v Dairy Containers Limited	Dismissed	Elias CJ
25.05.04	Hirst v Vousden	Dismissed	No
25.05.04	Bruce Thomas Howse v The Queen (<i>Petition to PC</i>)	Leave to appeal granted	No
14.07.04	Jennings v Buchanan	Dismissed	Elias CJ
14.07.04	Carter Holt Harvey Building Products Group Limited v Commerce commission	Allowed	No
22.07.04	Potter v Potter	Dismissed	No
22.07.04	Glenharrow Holdings Limited v The Attorney-General and Anor	Dismissed	No
26.07.04	Commissioner of Inland Revenue v Edgewater Motel Limited and Ors	Dismissed	No
26.07.04	(1)New Zealand Meat Board and (2) New Zealand Meat Industry Association Incorporated) v Paramount Export Limited (In Receivership and in Liquidation)	1) Dismissed 2) Allowed	No
27.07.04	Bailey Junior Kurariki v The Queen (<i>Petition to PC</i>)	Dismissed	No
27.07.04	Joe Edwin Kaukasi v The Queen (<i>Petition to PC</i>)	Dismissed	No
28.10.04	Margaret Joan Brittan v Telecom Corporation of NZ (<i>Petition to PC</i>)	Dismissed	No
28.10.01	Ngati Apa Ki Te Waipounamu Trust v Attorney General and Ors (<i>Petition to PC</i>)	Leave to appeal granted	No
10.11.04	The Commissioner of Inland Revenue v Thomas Cook (NZ) Limited	Dismissed	No
14.12.04	The Trustees in the CB Simkin Trust and Anor v Commissioner of Inland Revenue	Dismissed	No
16.12.04	Wislang v Medical Council of NZ and Ors	Dismissed	No
13.12.04	John Arthur Burrett v The Queen (<i>Petition to PC</i>)	Dismissed	No
13.12.04	Matthew Norman Payne v The Queen (<i>Petition to PC</i>)	Dismissed	No
	Total Heard	19	
	Total Dismissed	14	
	Total Allowed	5	
	Appeals from Courts of more than 3 Judges	5	
	Appeals from Courts of 3 Judges	14	



APPENDICES



A IMPORTANT CIVIL CASES

Administrative Law

Freedom of Speech – Penal Institutions Regulations 2000

In *TVNZ v Attorney-General* CA169/04 17 September 2004, the Court discussed the proper approach to the Chief Executive of the Department of Corrections' discretion, under regs 87 and 88 of the Penal Institutions Regulations 2000, to permit inmates of penal institutions to be interviewed by the media. The case concerned an application by Television New Zealand to interview Mr Ahmed Zaoui, who was imprisoned under the Immigration Act 1987 pending determination of his security risk status by the Inspector-General of Intelligence and Security.

The Chief Executive had refused to allow the interview, citing concerns that public confidence in the Inspector-General review process would be undermined and drawing an analogy with a remand inmate awaiting trial. The Court concluded, however, that the Chief Executive's decision gave insufficient weight to s 14 of the New Zealand Bill of Rights Act 1990, which guarantees freedom of expression. On the particular facts there was no realistic risk to the review process, and any risk was outweighed by s 14. The context was an unusual one, different from the ordinary case involving remand prisoners. The Chief Executive was directed to reconsider his decision in accordance with the ruling.

Leave to appeal to the Supreme Court was refused.

Fisheries Settlement – Adequacy of Provision for Urban Maori

In *Thompson v Treaty of Waitangi Fisheries Commission & Ors* CA247/03 15 June 2004 the Court allowed in part an appeal from a High Court decision which substantially upheld the provision made for urban Maori in the He Kawai Amokura draft fisheries settlement proposal. The proposals provided for the establishment of a Putea (trust) through which urban and other non-affiliated Maori would be able to obtain some benefit from the "Sealord" Fisheries Settlement. The High Court considered that the objects of the Putea as set out in He Kawai Amokura were too narrow, and therefore unreasonable in an administrative law sense, but did not go so far as to state that the capitalisation of the Putea (\$20m out of a total settlement value of approximately \$700m) was inadequate. This finding was the central issue in this appeal.

The majority upheld the High Court's findings that the legislation provided that allocation of both Pre-and-Post Settlement Assets must be fair and that the principles of the Treaty of Waitangi were imported into the settlement legislation. The majority also reaffirmed the previously expressed view of the Court that the deed of settlement "contemplated only an allocation to iwi both in relation to both pre and post settlement assets but with the requirement... that iwi have in place mechanisms to ensure that the settlement is for the ultimate benefit of all Maori."

The majority considered that the phrase “ultimately for the benefit of all Maori” as used in the Deed, did not require that there be an immediate benefit to each and every individual Maori. The majority went on to say that an allocation model cannot be seen as being ultimately for the benefit of all Maori, or indeed fair, if there are a group of Maori who identify as Maori but who will not at any stage be able to access the settlement.

The majority stated that, as a specialist body, the Commission was faced with a complex task, and recognised that there would have been a range of solutions that would have accorded with the Deed and the legislation. As long as some meaningful amount was reserved for those who could not access benefits through their iwi, it would be possible for a reasonable Commission to conclude that the allocation model was fair and for the ultimate benefit of all Maori. The majority nonetheless considered that the \$20m for the Putea had a minimalist and perhaps “iwi-centric” appearance. They stated that it appeared that realistically the numbers that will need to rely on the Putea will not in the foreseeable future be less than 10%, which would have suggested an allocation of \$40m if quota is not taken into account. It may have been possible, the Court considered, to argue that the \$20m funding figure did not accord with the requirement that the settlement be for the ultimate benefit of all Maori or that it was unreasonable in the administrative law sense, had the measure stood alone.

The majority did not, however, consider that the measure stood alone, noting that the adjustments which would have been required were that the Putea to be capitalised at a higher rate would have arguably produced unfairness for iwi.

Further, the majority noted other relevant matters, including the measures in the settlement to ensure that iwi reach out to their members. The majority partially agreed with a submission that such measures were likely to be ineffective as a result of a lack of incentive for iwi to do so, coupled with a lack of sanctions for breach, considering that further consideration needed to be given to the question of sanctions. They also expressed concern as to the ability of iwi to change their constitutions, even with the safeguards provided in the draft Bill. However, the majority concluded that it could not operate on the assumption that iwi will not use their best endeavours to meet the draft Bill’s kaupapa requirements.

Another relevant factor identified by the majority was the fact that the Te Ohu Kai Moana could provide further funding to the Putea in the future, should further information on the numbers accessing the Putea show it to be inadequately capitalised. The majority was concerned, however, that the Commission should have made sure that Te Ohu Kai Moana, at the time of making any decision as to the use or distribution of its funds, is required to consider the adequacy of the Putea funding in light of the requirement that the settlement be ultimately for the benefit of all Maori and to weigh that against other uses for the funds.

The majority did not consider that iwi control over the Putea was unreasonable per se. They did, however, note that any control must be exercised for the purpose of ensuring that the settlement is ultimately for the benefit of all Maori, and that this must be made “absolutely clear”. The same should, the majority considered, apply to the proposed winding up of the Putea.

The majority thus concluded that, for the Putea proposal to reach the required standard of being “ultimately for the benefit of all Maori” (and therefore be considered reasonable in an administrative law sense), it would be necessary for the issues of iwi control over future funding of the Putea, and the wind-up provisions to be dealt with in the way suggested.

Hammond J, dissenting, concluded that a traditional, low-level, “*Wednesbury* style” approach to the standard of review was appropriate. His Honour considered that standard was far from being met. As a parliamentary select committee was considering the settlement proposals at the time this application was before the Court, Hammond J would have left the question for Parliament to address.

Fisheries Settlement – Consideration of lease round inequities – Juridical Bay Formula

In *Whata-Wickliffe & Ors v Treaty of Waitangi Fisheries Commission & Ors* CA 73/04 30 June 2004, the Court considered another challenge to the *He Kawai Amokura* settlement proposal. The Appellants alleged that the settlement was unreasonable as it did not take into account alleged inequities in the outcome of tender and lease rounds of quota undertaken by the Commission from 1990 onwards; was agreed to after inadequate consultation; and used an allocation model which wrongly measured coastlines on a “juridical bay” formula under which harbours and shorelines of inlets were not included.

The High Court considered that there were no inequities in the lease rounds, and consequently no failure to consult. The High Court considered that the juridical bay formula was not unreasonable when considered as one aspect of the much wider Maori fisheries assets allocation proposal.

In determining whether there were inequities, the Court examined the statutory requirements the Commission must meet with both final allocation and lease rounds allocations. While accepting that there were similarities, the Court considered that did not mean that the statutory functions could be equated. Therefore, the mere fact that the final allocation model proposed a different distribution of benefits from the lease and tender rounds was not in itself objectionable. While it was open to the Commission to make an adjustment for differences between a final allocation scheme and leasing benefits, this was not required by the legislation.

The Appellants further argued that the Commission had breached its duties by not alerting iwi to the alleged inequity. The Court considered, however, that there had been full consultation with Maori. The Court also rejected an argument that the Commission had approached the issue with a closed mind.

The Appellants further submitted that the “juridical bay” formula (used by the Commission to deal with the issue of how to account for iwi with large harbours and bays when allocating quota) was not logically connected to the process of determining the area of fisheries under an iwi’s control and was therefore unreasonable. The Appellants submitted that there were a range of alternatives which ought to have been considered by the Commission but which were not. They further submitted that the

Commission had misled iwi in consultation documents concerning the basis for the formula

The Court commented that the coastline component of the allocation model was intended as a proxy for the measurement of traditional fishing rights. The Commission considered that including harbour coastlines in that proxy measurement would have disproportionately favoured certain iwi, something the Court considered could not be seen as meeting either the requirement of a fair allocation to iwi based on traditional fishing rights or that of a settlement ultimately for the benefit of all Maori. The juridical bay formula had been a sensible means of compromising between these competing considerations, and was agreed to by iwi having regard to information given by the Commission. In such circumstances the Commission's decision could not be characterised as unreasonable.

Leave to appeal to the Supreme Court has been refused.

Fisheries – Sea lion mortality limits

Squid Fishery Mgmt Co Ltd v Minister of Fisheries CA39/04 13 July 2004 concerned a decision of the Minister of Fisheries, acting pursuant to s 15 of the Fisheries Act 1996, to impose a fishing related mortality limit of 62 sea lions in relation to the squid fishery around the Auckland Islands and Campbell Island. The industry applied to the High Court for judicial review of the Minister's determination, but this application was dismissed. The industry appealed.

The Court held that under the legislation, the Minister had to balance utilisation objectives and conservation values, and he only had power to impose a limit if he considered it "necessary" for conservation purposes. However, the Minister's approach did not address the extent to which, or the point at which, utilisation of the squid resource conflicted with conservation of the sea lion population, and was thus flawed. Alternatively, if the Minister had set out to make such an assessment, he had not used the best evidence, and thus acted in breach of s 10 of the Act. The appeal was allowed.

Habeas Corpus – Penal Institutions

The appellant in *Manuel v Superintendent, Hawkes Bay Regional Prison* [2005] 1 NZLR 161 was convicted of murder and sentenced to life imprisonment in 1984. In 1993, he was convicted of further offences while on parole. He was then recalled to prison to serve the remainder of his life sentence for murder. He applied for a writ of habeas corpus, challenging his continuing detention on the basis of alleged procedural and other defects, which were said to have invalidated the order for recall. The High Court declined his application. He appealed.

The Court reviewed the authorities both before and after the Habeas Corpus Act 2001, and noted that habeas corpus has been considered or granted where detention depended on regular administrative decisions. The Court further said that under the Act, the courts were not confined to a jurisdictional enquiry and in principle, the issues as to the underlying validity of the orders under which the applicant was imprisoned were reviewable. However, the Court held that challenges raised in this

case were not capable of fair summary determination, and were thus not appropriately the subject of habeas corpus proceedings. The appeal was dismissed.

Leave to appeal to the Supreme Court was refused.

Immigration – Security risk certificate – validity of warrant of commitment - availability of bail.

In *Zaoui v Attorney-General and Others* [2005] 1 NZLR 577, the Court considered several challenges to the detention in prison of Mr Ahmed Zaoui, an Algerian National, pending determination of his security risk status under Part 4A of the Immigration Act 1987.

The first challenge was to the validity of the warrant of commitment prescribed by the Crown. It expressly stated that Mr Zaoui's detention was to be in penal institution. The High Court had held that that qualification was invalid, as it forbade what the statute permitted (detention in a place other than a penal institution). Unanimously, the Court concluded that the specification of particular places for detention in the warrant was within the discretion of the Crown. On national security matters, the Crown was more readily able to make decisions as to appropriate places for detention than the District Court. The warrant was therefore valid. However, the Court concluded that s 16 of the Interpretation Act 1999 gave the District Court the power to vary the warrant if the Crown elected to amend the prescribed form to permit detention in other places.

The second challenge was to the refusal of the High Court to grant bail either under the Court's inherent jurisdiction, as an adjunct to habeas corpus, or as a remedy for arbitrary detention under the New Zealand Bill of Rights Act 1990. The Court was divided on whether there was an inherent jurisdiction to grant bail. McGrath J concluded that the inherent jurisdiction was ousted by the legislative scheme, which precluded judicial consideration of information necessarily for bail decisions to be properly made. O'Regan J concluded that it was consistent with the statutory scheme to grant bail in exceptional cases where detention was unreasonably prolonged, as Parliament had assumed that the process would proceed expeditiously. However, that point had not yet been reached. Hammond J did not consider the issue.

Hammond J (dissenting) concluded that bail could be granted as an adjunct to habeas corpus where the detention had become unlawful. He took the view that it had, as its unreasonable length had made it arbitrary for the purposes of the New Zealand Bill of Rights Act. There had been almost two years of systemic delay. The Judge rejected as simplistic appeals to national security, which were incapable of justifying such a long period of detention without charge or trial.

The majority of the Court, however, concluded that the detention was not arbitrary. The delays were necessary for the proper determination of the case, and during that time release could not be contemplated because of national security concerns. It followed that the challenges were unsuccessful.

Mr Zaoui successfully appealed to the Supreme Court and was granted bail ([2005] 1 NZLR 629).

Immigration – Human Rights – Review of Security Risk Certificate

Attorney-General v Zaoui & Ors CA 20/04 30 September 2004 concerned the scope of the review function of the Inspector-General in relation to a security risk certificate pertaining to Mr Zaoui that was issued by the Director of the New Zealand Security and Intelligence Service. Confirmation of the certificate could lead to Mr Zaoui's deportation from New Zealand.

The Crown's position was that the focus of the Inspector-General's review is solely on security issues, while Mr Zaoui's position was that the Inspector-General is required to weigh Mr Zaoui's human rights, in particular his right not to be exposed to a real risk of death or torture, against New Zealand's security interests when deciding whether the security risk certificate was properly made.

As a threshold issue the Crown also argued that the Inspector-General was not amenable to judicial review in relation to his duties and powers in respect of a review of a security risk certificate. The Court regarded this argument as untenable on the basis that nothing in the scheme of Part 4A of the Immigration Act 1987 militated against the conclusion that review was intended to be available. An argument that the present intervention was premature was also rejected and the Court refused to exercise its residual discretion to deny review.

Glazebrook J (with whom Anderson P concurred) went on to hold that, based on the division of functions between the Inspector-General, who must decide only if the certificate was properly made, and the Minister, whose role it is to decide on questions of removal or deportation, any evidence as to the risk to Mr Zaoui of torture or persecution was not relevant to the Inspector-General's review and should instead be addressed to the Minister.

Despite the limits of the Inspector-General's functions under Part IVA of the Immigration Act, Glazebrook J held that the Act itself explicitly required the Inspector-General to consider the United Nations Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967 (the Refugee Convention). This followed from the importation into the relevant security criteria in ss114C of art 33.2 of the Refugee Convention. That meant that Mr Zaoui could not be deported unless there were reasonable grounds for regarding him as a danger to the security of New Zealand considered in light of New Zealand's obligations under the Refugee Convention. The starting point was the words themselves in the context of the Refugee Convention and in light of its object and purpose, which is of a humanitarian nature.

Glazebrook J concluded that to meet the security criteria applicable to a recognised refugee such as Mr Zaoui, there must be objectively reasonable grounds based on credible evidence that Mr Zaoui constitutes a danger to the security of New Zealand, of such seriousness that it would justify frustrating the purpose of the Convention by sending a person back to persecution. An evidential foundation was required before this conclusion could be reached.

The phrase “danger to the security of New Zealand”, while allowing for a margin of appreciation, had to be interpreted in good faith in accordance with the purpose of the Refugee Convention, the central object of which was the obligation of non-refoulement which is non-derogable, and has become part of customary international law. Against this background it was clear that the art 33.2 exception must be interpreted restrictively and must involve substantial threatened harm to the security of New Zealand with a real connection between Mr Zaoui himself and the prospective or current danger to national security. Further, an appreciable alleviation of that danger must be capable of being achieved through his deportation.

William Young J differed from Anderson P and Glazebrook J only in his preference not to express definitive conclusions in respect of how human rights considerations and international jurisprudence affect the interpretation to be placed on art 33.2 of the Refugee Convention and the way it must be applied by the Inspector-General.

Leave to appeal to the Supreme Court has been granted. The appeal is scheduled to be heard on 12 April 2005.

Arbitration

Setting aside arbitral award

Amaltal Corporation Ltd v Maruha (NZ) Corporation [2004] 2 NZLR 614 considered the circumstances in which an arbitral award may be set aside under art 34 of the First Schedule to the Arbitration Act 1996. The appellant Amaltal sought to have an arbitral award set aside on the ground that it was “in conflict with the public policy of New Zealand” in terms of art 34(2)(b)(ii).

Amaltal was owned by two New Zealand companies. The respondent Maruha was the New Zealand subsidiary of Maruha Corporation of Japan. Amaltal and Maruha became joint venturers under a shareholders’ agreement in Ceebay Holdings Ltd, a company set up to own and lease fishing quota. Amaltal held 751 A Class shares in Ceebay while Maruha held 249 B Class shares. 99% of the profits were to be received by the B Class shareholder while Amaltal would receive 1% of profits. The shareholders’ agreement provided that if Amaltal breached any of its obligations thereunder, the agreement would immediately terminate and Amaltal would transfer its shares in Ceebay to a person named by Maruha.

The arbitrator found that Amaltal had breached the shareholders’ agreement and ordered that Amaltal’s shares in Ceebay be transferred to Maruha.

Amaltal then made two applications to the High Court, which proceeded separately. First, Amaltal sought leave under cl 5 of the Second Schedule to the Act to appeal the award on a question of law. Leave was declined. Secondly, Amaltal sought to set aside the award on the basis that the forfeiture provision was unenforceable because it constituted a penalty contrary to the public policy of New Zealand under art 34(2)(b)(ii). Both applications were dismissed.



The Court found that cl 5 of the Second Schedule and art 34 of the First Schedule to the Act were not mutually exclusive. An appeal on a point of law might reasonably put procedural questions in issue. However, the Court commented that questions of issue estoppel or abuse of process might arise if a party sought to raise the same error of law under both art 34 and cl 5.

The Court proceeded on the basis that fundamental principles of law and justice are to be regarded as a matter of public policy for the purposes of art 34. The rule that a contractual penalty clause is unenforceable was a branch of equity's relief jurisdiction relating to oppressive contracts. The rule could not be properly characterised as so fundamental as to constitute "public policy" in terms of art 34.

The Court went on to note that the arbitrator's view that the relevant clauses of the shareholders' agreement were not penal in nature had to be respected. Further, Amaltal had undertaken to behave towards Maruha in a spirit of good faith and the arrangements between the parties had no appearance of actual or potential oppression.

Standing to challenge award – Contracting Out of Procedural Requirements - Natural Justice

In *Methanex Motonui Ltd v Spellman* [2004] 3 NZLR 454, the Court determined several issues concerning the interpretation of the Arbitration Act 1996 in the context of a challenge to an expert determination of the Maui Gas Field's reserves, which was conducted by way of arbitration. The challenge alleged failures of natural justice by the expert, who did not disclose for comment by the parties a reservoir simulation model developed to determine the economically recoverable reserves of the field. The appellant, Methanex Motonui Ltd (Methanex), was party to a long-term arrangement whereby the gas was bought by the Crown and then sold to Methanex at a price below the market value of the gas.

The Court first considered whether Methanex had standing to challenge the decision. This turned on whether Methanex was a party to the arbitration agreement. Section 2 of the Act defined that as an:

agreement by the parties to submit to arbitration all or certain disputes which have arisen (or which may arise) between them in respect of a defined legal relationship, whether contractual or not.

Methanex was a party to the settlement agreement submitting the dispute to arbitration, but that was not determinative of whether the definition was satisfied. The Court held that the parties to the agreement were those between whom the dispute and the defined legal relationship arose. Methanex was therefore not a party, as the relevant legal relationship was a contract between the Crown and the supplier of the gas. Methanex's contract with the Crown to buy the gas was insufficient, and any direct claims it had in relation to the contract between the Crown and the supplier had been settled. The Court also concluded that there was no basis for non-parties to challenge awards, rejecting an analogy with the principles governing standing to apply for judicial review.

The Arbitration Act specifies that an award can be set aside by the High Court if it is contrary to the public policy of New Zealand. “Public policy” is defined to include natural justice. The Court considered, obiter, whether that requirement was one which the parties could exclude by contract. The legislative history of the United Nations Commission on International Trade Model Law on International Commercial Arbitration, on which the Act was based, indicated that the public policy requirement was a fundamental one. It followed that contracting out of the fundamental requirements in arts 18 and 24 of the Model Law was not possible, though the parties could exclude the broader common law rules of natural justice. The Court accepted that the common law obligations had been excluded on the facts.

The Court then turned, obiter, to the requirements of arts 18 and 24 of the Model Law. The crucial provision was art 24, which required disclosure of “expert reports” and “evidentiary documents” to the parties for comment. The Court held that an expert report was a statement of fact or opinion to the arbitrator by a stranger to the arbitration. An evidentiary document was a document produced by someone other than the arbitrator or his or her staff. It also did not include works of general application, matters of which judicial notice could be taken, or legal precedents and articles used as part of the internal reasoning processes of the arbitrator.

The appeal against the High Court decision striking out the claim therefore failed.

Company Law

Constitution – Rights of pre-emption

In *Ord v Calan Healthcare Properties Ltd* (2004) 9 NZCLC 263,711, a trust held one third of the shares in the respondent company. There was a change of trustees, and the appellants were the transferees of the share transfer intending to give effect to this change. The High Court held that this transfer triggered the rights of pre-emption under the constitution of the respondent company. The appellants, on grounds of alleged oppression, then sought an interim injunction to prevent the implementation of those rights. In a second judgment, the High Court declined this application. The appellants appealed against both judgments.

The Court held that on the construction of the relevant clauses of the company’s constitution, the rights of pre-emption were only triggered when there was a sale of shares. The lodging of an updating share transfer to effect changes in trustee did not establish that the shareholder was “intending to transfer any shares” within the meaning of the constitution. In interpreting the constitution, the Court considered it significant that the first appellant’s stake in the respondent was held by the trust at the time the constitution was adopted. Having regard to other carve outs, it must have been obvious to the parties involved that the pre-emptive rights did not apply to mere changes of trustee.

The Court also held, on the assumption that the rights had been triggered, that it would have been appropriate to grant the interim injunction. The trust’s oppression proceedings were supported by an unreasonable attitude by the respondent company

throughout, and by it appearing to have taken the view most favourable to the majority shareholder and least favourable to the trust. Both the appeals were allowed.

Liquidation

In *Waimate Investments Ltd (in Liquidation) v O’Dea* [2004] 2 NZLR 433 the Court dismissed an appeal by Waimate Investments Ltd (Waimate) and others (being two companies and their liquidators) challenging the High Court’s refusal to exercise its discretion in favour of Waimate under s 258 of the Companies Act 1955.

Waimate and others applied for directions under s258 of the Companies Act 1955 that the filing and prosecution of proceedings against O’Dea represented a proper exercise of the powers of the liquidators of the two companies. Waimate alleged serious mismanagement by O’Dea in the course of managing two of its companies.

In the High Court it was common ground that the purpose of the application to the Court was to give the liquidators immunity from an award of costs in the event that the appellants were unsuccessful in the proceeding. It was also common ground that the Court had a discretion as to whether to grant or refuse the application. The High Court declined to exercise its discretion in favour of Waimate on the ground that the purpose of the application was inappropriate.

Waimate appealed against the High Court’s exercise of its discretion. The Court held that the fundamental purpose of s 240(1)(a) of the Companies Act 1955 was not to protect a liquidator against the costs of the defendant against whom the proceeding was brought, or any hypothetical liability for the company’s costs, but to ensure that there was a justifiable case for the liquidator to bring on behalf of the company for the apparent benefit of the creditors of the company. Underlying that approach is the basic premise that the company in liquidation will be liable for the costs of the liquidation and will not be able to obtain protection from the costs of a successful defendant.

It further held that there is no authority to the effect that a company in liquidation or its liquidator is entitled to receive protection for its costs or for his or her costs by seeking a pre-trial ruling based on the merits of the litigation. It is for the liquidators to make their own determination on legal advice, and for the trial to determine the merits of litigation. The Court cannot second-guess the outcome of proposed litigation with a view to protecting one party vis-à-vis another.

The Court concluded that the High Court approach to the application was correct.

Minority Shareholder Oppression – whether provision applies to listed companies – Applicable principles

In *Latimer Holdings Ltd & Anor v SEA Holdings New Zealand Ltd* (2004) 9 NZCLC 263,694, the Court upheld a High Court decision granting summary judgment against the appellants on a claim brought under the “oppression” provision (s 174) of the Companies Act 1993.

The appellants were minority shareholders in Trans Tasman Properties Ltd, a company listed on the New Zealand Stock Exchange. The respondent, SEA Holdings, was a New Zealand company which held the majority of the shares in Trans Tasman. The appellants alleged that the affairs of Trans Tasman were being managed by SEA adversely to the interests of its minority shareholders. They sought as relief under s 174 an order that SEA be required to purchase their shares at their net asset value.

The Court reviewed the evolution of the oppression remedy in the United Kingdom and New Zealand, along with the development of the legal tests for oppression. It noted that the leading case to date was *Thomas v HW Thomas Ltd* [1984] 1 NZLR 686 (CA), which held that fairness was not to be assessed in a vacuum, and that all of the interests involved must be balanced against each other. Further, for unfairness to be present there must be a “visible departure” from the standards of fair dealing “viewed in light of the history and structure of the particular company, and the reasonable expectations of [its] members”.

The High Court decision suggested that these principles may no longer have been applicable in light of a recent change in approach by English courts. This change was, the Court noted, because of an apprehension by English appellate courts that undue resort is being had to the oppression provisions, and that the legal tests to be applied were not sufficiently certain. These culminated in the House of Lords decision *O’Neill v Phillips* [1999] 1 WLR 1092, which sought to restrict the scope of the oppression remedy in that jurisdiction.

The Court rejected that approach, noting that there is a “doctrinal danger” in adopting a stiffer test than that of “reasonable expectations”. Further, the Court noted that *O’Neill* had not produced the desired effect. The *Thomas* approach was said still to be appropriate in New Zealand.

The Court also examined alleged problems in applying s 174 to listed companies. It rejected any suggestion that listed companies are not subject to the s 174 remedy, but noted that there are “considerations which may well make it more difficult for plaintiffs to succeed in the case of listed companies”.

Leave to appeal to the Supreme Court has been refused.

Constitutional Law

Parliamentary Privilege – Construction of s 55A-E of the Electoral Act 1993

In *Huata v Prebble* [2004] 3 NZLR 359, the Court considered a challenge to the decision of the parliamentary leader of the ACT party to begin the statutory process in s 55A-E of the Electoral Act 1993 for the expulsion of a member from Parliament. The statutory test in s 55D requires the leader first to form the belief that the Member had acted in a way that had “distorted, and was likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last general election”. Mrs Huata MP, the member affected, alleged that the decision was

unreasonable and that a caucus decision ratifying it was contrary to the principles of natural justice, being tainted by predetermination.

Noting its duty under s 242 of the Legislature Act 1908, the Court considered whether parliamentary privilege barred judicial review even though this point had not been raised on appeal. Unanimously, the Court concluded that review was permitted. Any parliamentary privilege was negated by the statutory scheme, principal features of which included the distancing of the House of Representatives and the Speaker from the decision and the involvement of the Act party caucus. The majority of the Court also indicated possible limits on the composition and internal proceedings privileges of the House which might in themselves have permitted judicial review.

The Court then construed s 55D. The majority held that, construed in the light of its legislative history and constitutional context, “proportionality” covered the number of seats held by a party and its relative voting strength in the House. An unambiguous resignation or a sustained pattern of voting against the party was required to satisfy the test.

The majority then held that the requirement that the Member must have “acted in a way that” distorted proportionality implied that the provision did not cover the situation where the immediate cause of the distortion is a voluntary act of the party.

The majority found that there was no evidence on which the leader could conclude that Mrs Huata had acted in a way that distorted proportionality. Misconduct, or actions such as the withdrawal of funding from a common pool and caucus misconduct were insufficient to distort proportionality. So too was voting against the party on a few occasions. While the number of seats held by the party had altered, that was caused by ACT’s voluntary decision to expel her from caucus and have her declared an independent MP for parliamentary purposes. The appeal was allowed on this basis and an order was made preventing the leader from delivering a notice of vacancy to the Speaker relying on those grounds.

The minority concluded that there was no warrant in the legislative history or constitutional context for reading down the broad words of the legislation. This was particularly so as the threshold for review had to be a high one given the necessity of avoiding inquiry into parliamentary matters in breach of Art 9 of the Bill of Rights 1688. As there was evidence on which the parliamentary leader could take the view that Mrs Huata had distorted the proportionality of Parliament, the minority would have dismissed the appeal.

The Court unanimously rejected the predetermination argument. The evidence did not establish, on the balance of probabilities, that the decision was predetermined. The leader was required to form a reasonable belief that proportionality had been distorted prior to the decision, and had only to genuinely address any response by the Member. The other caucus members were required to give genuine consideration to the Member’s conduct and any response, but in the political context could take political considerations into account and discuss the issue prior to the hearing. Predetermination could be shown if they were found simply to have gone through the motions, without addressing the central question of whether proportionality had been distorted. There was no evidence capable of meeting that high threshold.



Leave to appeal was granted. This was the first case heard by the Supreme Court of New Zealand. The appeal was allowed. (See [2005] 1 NZLR 289.)

Consumer Law

Vendor bidding - Whether breach of s 9 of the Fair Trading Act and s 59 of the Sale of Goods Act 1908

In *Commerce Commission v Grenadier Real Estate Ltd* [2004] 2 NZLR 186, the Court considered auctioneering practices in relation to vendor bidding. The appeal by the Commerce Commission arose out of a complaint by prospective purchasers regarding an auction by the respondents. At issue was the manner in which the respondent's auctioneer had made vendor bids throughout the auction, and whether such bidding breached s 9 of the Fair Trading Act 1986 and s 59 of the Sale of Goods Act 1908.

The Court considered the historical approach of the Courts at common law and equity to vendor bidding, before moving to ss 59(3), (4) and (5) of the Sale of Goods Act. It was noted that s59 emphasises the need to “expressly” give notification that the sale is subject to the vendor's right to bid. The Court found that s 9 of the Fair Trading Act extends and reinforces the rules in s 59, dictating that the bidding process must not mislead or be deceptive for persons who attend the auction intending to either bid for the property or to make an offer if it is passed in.

On the issue of when the bidding process might be misleading or deceptive, the Court emphasised that it is not realistic to expect people will be knowledgeable about auction procedures or have taken legal advice on them. Accordingly, the Court advised that where a vendor intends to bid, consumers should be told before bidding begins for each property that there is a reserve price and the vendor reserves the right to bid until that price has been reached. Even where consumers are educated in this way, it is still important that the auctioneer makes it clear and unambiguous whether a particular bid has been received from a bidder or on the vendor's behalf, and that auctioneers take care with the language they use. Any ambiguity would be construed unfavourably to the auctioneer.

Contract

Absence of consent – Undue Influence

In *Hogan v Commercial Factors Ltd* CA225/03 10 November 2004, the appellant appealed against the decision of the High Court rejecting his arguments that he was subject to undue influence when in 1997 he entered into guarantees, under which the principal debtor was associated with his son. He had claimed that his actions in entering into the guarantees were explicable only by the relationship of emotional dependence between him and his son; and that the respondents, who were the lenders, knew or ought to have known sufficient facts to put them on notice as to the risk of undue influence.

The Court noted that for sureties to avoid liability by arguing that they were induced to enter into the guarantees in question by reason of undue influence exercised by the borrower, they must show that they were subject to undue influence; the circumstances as known to the creditor put the creditor on inquiry as to the risk of undue influence; and the creditor did not act in such a way as to insulate itself from the consequences of such undue influence.

The Court took the opportunity to discuss the leading authorities in the area, including *Barclays Bank plc v O'Brien* [1994] 1 AC 180 and *RBS plc v Etridge (No 2)* [2002] 2 AC 773. The Court said that it was highly likely that the *Etridge* approach as to when creditors are on inquiry will be applied in the future. It was difficult to distinguish in principle between banks and other financiers, although *Etridge* may be applied less rigorously to the latter. *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 was also discussed.

The Court held that there was no evidence of undue influence. The appellant was the person who had primarily dealt with the respondents, and the need for the guarantees was brought to his personal attention. He had also acknowledged these requirements. He had further provided the valuations of his home over which security was taken by the respondents. These facts made it hard to support an argument that he did not know what he was signing.

The Court also held that there was nothing to put the creditor on notice. At the time the guarantees were given, the appellant was a director and creditor of the principal debtor, and was already exposed on existing guarantees in relation to its indebtedness. The appellant was also involved in the day to day operations of the business.

The appeal was dismissed.

Assignability of contract containing confidentiality clause – Reconsideration of NZ Payroll Systems Ltd v Advanced Management Systems [2003] 3 NZLR 1

In *Auckland City Council v Union House Ltd & Anor* CA162/03 11 August 2004, the Court considered whether a contract containing a confidentiality clause prohibiting the disclosure of its terms without prior consent was capable of assignment.

The contract, between Auckland City Council and the Union Steamship Company, governed various property transactions, resolved certain litigation, and provided for ongoing co-operation between the parties in relation to the “Britomart” development in Auckland City. Part of this agreement was a provision offering Union Steamship a right of first refusal to purchase back a site it had offloaded to the Council if the development did not proceed within five years. Due to the charged political atmosphere surrounding the development, a provision was included to the effect that the terms of the agreement were not to be disclosed to any other party without prior consent.

Some time later, Union Steamship purported to assign its rights under the agreement to an unrelated third party, Union House Ltd. There was correspondence between Union House’s solicitors and the Council’s solicitors as to this assignment, but it was

the Council's belief that the agreement was "obsolete". No consent was subsequently given. Following this, the Council resolved to sell the property concerned, triggering the right of first refusal. Union House wrote to the Council, advising it that Union Steamship's interest in the agreement had been transferred to Union House, and that it wished to receive notice of the terms and conditions upon which it wanted to sell the property. A question therefore arose as to the validity of the purported assignment in light of the confidentiality clause.

In the High Court, the assignment was said to be valid as there was no "necessarily implied prohibition" on an assignment of the right of first refusal.

This Court considered the law relating to assignment, noting that "the correct approach to the issue of whether there is a restriction on assignment is one of the proper construction of the particular agreement". Further, the Court stated that "the temporal standpoint at which the provisions of [the] contract fall to be interpreted is the date of the agreement, and they are to be construed as continuously speaking thereafter". As a result of this, the confidentiality clause could not be considered to be "spent". The Court considered that the construction issues raised were "narrow ones of whether (in the absence of an express provision) there is a necessary implication arising from the confidentiality clause that the agreement could not be assigned without the prior consent of the [Council], and as to the terms of that implication".

The Court accepted that there was a necessary implication to be drawn from the confidentiality clause that there was a restriction on assignment, but did not accept that assignment, in the circumstances of this case, would necessarily lead to a breach of it. The reason for this was that the necessary implication to be drawn from the clause should "extend no further than is necessary" to ensure that its objective is met. In the Court's view, that objective could be met by implying a restriction on assignment if it involved a breach of the clause. As a consequence, any purported assignment of rights under the agreement without the consent of the other party would be ineffective if the assigning party had breached the clause.

The Court rejected a submission that this approach differed from that in *Payroll Systems Ltd v Advanced Management Systems* [2003] 3 NZLR 1, stating that it was instead following that decision, but with a qualification reflecting the different contexts.

In this particular case, the Court considered it was appropriate to remit the issue of whether the clause had been breached to the High Court for determination.

Leave to appeal to the Supreme Court was granted. The appeal was later abandoned, and was dismissed.

Contractual interpretation – Goods and Services Tax – Summary judgment

Johannes C Starrenburg and Anor v Mortre Holdings Ltd (2004) 21 NZTC 18,696, concerned the interpretation of the standard form agreement for sale and purchase of real estate prepared by the Auckland District Law Society. Under the particular agreement, the price was deemed (by virtue of a failure to amend the form) to be inclusive of Goods and Services Tax (GST). The vendor, however, alleged breach of



a warranty that the purchaser was registered for GST. Had the purchaser been registered there would have been no GST liability on the supply. The purchaser argued that the clause did not apply as the price was inclusive of GST.

The Court noted that the warranty was intended to give effect to s 11(1)(m) of the Goods and Services Tax Act 1985. Like that provision, the warranty was intended to ensure certainty as to GST between the parties to the contract. This explained the requirement that the warranty be expressly excluded. The provision that the price included GST did not amount to an express exclusion.

The Court then considered whether the warranty could lead to damages where the price paid was inclusive of GST. There was a mechanism for the payment of GST where the warranty was breached, but that applied only if the price was exclusive of GST. Nonetheless, the Court held that breach of the warranty could found a claim in damages under ordinary contractual principles. The mechanism for repayment did not limit the scope of the warranties.

Finally, the Court considered an argument that the principles in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896 could lead to the Court taking a different view of the meaning of the contract than that apparent from its express terms. The Court indicated that where those principles were invoked effectively to rewrite a contract a cautious approach was required. The provision that derogation from the warranty must be express also limited the scope for interpreting the contract differently in the light of the factual background. Furthermore, even accepting the purchasers' evidence as to their intentions, there was nothing to justify a departure from the clear meaning of the words. Summary judgment for the vendor was therefore upheld.

Deed of Settlement - Duress

In *Pharmacy Care Systems Ltd v Attorney-General* CA198/03 16 August 2004, the Court upheld a decision of the High Court dismissing a claim by the appellant (Pharmacy Care) that a deed of settlement it entered into with the Northern Regional Health Authority (North Health) was induced by duress and ought to be set aside.

A, an entrepreneurial pharmacist, set up the appellant company to put into practice a business concept he had developed, which involved the company "recycling" undispensed medicines which it received from institutions.

Following healthcare reforms in 1993, the company entered into a purchase contract with North Health, the terms of which were in accordance with s 51 of the Health and Disability Services Act 1993. The company submitted claims for the prescribed amount for every medicine it dispensed, including "recycled" medicines as well as medicines supplied to it free of charge by drug suppliers for promotional reasons (so called "bonus supplies").

These practices came to the attention of North Health. An audit followed, during which a variance of tens of thousands of dollars between the submitted records of inwards supplies and its claims for payments was found. This was due to a

combination of the system it was using, the bonus supplies and the returns on recycling drugs where a subsidy had already been paid.

Various meetings were held addressing if, and how, these monies should be repaid. What followed were allegations that the appellant's recycling practice was unlawful, and statements that further action would be taken if a resolution could not be reached. North Health then withheld payment on a number of outstanding invoices, claiming it had a right to offset this against what it claimed to be historic over-claiming.

A claimed that at one meeting he was told that he had one hour to go away and consider a settlement offer whereby he would pay North Health \$80,000. If A refused North Health threatened that it would commence criminal proceedings against him and ensure he did not get another s 51 notice. The trial Judge preferred the evidence of North Health's representative that no such threats were made. This Court concluded that the Judge's finding in this regard was not sufficiently elaborated on, but concluded that it could not be shown that the Judge was wrong in his assessment.

A deed of settlement was subsequently drawn up, which the appellant sought to have set aside due to duress. The duress was claimed to arise from alleged threats of criminal prosecution, threats that A would never get another s 51 notice, North Health's actions in withholding funds from Pharmacy Care, and North Health's failure to release a caveat on a property owned by one of Pharmacy Care's directors.

The Court reviewed the law relating to duress, noting a widening of the categories of duress in recent years. The Court noted the risk of "courts inappropriately conflating impropriety and generalised "unfairness"" as well as the difficulties involved in drawing the line between what is permissible and what is impermissible when making threats of criminal or civil process.

The Court summarised the elements of duress in current New Zealand law: First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim's manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.

In this case, the Court was satisfied with the factual findings made by the first instance Judge and consequently found no basis on which duress could be made out. The Court concluded that even if duress had been made out, the appeal must fail because Pharmacy Care's failure to take timeous steps to avoid the Deed amounted to an affirmation of the Deed.

Leave to appeal to the Supreme Court was refused (see (2004) 17 PRNZ 308).

Defamation

Scope of privilege – Self-defence

In *Alexander & Ors v Clegg & Ors* [2004] 3 NZLR 586 the Court considered an appeal and cross-appeal in relation to proceedings for defamation and injurious falsehood.

The second respondent, New Image International Ltd ("NIIL"), was a company manufacturing health and lifestyle products distributed by networks. Clegg founded NIIL. Clegg recruited Alexander to work for NIIL. The second appellant joined NIIL in Australia. Alexander and the second appellant were engaged on terms that included trade restraints and confidentiality provisions. In August 1998 the second appellant's executive position with NIIL ceased. A month later, Alexander resigned from NIIL. In October 1998, Alexander and the second appellant had discussions with a representative of a company specialising in skin care and nutritional products. In December 1998 the second appellant incorporated Bettalife Hong Kong and the third appellant, Bettalife International (NZ) Ltd ("BIL").

Between August and December 1998, Clegg learned that Alexander and the second appellant were possibly encouraging NIIL distributors to become distributors for BIL. Clegg responded to that information by preparing a circular and sending it to NIIL's network of distributors. The circular made some disparaging remarks in relation to Alexander and the second appellant's unethical behaviour in attempting to poach NIIL's members, and in relation to their financial positions. This resulted in Alexander and others bringing proceedings alleging defamation and injurious falsehood.

In the High Court, Clegg's principal defence was one of qualified privilege. The Judge found that certain statements made by Clegg in the circular were false and injurious, but were not made with malice. The High Court also found that, except for the imputation of lack of financial standing, the alleged defamatory words were published on an occasion of qualified privilege because NIIL had a duty or a right to communicate the information relating to Alexander and the second appellant in order to protect its distributors and networks. NIIL's distributors had a corresponding interest to receive such information. However, damages were awarded for the imputation of a lack of financial standing, which was unconnected with and irrelevant to the duty giving rise to the privilege. The issue for the Court was whether the High Court erred in its conclusions about qualified privilege, and in its finding that injurious falsehood did not occur because Alexander and others had not proved malice.

The Court concluded that the High Court erred in holding that the alleged defamatory words relating to Alexander and the second appellant's financial affairs were not protected by qualified privilege. The words complained of were sufficiently relevant to and connected with the circumstances giving rise to the privileged occasion. The High Court erred in finding Clegg and others were permitted to retaliate to only some of the blows made by Alexander and others. There had been an attack on NIIL's financial soundness and, absent ill-will or malice, Alexander and the second appellant were within the lawful range of Clegg's counter-punch. Alexander and the others

were not entitled to take up the malice issue because of an omission to file a Notice of Intention to Rely on Ill-Will as required under s 41 of the Defamation Act 1992. Therefore, the entire circular was protected by qualified privilege and the cross-appeal was allowed.

In relation to the appeal by Alexander and others on the injurious falsehood point, the Court of Appeal was not persuaded to take a different view from the High Court on the matter of Clegg's honesty. Alexander argued that Clegg must have been reckless in claiming in the circular that Alexander and the second appellant had been using lists of NIIL employees for their own purposes. The Court concluded, however, that a genuine belief that the facts were true may reflect carelessness but not recklessness, because recklessness implies not knowing whether a fact is true or false or not caring. Accordingly, it had not been proved that Clegg acted with malice, and a fundamental element of injurious falsehood was not established. The appeal was dismissed.

Employment Law

Contracts for services

The appellant in *Three Foot Six Ltd v Bryson* CA246/03 12 November 2004 was a film production company. It engaged the respondent to work on the *Lord of the Rings* trilogy as an on-set model technician. The respondent later signed a contract, known as a "Crew Deal Memo", which described him as an independent contractor. He claimed tax deductions in accordance with the terms of the contract. Later, due to downsizing, the respondent's employment was terminated. He then argued that he was an employee and was thus entitled to resort to the claims procedure under the Employment Relations Act 2000. The appellant said that he was an independent contractor. The Employment Court, overturning the decision of the Employment Relations Authority, found in the respondent's favour. Three Foot Six Ltd appealed. The issue for the Court was whether the respondent was an "employee" pursuant to s 6 of the Act.

The majority reviewed the legislation and said that Parliament had intended, through the wording of s 6, to nudge the law away from the position of almost absolute deference to party autonomy adopted in *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681. Parliament had not intended to radically change the law. The Court held that the phrase "real nature of the relationship" in s 6 was not just short hand for the result of an analysis based solely on the control and integration test, or the fundamental test applied primarily by reference to the control and integration test. Parliament could easily have said so if that had been its intention. Instead, the wording of the section suggested a more open-textured inquiry. Parliament had used the expression "the real nature of the relationship" in a way that was consistent with Cooke J's "fundamental test" in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173. However, it was important to recognise that the Judge in that case was not purporting to list exhaustively all the relevant criteria.

The Court said that the Employment Court had significantly underplayed the importance of the form of contract between the parties, and the fact that the film industry almost invariably engaged workers under contracts for services rather than

contracts of service. While the incidents of his engagement “smacked of employment in a general sense”, his engagement as a contractor was consistent with industry norms. The Employment Court’s approach effectively required a restructuring of the way the film industry operates, and this went beyond the jurisdiction which Parliament intended to confer on the Employment Relations Authority or the Employment Court.

The majority held that the real nature of the parties’ relationship deemed the respondent to be an independent contractor. That was in accordance with both the contract he signed and the invariable practice in the industry. The contract was not a sham and was bona fide implemented.

The minority held that the real nature of the relationship between the parties was one of employment under a contract of service. The minority considered that the classification of all the workers in the film industry as independent workers was a label argument. Under the 2000 Act, the minority considered that the Court is required to assess the real nature of the parties’ relationship and to determine its individual character, which may be shared with other employees. Nothing in the language of the Act indicates an intention to deal with engagements on an industry wide basis.

Leave to appeal to the Supreme Court has been granted. There is a fixture for oral argument on 8 April 2005.

Personal grievance – Remedies

In *Telecom NZ Ltd v Nutter* (2004) 7 NZELC 97,563, the Employment Court found that Vincent Nutter was unjustifiably dismissed by Telecom from his employment as an investment analyst, and allowing for contributory conduct, awarded him 5 months lost remuneration and \$5,000 compensation for hurt and humiliation. Telecom appealed against the finding of unjustifiable dismissal and Mr Nutter cross-appealed against the compensation awarded.

The Court held that the Employment Court’s conclusion that in the absence of prior warning, the conduct of Mr Nutter did not warrant dismissal was one open to the Judge. The appeal was accordingly dismissed. However, the Court noted that the Employment Court Judge’s opinion based on *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 that the execution of an employment agreement after earlier misconduct “wiped the slate clean” was wrong. The earlier incidents were part of the relevant background.

The Court discussed the remedies under the Employment Relations Act 2000. Citing *Telecom South Ltd v Post Office Union* [1992] 1 ERNZ 711, it said that awards of compensation are discretionary, with no automatic entitlement to an award reflecting the balance of the expected working career of the employee. The Court further pointed out that moderation is required because full compensation may be disproportionate to the nature of the wrong, and could discourage employment and personal rehabilitation. The assessment must take into account all contingencies which might, but for the unjustified dismissal, have resulted in the end of employment. Compensation for non-economic loss had to consider the actual

consequences to the employee and inflation, and are not necessarily confined to \$10,000.

In this case, the Judge did not address Mr Nutter's claims based on future financial loss. The circumstances of Mr Nutter's dismissal, along with his age, compromised his ability to obtain another job in the same field. The Judge had apparently treated 12 months compensation as the maximum able to be awarded, or had not allowed for Mr Nutter's total loss. The cross-appeal was allowed. The Court instead adopted a starting point of 18 months remuneration. However, the respondent's challenges to the award for non-economic loss and allowance for contribution did not disclose any error of law, and thus failed.

Personal grievance – Employment agreement – Fixed-term

Norske Skog Tasman Ltd v Clarke [2004] 2 NZLR 323 was an appeal against a judgment of the Employment Court holding that Mr Clarke had been unjustifiably dismissed from his employment by Norske Skog (NSTL). NSTL operated a paper mill. One of the units in the mill employed a six-member team, but by late 2000 the number of employees in the team had fallen to five. NSTL began to negotiate a new collective employment agreement with the workers' union, who expressed concern in the course of discussions about an inadequate manning level in the team. An interim agreement was reached whereby, in addition to having three permanent employees, there would be three other members of the team employed, for the foreseeable future, on a temporary basis. Until the outcomes of the bargaining processes and operational needs of the business were known, the temporary positions would not become permanent. Mr Clarke successfully applied for one of the three temporary positions. On 1 November 2000 he signed an employment agreement that described the job as "a temporary position for the period specified", which was 3 months. This was succeeded by a series of further agreements, each purporting to be of a fixed term nature and covering a period of two and a half years.

In April 2002 it was agreed between NSTL and the union that two of the temporary positions (including Mr Clarke's position) would be replaced with permanent positions. The jobs were advertised and Mr Clarke applied for one, but was unsuccessful. He made a personal grievance claim against NSTL, claiming that s 66 of the Employment Relations Act had not been complied with. That section entitles employers and employees to agree on a fixed term contract, but only where the employer has genuine reasons based on reasonable grounds for specifying that the employment end in a specific way (s 66(2)(a)), and the employee has been advised of when or how the employment will end, and the reasons for the employment ending (s 66(2)(b)).

It was accepted that NSTL had genuine reasons based on reasonable grounds for arranging a fixed term of employment, and therefore s 66(2)(a) had been complied with. The majority of the Court began by considering whether s 66(2)(b) had also been complied with at the time when Mr Clarke entered into the first employment contract. The letter of appointment referred to the need to maintain agreed manning levels. NSTL argued that this was sufficient to advise him of the reasons for his employment ending at the specified date. The majority of the Court did not accept this. The majority considered that "advise...of" had a meaning equivalent to

“give...notice of”. Therefore, it would be sufficient to comply with s 66(2)(b) if the employer brings the relevant reasons to the attention of the employee, whether by writing or otherwise. To this end, the background knowledge of an employee may potentially be highly relevant. What might appear to be an elliptical statement of reasons on the part of an employer might be sufficient to bring the reasons fairly to the employee’s attention if he or she already knew the missing details. In this case, however, Mr Clarke did not know in November 2000 of the substance of the interim agreement between NSTL and the union.

The majority also had doubts about whether s 66(2)(b) had been complied with in relation to the later employment contracts. Mr Clarke was aware by that stage that the agreement on manning levels was an interim one, pending final negotiation as to the eventual configuration of the unit between NSTL and the union. However, there was no evidence that he recognised that there would be a contestable selection process if his temporary position was made permanent. Nonetheless, the Court proceeded on the basis found by the Employment Court – namely, that s 66(2)(b) had been complied with in relation to the second and subsequent contracts.

The next issue was the effect of non-compliance with s 66(2), given that the section does not specify any consequences. The majority considered that it would be unrealistic to ascribe to Parliament an intention that a failure to comply with s 66(2)(b) should have no consequence. Accordingly, they were of the view that a provision as to termination of a fixed term agreement will be ineffective where s 66(2)(b) has not been satisfied. In this case, Mr Clarke’s employment had been brought to an end pursuant to processes that depended for their validity on the effectiveness of all the fixed term agreements. The processes were implemented by NSTL and on that basis it could be concluded that Mr Clarke was dismissed by NSTL. The dismissal could not be justified on the basis of the purportedly fixed term nature of the agreement, because that would be contrary to the policy underlying s 66. Accordingly, the majority held that the Employment Court Judge was correct to find that NSTL had unjustifiably dismissed Mr Clarke, and the appeal on this ground was dismissed.

NSTL was also unsuccessful in challenging the remedies of reinstatement and financial compensation ordered by the Judge. The appropriateness of both remedies were questions of fact to which the Judge had taken an orthodox approach based on his evaluation of the probabilities. His conclusions were available to him on the evidence.

The minority judge considered that it was clear that Mr Clarke had applied for a fixed term position, and there was no suggestion that he was employed on the basis of a contract of indefinite duration, terminable on reasonable notice. His real grievance was that he had not been appointed to the permanent position that was advertised. Heath J considered it difficult to see how a genuine fixed term agreement could be transformed into one of indefinite duration because of a failure to communicate the matters set out in s 66(2)(b). In this respect, s 66(2)(b) differs from s 66(2)(a), which addresses a substantive question, namely, the need for a genuine reason for the agreement. Section 66(2)(b) is concerned with matters of process, namely, the communication of certain information to an employee before a fixed term agreement is concluded. It was therefore unlikely that Parliament intended the same



consequences to follow if an employer breached s 66(2)(b) as opposed to s 66(2)(a). The consequence of s 66(2)(b) had to take into account the express finding that the fixed term contracts were genuine. Substance should prevail over form, particularly where Parliament had not specified any penalty for breach of s 66, nor stated the degree of specificity with which the advice must be communicated.

In any event the minority concluded that there was ample evidence to establish that Mr Clarke knew the reasons why his employment would end on the dates specified, and therefore there was no breach of s 66(2)(b). All the knowledge available to an employee at the time advice is given can be taken into account in determining whether sufficient advice has been conveyed for the purposes of s 66(2)(b).

*Reduction of damages for employee's contribution to wrongful dismissal -
Reinstatement: obligation of Employment Court to call for updated medical reports*

In *Waitakere City Council v Ponifasio Ioane* CA 21/03 and CA113/03 9 September 2004, the Court considered an appeal and cross appeal from a decision of the Employment Court in connection with a wrongful dismissal. The employee appealed against the Employment Court's decision not to make an order for reinstatement. The employer cross-appealed against the Employment Court's decision not to make any reduction of damages awarded to the employee to reflect the causative impact of the employee's own misconduct on his dismissal.

On the issue of reinstatement, the Chief Judge of the Employment Court had declined to make such an order on the basis that there was substantial doubt as to whether the employee was physically and emotionally fit to resume work. This determination was made without reference to updated medical reports, and the issue for this Court was whether as a matter of natural justice, the Judge should not have denied reinstatement on medical grounds without having or calling for updated medical reports. The Court said the Chief Judge was under no obligation, still less would he have authority, to require the employee to have a medical examination for updating purposes. Nor could the Council. The employee, the Court said, had ample opportunity to arrange for a new examination and report as to fitness before the hearing scheduled to address this issue. Accordingly the appeal in relation to reinstatement was dismissed.

On the cross-appeal the Court agreed that the amount of damages awarded to the employee ought to reflect the employee's contribution to his dismissal in accordance with ss 40(2) and 41(3) of the Employment Contracts Act 1991. The findings of the Employment Tribunal, the Courts said, conclusively showed that the employee's own conduct was causative of his dismissal. Critical to the Chief Judge's decision not to reduce damages had been the fact the employee had done nothing wrong for two months prior to his dismissal. However, the Court pointed out that this was because two months before his dismissal the employee stormed irrationally from a meeting and thereafter refused to return to work. The Court disagreed that the quality of the employee's conduct was in dispute and could not be assessed. By any objective standard it was, qualitatively, a significant and substantive cause of his dismissal. The Chief Judge was required to reduce the damages to the employee to such an extent as he thought just and equitable. Accordingly, the employer's cross appeal was allowed.

William Young J agreed with the judgment of the Court, but added comments regarding the assessment of compensation where a dismissal is held to be unjustifiable on procedural grounds. His Honour referred to situations where, had a fair procedure been followed, the dismissal would have been justified. If the dismissal would “unquestionably” have been justified, then the unfair process was not causative of any significant loss of remuneration. If the dismissal would “likely” have been justified, his Honour favoured the “loss of chance” approach to determining compensation, whereby the assessment must take account of the possible contingencies.

Leave to appeal to the Supreme Court has been refused.

Lawfulness of bargaining agent’s fee clause in collective agreement

NZ Dairy Workers Union Inc v NZ Milk Products Ltd [2004] 3 NZLR 652 was an unsuccessful appeal against a decision of the Employment Court which held that the deduction of a bargaining fee from non-union employees of the respondent was unlawful.

The appellant union and the respondent employer entered into a collective agreement which made provision for a bargaining fee to be paid by non-union members whose terms and conditions of employment were determined by the collective agreement.

The appellant was concerned that non-union members were “free-riding” by benefiting from the terms and conditions negotiated by the union without contributing to the costs of that bargaining. The respondent had a policy requiring employees who were not union members to make an election between having the bargaining fee deducted from their salary, or if they chose not to join the union or to pay the fee, remain on their individual terms and conditions and not benefit from the terms and conditions in the collective agreement.

The Employment Court held that the fee clause and related policy were unlawful under the Employment Relations Act 2000 (ERA) and the Wages Protection Act 1983 (WPA). They went beyond an incentive and amounted to compulsion to join the union. They breached ss 4 and 12 of the WPA and were not saved by s 16 because otherwise unlawful provisions could not be made lawful simply by their inclusion in a collective agreement.

The Court accepted that pursuant to s 5(1)(a) of the WPA, amounts could be deducted from an employee's wages if he consented in writing to the deduction. There was an authorisation form provided and, prima facie, if signed by an employee, that would have been sufficient. However, s 11(1)(a)(ii) of the WPA was clear that consent obtained under duress was not true consent. The WPA therefore required consent to be freely given and not as a result of improper exploitation of inequality in bargaining power. As improved terms and conditions were not available for non-union members without signing the authorisation, it may have been that the particular requirement would not have been satisfied.

The Court also held that the employer’s policy did not inform employees that they could withdraw their consent under s 5(2) of the WPA and that the company would then have been obliged to cease the deduction within two weeks if practicable. The

provision that the fee would continue to be payable on a fortnightly basis despite any revocation of consent breached s 12 of the WPA. The provision for payment of a lump sum upon termination of employment constituted a penalty and was unenforceable.

Section 16 of the WPA applied only to deductions authorised by a collective agreement which governed the employment relationship in question. It was not within the scheme of the Act that the requirement for consent could be overridden by a provision in a collective agreement that the employee could not be seen to have consented to in any way.

The Employment Court may also have been correct with regard to the policy breaching s 4 of the WPA, but whether or not that was so depended on the factual circumstances and a definitive answer was not able to be given on the present facts.

The Court accepted that s 8 of the ERA prohibited the imposition of a requirement to become a union member. It was not possible to rule out that a requirement for non-union members to pay money to a union could amount to "practical compulsion" to join or remain a member of a union in breach of s 8. Usually, however, issues of practical compulsion appeared to be the province of ss 9 or 11 of the ERA. Whether any such requirement amounted to practical compulsion in breach of s 8, rather than merely an incentive to join or remain a member of a union, depended on the factual circumstances. In the present case, there was not enough factual information to make any definitive finding.

For s 11 of the ERA to have applied, there must have been undue influence exerted and with the intention of inducing a person to become or remain a member of a union. It followed that there was nothing wrong with exerting influence, unless it was undue and had the requisite intent. Those requirements were intensely factual issues and not ones that could have been determined in a hypothetical manner on an agreed statement of facts that was before the Employment Court. It followed that the Employment Court should not have made the findings it did in relation s 11 of the ERA. The same applied even more strongly to the findings regarding s 68(2)(c), given the requirement of mediation set out in s 164.

Finally, the Court commented that it did not appear that the proceedings had been drawn to the attention of the non-unionised workers who were clearly affected by them. In the Court's view they should have been so that those workers had the opportunity to become involved directly if they so wished.

Prohibition on appeals on the construction of employment agreement

Secretary of Education v Yates CA166/03 10 August 2004 was an appeal concerning the interpretation of a collective employment contract. The respondents had been unsuccessful in the Employment Tribunal but successful on appeal to the Employment Court.

An appeal was brought to this Court. The Court was unanimous that the contract had been wrongly interpreted. The main issue, however, was whether s 135 of the Employment Contracts Act 1991 (now s 214 of the Employment Relations Act 2000)

precluded appellate intervention. The section prohibits appeals against decisions on the construction of individual and collective employment contracts.

McGrath J traced the history of the provision, noting that originally industrial awards and agreements had been seen as quasi-legislative instruments not necessarily to be interpreted legalistically. The primacy of contract in New Zealand employment law, introduced in the 1991 Act, had altered the position. The Court of Appeal had therefore undertaken appellate review of decisions raising issues of principle going beyond the terms of the contract. That permitted the Court to intervene where the lower Court's approach was not an orthodox application of the principles of contractual interpretation. On the facts, there was an error of principle as the Chief Judge had assumed that an express power was required for the appellant to act in the way he did, thus failing to construe the contract properly.

Glazebrook J agreed with McGrath J's approach to s 135, but could not discern any error of principle in the Employment Court decision. The Chief Judge had adopted the Tribunal's construction of the contract, which was based on orthodox principle. The Chief Judge's statement that an express power was required was simply a rejection of a non-contractual power.

William Young J took a similar approach to s 135, holding that there were several errors of principle, but focussing primarily on that on which McGrath J relied. The appeal was therefore allowed.

Equity

Breach of confidence

In *Norbrook Laboratories Ltd v Bomac Laboratories Ltd* [2004] 3 NZLR 49, the Court discussed the approach to proving misuse of confidential information. The case concerned the development of a cow remedy by Bomac. It was effectively identical to a remedy made by Norbrook which Bomac had for many years sold in New Zealand pursuant to a licensing agreement. Norbrook's information concerning the composition of the remedy was protected by a confidentiality agreement. With one possible exception, the development of the substitute product was done without reference to that information. This was made possible by the involvement of a third party which actually developed the product.

The possible exception was the percentage of a chemical, lecithin coated cloxacillin, in the product. This was not public knowledge. The third party suggested that it might have to be a particular percentage as that was what could be obtained from its suppliers. That happened to be the correct figure. Before the third party confirmed that figure, however, a principal of Bomac sent to it a facsimile mentioning the particular percentage coating.

The question was whether that amounted to a misuse of confidential information. The Court rejected a submission that the onus of disproving misuse fell on the defendant, which was based on *Bolkiah v KPMG* [1998] 2 AC 222. That had no application outside a fiduciary situation akin to the lawyer-client relationship.

The Court held that misuse occurred only when a person did or omitted to do something on the basis of knowledge of or comfort drawn from the confidential information. That approach was necessary if people were not to be inappropriately prevented from developing substitute products. The Court would rarely draw an inference of misuse if there was another reasonably possible explanation for the behaviour.

On the particular facts, Bomac was entitled to work on the basis that the coating would be the percentage specified by the third party. Its principal had not confirmed that or otherwise misused information by referring to the percentage, without more, in the facsimile. The fact that the third party never looked for alternative suppliers was explicable on the basis that the development was a speculative one, being produced in the hope that the product would pass the statutory test for equivalence or at least yield valuable information. The appeal was therefore dismissed.

Fiduciary relationships – Breach – Joint Ventures – Remedies – Equitable compensation

In *Chirnside v Fay* [2004] 3 NZLR 637, the Court dismissed an appeal against the High Court finding of liability.

The case arose out of a deterioration of the relationship between two men, Messrs Chirnside and Fay, who had previously completed one joint venture development together. Various steps had been taken by the two men towards the development of a Dunedin site, and tenanting of that site by a major retailer. A series of meetings were held, involving both men, planning officers and architects. Mr Fay attended these as a distinct “co-venturer”.

After the major retailer committed itself to the project Mr Chirnside “went cold” on Mr Fay. It was in this context that Mr Chirnside brought external investors into the project and excluded Mr Fay. He was not told of Mr Chirnside’s moves to exclude him from the project. When Mr Fay became so aware, he communicated with Mr Chirnside but was initially “fobbed off” before finally being told by Mr Chirnside that the two were never partners, and that he was free to exclude Mr Fay from the project. The project went ahead, driven by a company primarily controlled by Mr Chirnside.

The High Court concluded that Mr Chirnside was “not entitled to exclude Mr Fay from the venture when he did” and that Mr Fay was entitled to relief in the form of either damages or an account of profits.

The Court concluded that given the primary facts it had not been shown that any error was made in concluding that a commercial joint venture existed. The Court resisted an argument that there can not or should not ever be a fiduciary relationship between parties negotiating towards a joint venture, concluding that “the fact that there is in a commercial sense a joint enterprise, but no joint venture agreement yet entered into, is not fatal to a claim that there may nevertheless have been a fiduciary relationship at the relevant time”.



The Court considered that the real question was what, in principle, is required to be established before the fiduciary doctrine is invoked, and that what was important was “less the particular verbal formulae which is adopted than a proper appreciation of the purposes which fiduciary law serves”. The starting point must always be whether there was a mutual relationship of mutual trust and confidence between the parties giving rise to an obligation of loyalty.

The Court was of the opinion that in the present case, the relationship between the parties was such that they were obliged to act towards each other within appropriate bounds of loyalty (and hence good faith). The Court said that the factors leading to this conclusion could be grouped under five heads: the project was not a one-off dealing between the two men; each man had something to contribute to the venture; each in fact contributed to the venture what was understood to be their part; the evidence was that, but for the contributions of each side, the venture would not have reached fruition; and finally that it was common ground that there was a relationship of confidence which would have been independently actionable, if breached.

The chief incidence of the duty was, the Court said, one of good faith. The Court stated that “the import of that obligation was that there would be no presumptive hijacking of the incipient transaction by either man (or his interests); and no destruction of their relationship without good faith efforts to come to terms”. What Mr Fay lost, therefore, was the chance to come to satisfactory terms with Mr Chirside or his interests.

The Court then turned to the question of damages. It reviewed the history of equitable damages, noting that there was no doubt that there exists today, independent of equitable damages derived from the statutory jurisdiction, a remedy called “compensation” which is available against trustees and other fiduciaries who are in breach of their equitable obligations. The Court also stated that it was inclined to the view that the remedy is truly compensatory, rather than restitutionary, in nature.

The distinction between compensation and common law damages was also discussed. Several differences were noted. The first was that compensation, as an equitable remedy, is subject to the normal equitable discretionary considerations. The second was that because of the more absolute nature of some equitable obligations, an award of compensation may be appropriately addressed in a manner in which it would not usually be assessed at common law. It follows, the Court considered, that “the essential task of a Court under the head of equitable compensation is to compensate whatever real loss or detriment the plaintiff may have suffered in the particular case, on the sort of considerations which have always impelled Chancery Judges. Those considerations may be, but will not always be, the same as would have arisen at common law. A variety of remedial considerations may be appropriate.”

What Mr Fay lost was the opportunity to enter into a joint venture agreement with Mr Chirside. The Court considered that compensation for that kind of loss should be approached primarily by reference to the Court’s assessment of the prospect of success of the particular opportunity, had it gone forward. Even where the chances of success were not high, the Court said there may still be a proper case for compensation, albeit with a significant discount factor.



The appeal was adjourned for further argument on the damages issues. A further judgment of the Court will be handed down in that respect.

Leave to appeal to the Supreme Court has been granted, but a hearing date has not been set, pending resolution of the outstanding matters in this Court.

Family Law

Adoption – Status of Children Act - Proceedings to determine paternity

In *Hemmes v Young* [2005] NZFLR 152, the Court considered whether an adult adopted person can bring proceedings against a third party to establish that the third party is his or her natural father. The Court, by majority, upheld the High Court finding that such proceedings were not barred.

At issue was the interpretation of s16(2)(a) of the Adoption Act 1955, which provides that “for all purposes” the adopted child shall become a child of the adopting parent.

In determining the correct interpretation of this provision, Hammond J undertook a detailed survey of the history of adoption law in New Zealand, as well as the human rights dimensions of the case. With regard to the latter, a trend towards an internationally recognised “right to know” one’s genetic origins was discussed, but it was concluded that the law had not yet reached this point.

Hammond J considered that to preclude the applicant from seeking a declaration of paternity would be to discriminate against him on the ground of his adoptive status. While such discrimination is not prohibited by either the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993, it is prohibited by the International Covenant on Civil and Political Rights. Hammond J noted a line of authority stretching back over 100 years to the effect that, where possible, statutes should be interpreted consistently with international law, and concluded that s16(2)(a) should be read so as to avoid any discrimination on the ground of adoptive status. Accordingly, Hammond J concluded that there was no bar to the proceedings.

William Young J concurred with Hammond J’s result, but for different reasons. He considered that s16(2) would not pose a jurisdictional barrier providing there were substantial legal consequences immediately associated with the establishment of a blood relationship. While none were identified, William Young J considered that there are many factual situations in which the existence of a blood relationship may have actual or potential legal significance despite a “conflicting” adoption order. His Honour considered that this was a matter of discretion better assessed at trial, rather than a threshold jurisdictional issue.

O’Regan J considered that such proceedings were barred, and would have struck out the claim. His Honour considered that the deemed relationship created by s16(2)(a) left the applicant in the position where it would have been impossible to satisfy the requirements for an order under the Status of Children Act.

Leave to appeal to the Supreme Court has been granted.

*Guardianship – Guardianship of Family Court – Paternity – DNA testing*

In *T v S* CA249/02 17 December 2004, a child was the subject of a claim seeking a declaration of paternity under s 10 of the Status of Children Act 1969. The child's mother resisted the claim, and refused to comply with a recommendation by the High Court under s 54 of the Family Proceedings Act 1980 that blood tests be carried out. The High Court then ordered, pursuant to the Guardianship Act 1968, the taking of a buccal swab from the child for DNA testing to determine paternity. The mother appealed against this decision.

The Court noted that the provisions under the Family Proceedings Act were not a good fit for DNA technology. The Court discussed the New Zealand and UK case law concerning whether the Court can and ought to exercise jurisdiction to give consent on behalf of a child to the taking of blood samples for DNA testing. It also noted that DNA samples can be obtained using non-intrusive methods and that DNA analysis can be carried out without the cooperation of the person whose DNA is to be analysed.

The Court said that there was no serious challenge to the High Court's finding that the proposed testing would be in the best interests of the child, and as counsel recognised, the issue was whether the Court had jurisdiction to make the orders it did. The Court held that the jurisdiction under the Guardianship Act supplemented the procedures under the Family Proceedings Act, which are, in any event, confined to blood testing. There was no jurisdictional or other objection to the course taken in the High Court. In so concluding, the Court included in its consideration the best interests of the child and arts 7 and 8 of the UN Convention on the Rights of the Child. The appeal was dismissed.

Relationship Property – Division – Test for “serious injustice” under s 21J of the Property (Relationships) Act 1976

In *Harrison v Harrison* CA117/04 10 December 2004, the parties had lived together intermittently for short periods of time, and had two young children. The husband had substantially more pre-relationship assets than the wife, and made entering into a matrimonial property agreement a pre-condition for reconciliation. In 1998, the parties entered into an agreement under the Matrimonial Property Act 1976. The reconciliation was short-lived and the parties permanently separated in August 1999. The wife then applied to have the agreement set aside. The agreement was upheld in the Family Court, but set aside on appeal to the High Court. The husband appealed.

The Court discussed the new test for setting aside agreements under s 21J of the Property (Relationships) Act 1976, under which the case fell to be decided. The Court observed that its discretion to set aside agreements was broad, but had to be administered in light of legislative policy. It noted that the agreement in question was primarily a contracting out agreement, and that the purpose of such agreements was to make provision which differed from the statutory regime. It said that the pressure to which the wife had been subject was of a kind contemplated by the legislature. It would be very destabilising of the contracting out regime for the Courts to hold that that sort of pressure was in itself sufficient to make an agreement unjust. The sort of reconciliation attempted by the parties in this case would not occur unless similarly

positioned people can have a reasonable degree of confidence that a contracting out agreement will be honoured by the Courts.

The Court noted that the amendments to the legislation have produced an elevated test for setting aside a settlement or contracting out agreement. “Serious injustice” is likely to be demonstrated more often by an unsatisfactory process resulting in inequality of outcome rather than mere inequality of outcome itself. Parties are in general free to agree to quite different agreements to those otherwise imposed upon them by the Act.

The Court held that the agreement was reasonable when entered into, and it was not right to assess it against the provisions of the Property (Relationships) Act which were not enacted until three years later. The Court further said that the change in statutory provisions itself is not a relevant circumstance for the purposes of determining whether to set aside agreements made under the Matrimonial Property Act. The appeal was allowed and the agreement was upheld.

Relationship Property – Division

In *Nation v Nation* [2005] NZFLR 103; (2004) 23 FRNZ 783, the Court considered a multi-faceted claim to farm property under the Property (Relationships) Act 1976 as amended in 2001 (the Act). The farm had been in the husband’s family since 1917 and had been farmed by the husband and wife in partnership with the husband’s father for the duration of their marriage. At the time of marriage the farm was owned in equal shares by the estate of the husband’s grandfather and by the H A Nation Trust, a discretionary trust. In 1978 the husband acquired a half-share from the grandfather’s estate as relationship property. In 1990 the husband acquired the remaining half-share when the Trust was wound up. This was held by the Family Court to be separate property. One year prior to the dissolution of the marriage, in 1999, the farm was sold to the Punawaitai Trust. At the date of separation, the majority of the purchase price was owed to the husband as debt. The husband continued to farm the property.

In the Court of Appeal the remaining issues concerned whether the wife could establish an interest in the husband’s separate property in the half share of the farm under ss 10(2) or 17(2) of the Act or an interest in the increase of the value of the separate property under s 9A. The husband also sought to overturn the High Court finding that the wife had an interest under s 10(2) in 247 cattle owned by the husband as separate property. Finally, the wife sought a further amount under s 44C on the basis that the sale to the Punawaitai trust had the effect of defeating her claim or rights and claimed under ss 15 and 15A on the basis of economic disparity.

On the s 9A claim, the Court agreed with the High Court that the changes made to s 9(3) by s9A were significant and intended to be remedial of the anomalies identified in *Fisher on Matrimonial Property* (2ed 1984). While the onus remained on the non-owning spouse, what needed to be established was easier to prove – the increase needed to be only indirectly attributable to the actions of the non-owning spouse. However, on the facts, the Court held that the wife had not established her claim. There was insufficient evidence of the value of the property in 1990, when the husband had acquired the separate property.



Turning to the wife's s 10(2) claim, the Court saw no reason to depart from *Jackson v Jackson* [1984] 1 NZLR 382 and *Reid v Reid* (1980) 4 MPC 170, which were fatal to the wife's claim that the operation of the farm as a single entity was sufficient to intermingle the husband's separate property with the relationship property.

However, the Court considered that the wife had established a sustenance claim under s 17(2). The Court rejected the dicta in *Buckman v Buckman* (1979) 3 MPC 20 that a spouse's actions will not amount to sustenance unless, but for those actions, the other spouse's ability to retain the property would have been in jeopardy. It was sufficient that the spouse's work on the farm had the effect of keeping the asset up or keep it going: *French v French* [1988] 1 NZLR 62.

On the s 10(2) claim to the cattle, the Court held that the High Court was entitled to conclude that the asset in which the husband had separate property was the cattle, rather than a chose in action, and that it was correct to adopt the approach in *Scott v Scott* (1980) 3 MPC 163 over that in *Bowen v Bowen* (1981) 4 MPC 22. Accordingly, the Court dismissed the husband's appeal on this aspect of the case.

The Court also accepted that the transfer of the farm to the Punawaitai Trust had the effect of defeating the wife's claim under s 44C. The word "defeat" did not require bad faith or improper motive. She had been denied a claim to an equal share of one half of the equity in the farm, valued as at the date of the hearing. Instead, her claim was to interest free debt which had remained constant from the time of sale of the farm to the hearing, during which the value of the farm had increased. This was to be distinguished from a situation where an asset is exchanged for another asset of similar worth, with equal scope for increase in value and risk of loss of value. The Court remitted the claim to the Family Court to determine the amount of compensation under this head.

Finally, the Court dealt with the wife's claim under ss 15 and 15A. The Court noted that there were important issues concerning this section requiring curial resolution. Given the absence of evidence and the fact that this ground had not been strongly pressed, the Court considered it was not appropriate or feasible to address those issues in this case.

Leave to appeal to the Supreme Court has been granted.

Intellectual Property

Patents - Creation of interests - Protection of interests - Methods of medical treatment of humans - Whether patentable in New Zealand

In *Pfizer Inc v Commissioner of Patents* [2005] 1 NZLR 362; (2004) 60 IPR 624, Pfizer appealed unsuccessfully against a decision of the High Court upholding a decision of the Assistant Commissioner of Patents that two patent applications relating to methods of medical treatment of psychotic disorders in humans using a new compound were not patentable on policy grounds.

In the Court of Appeal, Pfizer submitted that patentability of methods of medical treatment was desirable and that *Wellcome Foundation Ltd v Commissioner of Patents*

[1983] NZLR 385 should be overruled for policy reasons. In *Wellcome* the Court of Appeal had determined that a patent could not be granted in New Zealand under the Patents Act for a method of treating disease or illness in a human being. A series of changes to the Patents Act 1953 and dicta in the Court in *Pharmaceutical Management Agency Ltd v Commissioner of Patents* [2002] 2 NZLR 529 (“*Pharmac*”) removed the reasons for the ban given *Wellcome*.

The Court was unanimous in its conclusion that the Assistant Commissioner had rightly excluded the claims to methods of medical treatment of human beings. O’Regan J, delivering the principal judgment, observed that a long line of English caselaw had established that methods of medical treatment were not patentable, although the basis for this exclusion had varied between judgments. These cases had been followed by the Court in *Wellcome*, which had stood as the law in New Zealand for over 20 years. It was not accepted that *Pharmac* had the effect of overruling *Wellcome*, and the Court concluded that developments subsequent to *Wellcome* were not of sufficient significance that it should now overrule it in this case. There were a number of reasons for this finding.

First, while the interpretation of the Patents Act could be informed by New Zealand’s obligations under the 1994 TRIPS agreement, the Act was only amended to the extent necessary to bring New Zealand into compliance with TRIPS. No change was made to the definition of “invention” in s 2, which incorporates by reference s 6 of the Statute of Monopolies. Parliament could have chosen to provide for a specific exception for methods of medical treatment, but did not need to because the definition of invention in s 2 limited the patentability of a claim that is “generally inconvenient”.

Second, the amendment made to s 17 of the Patents Act had no significance to the present issue. Although the amendment deleted references to the “unlawful” use of inventions, it otherwise maintained the focus of s 17 on the use of the “invention” for which the patent was sought rather than on the use of the patent for the invention. It was, therefore, difficult to see how s 17 could have been a basis for excluding medical treatment methods.

The Court acknowledged that Australian courts have accepted the patentability of methods of medical treatment. However, while conformity of law in New Zealand and Australia may be a desirable policy objective in matters of commerce, this could not be determinative of the issue.

Finally, it was seen as appropriate that there be a proper evaluation of the policy reasons for the medical treatment exclusion, in light of developments of the law in Australia, the TRIPS agreement, the decision in *Pharmac* and the ongoing reform process in New Zealand. However, reform of this area of patent law would be better undertaken through the Parliamentary process. This would also allow proper consultation with medical professionals and other organisations, as well as commercial interests which favour patentability. Accordingly, the ratio of *Wellcome* remained the law in New Zealand and the appeal was dismissed.

Legal Practitioners

Powers of District Law Societies

In *McFadden v Nelson District Law Society* [2004] 2 NZLR 441, the Court considered whether it was reasonable for a District Law Society to exercise a power to “rehear a case” against a practitioner, where a Lay Observer’s recommendation has been referred back to the District Law Society by the NZLS Complaints Committee, pursuant to s 97A of the Law Practitioners Act 1982.

The appellant’s principal objection was that to be investigated de novo has the effect of his being “tried” twice. Underpinning the allegation of unreasonableness were contentions that the District Law Society essentially abrogated its decision making function to the s 97 committee, was acting on a speculative basis, and was misconceived in relying on the appearance of bias and pre-determination.

The Court held that the statutory context contemplates that a complaint can be reopened after the original “completion of the inquiry” by the District Law Society. It held that there was no merit in the appellant’s contentions, and that there was nothing in the decision that could be characterised as unreasonable.

Limitation

“Future interest” in s 21(2) of the Limitation Act 1950 – Limitation by analogy

In *Johns v Johns* [2004] 3 NZLR 202, the appellant alleged breaches of trust and fiduciary duty by the respondent trustees. The trust was settled by deed in 1967 and the alleged breaches had occurred in the 1970’s. Under the terms of a trust deed, the appellant had an interest as a discretionary beneficiary, a residual interest contingent on survival, and an income interest. The High Court struck out a range of claims under s 21 of the Limitation Act 1950. The appellant appealed, arguing that the proviso to s 21(2) saved his right of action for breach of trust, and that his claims for breach of fiduciary duty were not out of time by way of analogy under s 4(9).

The Court held that a “future interest” under s 21(2) meant an interest of which the beneficiary might enjoy possession as of right at a future time. In reliance on *Hunt v Muollo* [2003] 2 NZLR 322, the Court held that a discretionary interest in trust property was not a legal or equitable interest in that property. The appellant was merely the object of a discretionary power which might never be exercised in his favour. This interest could not therefore be a “future interest”.

The Court then examined the residual interest. Under the trust, the appellant had a right to a share in the residue of the trust fund contingent on survival to the date of distribution. The Court held that this was a future interest. The fact that the interest is contingent on survival to the date of distribution and on there being trust property available for distribution at that time does not prevent it from being an interest. The limitation period for suing in respect of damage to such an interest did not start running vis-à-vis the beneficiary until, in the case of contingent interests, the contingency upon which the condition was dependent was fulfilled. The fact that the trust had been wound up did not mean the appellant no longer had a future interest.

Finally, the appellant's income interest was considered. The Court held, in reliance upon *Re Pauling's Settlement Trusts* [1962] Ch 303, that this interest was also a future interest. If, by breaches of trust, the trustees have diminished the extent or value of the trust property, the future interest has been contingently harmed.

The Court also considered the related issue of whether, if the claim of breach of trust were statute barred, a claim of breach of a fiduciary duty would also be statute barred by analogy, pursuant to s 4(9). The Court thought not, as the first respondent's duties as trustee did not necessarily closely correspond to his duties as fiduciary. These will be barred by analogy only when the fiduciary claim parallels the statute-barréd claim so closely that it would be inequitable to allow the statutory bar to be outflanked by the fiduciary claim. If there is a sufficient difference in any material respect, the suggested parallel is unlikely to be close enough to make it appropriate in equity to apply an analogous bar.

Procedure

Injunctions – Mareva injunctions

In *Allen v Commissioner of Inland Revenue* (2004) 21 NZTC 18,718, the first appellant, Mr Allen, and a Mr Palmer solicited funds from New Zealanders for use in an offshore investment scheme. The Serious Fraud Office and the Inland Revenue Department investigated, and formed the view that the two were in partnership. The Commissioner concluded that they had derived substantial amounts of income, and he issued assessments, said to have been made under s 92 of the Tax Administration Act 1994 (which were based on s CD6 of the Income Tax Act 1994). He issued proceedings, and sought leave to issue charging orders before judgment and a Mareva injunction over the proceeds from the sale of a property apparently owned by the second appellant, the Silver Fern Trust Ltd, a company connected with the first appellant.

The High Court dismissed Mr Allen's applications to strike out the Commissioner's claim against him on two tax assessments and to set aside or modify a charging order and Mareva injunction affecting the Silver Fern Trustees Ltd and himself. Mr Allen appealed.

In relation to the strike out application, it was argued that the tax assessments were invalid because they were issued under the wrong section of the Tax Administration Act. It was said that s 92 only applies where a return has been filed. Mr Allen did not, prior to April 2002, file tax returns. Accordingly, it was counsel's submission that the assessments could only be made under s 106. The Court concluded that there was no reason to read down s 2 so that it had no application in cases where s 106 was available. In any event, if the Commissioner made an assessment which s 106 allowed him to do, but purported to do it under s 92, it did not follow that the assessment itself was invalid. The Commissioner had done something that the legislation empowered him to do.

The challenge to the charging orders was similarly rejected. There was ample evidence that there was a risk that Mr Allen would dissipate his assets.

The Mareva injunction was also challenged on a number of grounds, none ultimately successful. The Commissioner had established a good arguable case so as to warrant a Mareva injunction. There was a solid evidential foundation for the view that Mr Allen and Mr Palmer were, in substance, partners engaged in the business of promoting a fraudulent investment scheme. Profits made pursuant to a partnership that is illegal may nonetheless be taxable.

In relation to the profits from the sale of the Whenuapai property, the Court observed that the availability of a Mareva injunction is not confined to situations where the assets to be frozen unquestionably belong to the defendant. For example, it may be appropriate in some circumstances to use a Mareva injunction where a third party owes the defendant money and has assets within the jurisdiction against which that debt can be enforced. This is particularly the case where there are indications that the third party will otherwise co-operate in attempts intended to render the defendant judgment-proof. In the present case it was well open to inference that the money used to purchase the Whenuapai property represented the proceeds of frauds committed by Mr Allen. In any event, the ownership structure associated with the property suggested an attempt by Mr Allen to make himself judgment-proof, and Silver Fern Trustees Ltd was undoubtedly mixed up in that attempt. A Mareva injunction was an appropriate remedy to prevent Mr Allen from dissipating the proceeds of his alleged frauds.

The appeal was dismissed.

High Court Costs – Principles for Determination

Glaister v Amalgamated Dairies Ltd [2004] 2 NZLR 606 involved the interpretation of a clause of the constitution of the first respondent, Amalgamated Dairies Ltd. The appellants were successful in the High Court and judgment was entered for \$2.5 million. In reaching this result the appellants incurred actual legal fees of approximately \$258,000 and accountancy fees of almost \$55,000. The High Court assessed costs in favour of the appellants on a category 3B basis with the exception of one item (inspection of documents) which was assessed as category 3C. The award for legal fees was \$87,210 on that basis. This was about one-third of the fees actually incurred by the successful appellants.

The appellants appealed against the rulings on costs. There were three main contentions: first, that the fundamental purpose of the new regime for the assessment of costs in the High Court was to secure to a successful party two-thirds of the actual and reasonable costs of that party; secondly, that the High Court unnecessarily fettered its discretion and the first proposition was therefore not properly acted upon; and thirdly, that given the way the costs submissions and hearings unfolded the appellants had not fairly and appropriately been heard on the issue, principally, of a proper allowance of time for preparation for trial.

The Court held that the costs scheme in the High Court Rules had at its heart the proposition that a successful party should receive a reasonable contribution towards his or her costs, being two-thirds of the costs deemed (under the new scheme) to be reasonable in a proceeding or interlocutory application, having regard to the

complexity and significance of the matters at issue and the time that was reasonably required to be taken. The Court noted that this point had been plainly made in the previous case of *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 (CA), and held that the proposition that a successful party was to receive two-thirds of reasonable and actual costs was misconceived.

The Court further held that the costs regime, as between competing parties, was of a regulatory character. It was important that its integrity be maintained, and if a departure was to be made from the statutory allowances then it was necessary that it be done in a principled and particularised way. On the facts of the case it appeared that the Court had gone about the quantum issue in the proper manner. Given his involvement with what was a relatively extensive commercial case, the Judge was well placed to make the kind of assessment involved. The appellants had not discharged the burden upon them of demonstrating that the High Court had applied wrong principles of law in this respect, or was plainly wrong. The appeal was dismissed.

Security for costs

In *Reihana v Crown Island Administering Body* (2004) 16 PRNZ 1062, the key issue was whether, in granting special leave to appeal under r 5 of the Court of Appeal (Civil) Rules 1997, the Court of Appeal may make it a condition that the appellant provide security for costs.

The majority acknowledged that r 5 contains no express provision allowing the Court to grant special leave subject to the fulfilment of conditions. However, such a power is implicit in the notion that the power to grant special leave is a discretionary power. A grant of special leave can be made subject to any condition which is reasonably related to the appeal or its due prosecution, and a condition requiring the provision of security for costs is such a condition. In support it was noted that it is accepted law that leave may be made subject to the condition that the appellant pay the full costs irrespective of the outcome. It would be anomalous if the potentially less onerous condition of providing security for costs should be viewed as being outside the Court's powers. Reliance was also placed on the fact that under r 11, there is a mandatory requirement to provide security for appeals brought in time.

The minority considered that the Court of Appeal (Civil) Rules 1997 have the effect of characterising the settling of the nature and amount of security for costs on appeal to the Court of Appeal as an administrative act of a Registrar of the High Court, subject to a limited power of review by a Judge of the High Court. The Court of Appeal does not, in the minority's view, have the power to fix the amount of security for costs on an appeal to its own jurisdiction.

Leave to appeal to the Supreme Court was refused.

Costs – Public Interest

In *PPCS v Richmond Ltd & Anor* [2005] 1 NZLR 201, the Court determined that costs would be awarded in favour of an unsuccessful appellant alleging breach of the substantial security holder disclosure regime in the Securities (Markets) Act 1988.

The litigants were a group of farmers, known as the Bell Group, who were shareholders in Richmond. They brought an action against PPCS under the Act. The High Court found a breach and ordered substantial penalties. PPCS appealed against the penalty orders and the Bell Group cross-appealed. The appeal was successful in part and the cross-appeal unsuccessful.

The Court noted that the discretion as to costs had to be exercised according to the interests of justice in the particular case. The general practice was to award the successful party \$6000 per day plus reasonable disbursements. That practice however could be departed from where the unsuccessful party had brought or defended the appeal in the public interest.

In the particular case, three factors supported a costs order in favour of the Bell Group. First, the Securities (Markets) Act gave individual litigants a primary role in the enforcement of the disclosure regime. The Bell Group had acted in what they saw as their personal interest, but the legislation relied upon a coincidence of public and private interests. Secondly, the law was uncertain, so the action served an important wider purpose. Third, the misconduct on the part of PPCS was serious, and had made prosecution and funding of the litigation difficult for the Bell Group. Costs of \$100,000 plus reasonable disbursements were awarded.

Name suppression – proceedings by former inmate alleging ill-treatment in prison – principle of open justice – whether torture convention requires name suppression

In *Clark v Attorney-General* CA213/04 2 December 2004 Clark appealed against the High Court's refusal to grant name suppression in proceedings brought by him alleging ill-treatment in prison and seeking a declaration that he was entitled to a prompt and impartial investigation of his allegations. Clark's proceeding alleges general and systemic breaches of various international conventions and documents including the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), the International Covenant on Civil and Political Rights (the ICCPR), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the Principles on Detention) and the New Zealand Bill of Rights Act 1990 (the BORA).

In the High Court Mr Clark took the position that the issues raised by his case were of great public importance, but that his identity was not and that publication would risk undue attention being focussed on his past history. It was also submitted that New Zealand's international obligations rendered starting with the principle of open justice inappropriate. MacKenzie J disagreed, finding nothing in the international instruments that rendered the principle of open justice inapplicable in this case.

The Court of Appeal said MacKenzie J was correct to refuse name suppression. The Court remarked that the principles of open justice and freedom of expression created a presumption in favour of disclosure of all aspects of court proceedings. Further the Court agreed that there was nothing in the CAT, nor in the other international instruments or documents relied on by Mr Clark, that either explicitly or by necessary implication impose any obligation on States to grant name suppression on request whenever there are allegations of torture. While there may be good reasons why name suppression should be granted in particular cases, none had been put forward in the instant case. The Court was not persuaded that prisoners and ex-prisoners alleging torture should form a class where name suppression is automatically given. The Court also did not accept an assertion that the object of the substantive proceeding would be frustrated.

Addressing Mr Clark's concern about possible retaliation by prison officers, the Court noted that, leaving aside the fact that Mr Clark is no longer incarcerated, even in a confidential investigation, disclosure of the allegation and the identity of the alleged victim to the alleged perpetrators will clearly have to take place for a proper investigation to be conducted. It was also irrelevant that Mr Clark had been granted confidentiality in the investigations of his complaint to date.

Finally, the Court did not accept the Crown's submission that a limited award of costs should be made in its favour. While s 40(4) of the Legal Services Act 2000 allowed for an order specifying what order for costs would have been made had Mr Clark not been legally aided and gave the successful opponent the right under s 41 to apply to the Legal Services Agency for payment of some or all of those costs, the Court did not consider this to be a case where s 41 should apply as the appeal did raise issues of principle, albeit misconceived.

Leave to appeal to the Supreme Court was refused.

Abuse of process – previous striking out of substantially similar proceedings

Foreign currency loans made by the BNZ nearly 20 years ago to interests associated with Mr Robin Murray formed the background to *Savril Contractors v Bank of New Zealand* (2004) 16 PRNZ 1096. The loans proved disastrous due to adverse currency movements, and over the past decade a number of proceedings were taken against the BNZ seeking injunctive relief to prevent the BNZ exercising its power of sale over assets and to recover the lost monies and general and exemplary damages. In 2001 the Court upheld a High Court decision striking out five proceedings for want of prosecution on the ground that the lengthy delays caused by the Murray interests had seriously prejudiced the BNZ. In the meantime the Murray interests had filed further proceedings against the BNZ with substantially similar statements of claim.

The High Court struck out all of the proceedings, except a credit contracts action, following the House of Lords authority of *Birkett v James* [1978] AC 278 which held that proceedings should not be struck out on the grounds that a fair trial is impossible by reason of delay where the limitation period had not expired. The Murray interests appealed and the BNZ cross appealed.

The Court stated that it was important to note that although *Birkett* appears to stand for the proposition that fresh proceedings may be issued after previous proceedings have been struck out for delay so long as the limitation period has not expired, that case did recognise that in some cases that later proceedings may still be struck out if the plaintiff's conduct amounted to an abuse of process. After traversing the subsequent English and New Zealand decisions the Court held that the *Birkett* principles clearly apply in New Zealand although the New Zealand Courts had adopted a more cautious approach, stressing that case management principles should not be allowed to undermine the delivery of justice to the parties.

In this case the Court had, as long ago as 1994, expressed concern about the delay in the progress of the first proceeding and had in 2001 recognised that justice could no longer be done between the parties. Allowing the proceedings to continue would not only be unfair to the BNZ but would bring the administration of justice into disrepute. The Court added the observation that, in a case such as this where the credit contracts cause of action effectively lacked a limitation period, plaintiffs could not expect to continue to get the advantage of there being no limitation if justice can no longer be done between the parties because of their delays after proceedings have been commenced.

Judicial Review – Cross-examination on affidavits

In *Wilson v White* [2005] 1 NZLR 189, the Court considered when cross-examination is available in an action for extraordinary remedies under Part 7 of the High Court Rules (judicial review not brought as an application for review under the Judicature Amendment Act 1972). It was clear that under the Judicature Amendment Act, cross-examination is not available as of right, and that it would be permitted only where it was necessary in the interests of justice. The question was whether the same approach applied where the Act was not invoked.

The Court held that r 508 of the High Court Rules, which required special leave before an affidavit was used if the deponent was not produced for cross-examination, did not require a different approach. The discretion to permit the use of the affidavit had to be exercised consistently with the principles underlying judicial review. The proceedings were in substance the same as a statutory judicial review, and indeed could probably have been brought under the statutory procedure. The Court concluded that it should interpret r 508 to ensure that the procedural rules in each procedure were as similar as possible.

The Court nonetheless agreed that cross-examination should be permitted on one of the affidavits. The application was in the context of a dispute about the appointment of the fourth respondent as a paediatric surgeon at Waikato Hospital. The appellant alleged that the fourth respondent did not have a required qualification and had not disclosed to the appointment panel that he had been subject to a disciplinary inquiry. The appellant also contended that the panel was tainted by a lack of impartiality on the part of one member. Rejecting a submission that, the allegation being made only against one member, it could not taint the decision, the Court held that cross-examination of that member should be permitted to establish the possible influence of the alleged partiality on the process.

The Court however refused to sanction cross-examination of the fourth respondent. The Court rejected the applicability of the principle that an administrative decision procured by a knowingly false statement is invalid. In the employment context, an unsuccessful applicant had no right to challenge the decision to employ another on that basis. It followed that the real issue was what the panel did with the information it had when it made its decision. That meant that cross-examination was unnecessary.

Finally, the Court rejected an argument that the refusal to produce the deponents for cross-examination amounted to an abuse of process, the affidavits having been used earlier in the proceedings. This submission was based on *Re Quartz Hill and Co* (1882) 21 Ch D 642, which did not represent the law in New Zealand. The prior use of an affidavit in a proceeding was nothing more than a relevant factor in exercising the discretion to permit the use of affidavits despite the deponent not being produced.

Property Law

Property Law Act, s 90 – Restriction on Mortgagee’s Power of Sale

Savill v Damesh Holdings Ltd [2004] 2 NZLR 289 involved an action for summary judgment against guarantors of a mortgage debt. The mortgagor had failed to repay the principal on the date fixed by the contract. Subsequent to that default, the mortgagee accepted more than three months interest from one of the guarantors. The appellants claimed that the remainder of the debt could not be called up because of s 90 of the Property Law Act. Section 90 provides that on default at the expiry of the mortgage, if the mortgagee then accepts interest for a period of more than 3 months, and the mortgagor otherwise observes its covenants, the debt cannot be called up without “3 clear months’ notice” of intention being given.

The Court considered that the appellants could not rely on s 90. They had defaulted on an obligation to pay penalty interest, and therefore had not observed all covenants other than that for the repayment of the principal. The appeal was therefore dismissed and summary judgment issued against the guarantors.

The Court then discussed, obiter, whether the appellants were “mortgagors” for the purposes of s 90. The Court discussed a line of cases relating to s 92 of the Act, which requires 1 months’ notice of default before a mortgagee sale can take place. These indicated that a guarantor could fall within the meaning of the term “mortgagor” in some circumstances. The Court, however, concluded that the cases indicated not that s 92 was to be construed purposively to extend protection to guarantors, but that its language might permit guarantors to be covered depending on the arrangement entered into. The cases were therefore of little significance to s 90 which was differently worded.

The purpose of s 90 was to protect those giving security over land, who stand to lose it in the event of a default and may be lulled into a false sense of security by the mortgagee’s acceptance of interest. That purpose did not require a broader meaning to be given to “mortgagor” than that indicated by its ordinary meaning and context. The term did not cover a guarantor.

The Court also indicated that *Development Consultants Ltd v Lion Breweries Ltd* [1981] 2 NZLR 258, which held that a new notice was not required if a mortgagor paid 3 months interest after receiving a s 90 notice, may have been wrongly decided. The words of the section were consistent with the provision operating mechanically on receipt of 3 months interest.

Conveyancing Dispute – Specific Performance

In *Kumar & Anor v Bahramitash* (2005) 5 NZ ConvC 194,111 the Court considered a conveyancing dispute in which the Kumars (as purchasers) sought specific performance against the respondent (the vendor) with respect to an agreement for the sale and purchase of a residential section in Auckland. The appeal succeeded and the Court found that the case was one for specific performance, with abatement in price if necessary.

On 21 August 2003 the Kumars entered into a contract to purchase a vacant section from B. The settlement date was 11 September 2003. After the agreement was executed, the Kumars became concerned that there was difficulty over the location of boundary pegs, and there was a large amount of spoilage (mixed soil and building debris) on the section which had not been there prior to the agreement being entered into. On appeal, the main issue was the complaint as to spoilage on the subject land.

Correspondence followed between solicitors for the Kumars and B. The Kumars' solicitor told B's solicitor that the Kumars required the removal of the spoilage and would claim compensation if this work was not done before settlement. The matter was not resolved when B's solicitor asserted that settlement would be required in full on 11 September 2003. On 11 September, the Kumars' solicitor indicated that he was ready to settle but he maintained the objection with respect to the removal of the spoilage. Settlement did not occur. The Kumars did not make a tender of settlement because of an indication by B's solicitor that such a tender, for settlement less compensation for the spoilage, would be futile.

On 12 September B's solicitor served a settlement notice, which the Kumars' solicitor asserted was invalid. The Kumar's solicitor also enclosed his own settlement notice requiring B's solicitor to deliver possession of the property in the state in which it had originally been inspected. On 1 October, B's solicitor wrote cancelling the contract for failure by the Kumars to settle in accordance with B's settlement notice.

In the High Court, Williams J held that the spoilage had been dumped on the subject land after the date of contract, and that the purchasers were entitled to receive the property in the position it had been at the time of the contract. However, this was subject to the Kumars tendering settlement prior to service of their settlement notice, under cl 4.2(2) of the agreement.

The Court found that Williams J had taken an incorrect starting point. The starting point was that B purported to cancel the agreement on the basis of his settlement notice. But B was not, in terms of cl 9.1(2) of the contract "in all material respects ready able and willing to proceed to settle". B was not prepared to give what he had contracted to give, thus his settlement notice was invalid and the original contract remained on foot. It followed that the Kumars were entitled to seek specific



performance on the usual basis for non-performance, but subject to the usual considerations that pertain to the exercise of that remedy.

The Court observed that, had the Kumars tendered a settlement amount less the diminution in value of the property, B would have been bound by that settlement sum actually tendered.

The Kumars were not precluded from advancing to the Court a claim for specific performance, if necessary with abatement in price. This remedy was reserved to them by the contract. Having adopted this course, the Kumars were required to show that, as at the date of consideration of this remedy, they were ready, willing and able to settle on the contract for the subject land, in its proper and unencumbered state. The Court found that this was the case on the facts. There were no discretionary considerations that militated against the claim for specific performance being advanced.

The Court ordered that if B did not have the spoilage cleared off on the date of settlement, then the purchase price was to abate by \$2000. The Court also fixed the settlement date at 19 November 2004 and awarded costs to the appellant.

Leave to appeal to the Supreme Court has been granted. The appeal is scheduled to be heard on 21 June 2005.

Conveyancing – Acceptability of Personal Cheque for Payment of Deposit

Otago Station Estates Ltd v Parker (2004) 5 NZ ConvC 193,996 concerned an agreement for the sale and purchase of land, and specifically whether the tender of a personal cheque satisfied the requirement to pay a deposit after notice of default had been given.

Otago Station Estates Ltd (the purchaser) entered into two agreements for the sale and purchase of real estate, through its agents, for the purchase of land from the Parkers (the vendors). Each agreement was conditional upon confirmation of the other. The agreements provided that deposits were due on confirmation of the agreements. When both agreements became unconditional, the parties agreed to defer payment of the deposits. Subsequently, the purchaser gave notice to the vendors that it was ready, willing and able to settle the agreements. Several weeks later, the vendors gave notice to the plaintiff's solicitor purporting to cancel the agreements for non-payment of the deposit unless payment of the deposit was received within three working days of the service of the notice. At 4:32 pm on the third day, the purchaser's solicitor advised the vendors' solicitor that payment had been made and copies of the deposit slip and the plaintiff's cheque in favour of the vendors' solicitor's trust account were forwarded by facsimile. The following day, the vendors' solicitor rejected the payment and purported to cancel the agreements for non-payment of deposit because payment by personal cheque was not legal tender and did not comply with cl 2.2 of the agreements. The vendors accepted that a bank cheque would have satisfied the default notices.

Chisholm J in the High Court found that the tendering of a personal cheque was not sufficient to remedy the default in the circumstances of the case. In this Court,

counsel for the purchaser made three separate arguments. First, he submitted that payment by a personal cheque was in accord with the agreement and with usual custom unless the vendor had stipulated to the contrary in advance. In the absence of such a stipulation in this case the tendering of a personal cheque was sufficient to remedy the default. Secondly, counsel submitted that on the facts of the case it was wrong to infer a need for certainty so as to require a departure from custom as to personal cheques being acceptable for the payment of a deposit simply because the payment was after a notice that had been given under cl 2.2. Thirdly, it was submitted that given the events that happened, the vendors had forgone their right to reject the personal cheque.

The Court dealt with each of these arguments in turn, in the end dismissing the appeal. In regard to the first argument the Court held that there was no custom in relation to payments to remedy defaults in payment of deposits. In regard to the provisions of the agreement, the Court held that the reference to a requirement for the settlement payment to be made “in cash” indicated that the vendor would not waive the requirement for a bank cheque for the settlement payment. But the omission of the words “in cash” from the provision relating to deposits did not mean that the vendor committed to accept a personal cheque. At best it left open the possibility that the vendor would accept a personal cheque without objection. The Court observed that there was no difference between deposit payments, and settlement payments in legal terms, but there was a big difference in practice: personal cheques are usually accepted for deposits without objection, while personal cheques are almost never accepted for settlement payments. The Court also noted that even if it was normal practice for vendor’s solicitors to specify mode of payment, failure to do so could not be construed as a waiver of the requirement to pay in cash.

In regard to the second argument, the Court held that evidence of the custom followed in relation to payment of deposits did not justify the implication of a term that a personal cheque represented valid tender for a deposit paid. The Court accepted that the vendors almost always accept personal cheques for deposits, but in the Court’s view if a payee accepts tender of a cheque without objection to its form, the payee is deemed to have waived the right to payment in cash. However the Court’s acceptance of the practice that personal cheques are usually accepted did not change the underlying legal obligation to “pay” the deposit, and the vendor’s right to stipulate in advance that a personal cheque will not be accepted or object to the tender of the personal cheque at the time of receipt. The Court further held that payment by cheque is not strictly speaking payment at all, in that it does not unconditionally discharge the debt that gave rise to the drawing of the cheque. Unless the payee expressly agrees to payment by personal cheque or does not object when one is tendered, “payment” under cl 2.2 requires payment by legal tender, bank cheque or bank transfer in cleared funds. The Court thus accepted the purchaser’s argument; however this did not avail the purchaser of the Court’s view that vendors were entitled under the relevant provisions of the agreement to reject a personal cheque by way of deposit.

The basis of counsel’s third argument is the rule that, where a personal cheque is tendered in payment of a debt and the cheque is accepted by the creditor, that acceptance constitutes payment subject to a condition subsequent that the cheque is honoured. The Court accepted this general principle but considered the key question to be whether the vendors waived the requirement for legal tender, and held that there

had been no such waiver in this case. It was not a case where the vendors had failed to object, and it could not be said that simply because the Bank involved had started processing the cheque, that there had been acceptance of payment. The vendor's solicitors had no opportunity to, and did not, accept the personal cheque themselves. Only if there had been prior agreement that a personal cheque would be accepted, or if the vendors had accepted the personal cheque without objection before the notice, could a personal cheque have satisfied the requirements of cl 2.2. Given the Court's findings the appeal was dismissed.

Leave was granted to appeal to the Supreme Court. Oral argument has been heard and the decision of that Court is presently reserved.

Resource Management

Resource Management Act – Public Notification – Principles Applicable

In *Discount Brands Ltd v Northcote Mainstreet Inc & Ors* [2004] 3 NZLR 619 the Court considered when a consent authority can appropriately dispense with public notification of a consent application under the Resource Management Act 1991.

The consent in issue was for the construction of a substantial outlet shopping centre in Auckland's North Shore. The consent authority decided not to notify the application and approved the consent. The High Court, on a judicial review of the notification decision, held that the notification decision was wrong, and set aside both this decision and the decision on the consent. This Court reversed the High Court's decision and re-instated the consent.

The Court noted that the issue of when to notify consent applications has been of longstanding concern both in New Zealand and overseas. The obligations of consent authorities were considered, and two points were made. The first was that it is wrong in principle to impugn a consent authority's decision on the basis of material which was never before it at the relevant time. The second, related, point was that there is no stand-alone threshold of information which must be available to the authority before it can even begin to turn its mind to the issue of notification. Instead, the question is whether the authority could reasonably have come to view that it did.

The Court considered, in some detail, the question of whether a Court could review the sufficiency of evidence before a consent authority. The development of what might be called a common law "wrong factual basis" doctrine was discussed, and welcomed as "both appropriate and timely". Overall, however, the Court concluded that the test which is applicable is whether there was *some* probative evidence capable of supporting the decision, rather than a broader enquiry into the sufficiency of the evidence.

The Court also considered whether a higher standard of review than the traditional *Wednesbury* standard was applicable in reviews of notification decisions, concluding that there was no justification for such a requirement.

The decision also emphasised that consent authorities were to have due regard to the importance of the decision being reached, as the right to participate is in issue. That consent authorities should record the reasons for their decisions was also noted.

In the particular case before the Court, there was information before the consent authority that could reasonably justify the decisions it made. The High Court decision was consequently reversed.

Leave was granted to appeal to the Supreme Court. Oral argument has been heard and the decision of that Court is presently reserved.

Breach of District Plan - Prosecution – Defences

In *Gillies Waiheke Limited v Auckland City Council* [2004] NZRMA 385, Gillies was the owner of a parcel of land on Waiheke Island. Graeme and Dallas Pendergrast, the other appellants, were the directors of the company.

Mr and Mrs Pendergrast proposed to construct a house, swimming pool, vehicle access and retaining walls on the land. The proposed development required earthworks exceeding the permitted standard of 20 m³ in the district plan. An application was made to the Auckland City Council for the development. Four plans were annexed to the application. Plan TP1 stated that approximately 765 m³ of earthworks was proposed.

The council granted the resource consent. Condition One of the resource consent stated that the proposed activity “shall be carried out in accordance with the information and plans submitted as part of [the] application . . .”.

The appellants undertook earthworks of 2300 m³ on the land. The appellants were charged with using land in contravention of s 9(1) of the Resource Management Act 1991 by undertaking earthworks contrary to a rule in the council’s district plan, such work not having been expressly allowed by a resource consent.

The council’s position was that the words “approximately 765m³” on plan TP1 operated as a limitation on the amount of earthworks that could be carried out. If more work was to be done, the council submitted that a further resource consent was required. The appellants’ defence was that the resource consent granted did in fact authorise the earthworks that were undertaken.

In the District Court convictions were entered against all of the appellants. Randerson J dismissed the appeal to the High Court. Leave was granted for the appellants to appeal to the Court of Appeal.

The Court held that in planning matters of this kind, the scope of the permitted activity was to be determined not just by the bare consent, but also by reference to the documentation supporting the application for the consent. In any case, the consent here was specifically subject to the condition that the proposed activity was to be carried out in accordance with the information and plans that were submitted as part of the application for the resource consent.

Section 67(8) of the Summary Proceedings Act 1957 had correctly been held to apply to s 9(1)(a) of the Resource Management Act. The effect of this was that the burden was on a defendant to prove, on the balance of probabilities, that the use was expressly allowed for by a resource consent.

Due to the purposive approach to statutory interpretation that prevailed today, the old presumption that statutes having a criminal effect were to be strictly construed in favour of the individual had lost some real force in recent years. Section 5(j) of the Acts Interpretation Act 1924 (s 5(1) of the Interpretation Act 1999) had as much application to penal statutes as to any others.

Looking at all the relevant material submitted, the Court was in no doubt that, when read objectively, the specific notation “approximately 765m³ proposed” on plan TP1, imposed an upper limit for earthworks. On an ordinary, everyday reading, the word “proposed” was of great significance. It indicated to the reader that 765 m³ was the amount of earthworks to be undertaken in the development. Construction of the documentation had to be resolved against the appellants. Even if there was some plausible conflicting interpretation of the documentation, it was the appellants’ infelicities and the “misleading” plan that led to the position that arose. As such, the appellants could not create a latent ambiguity and then use this, when it arose, as a defence in a Resource Management Act prosecution. The appeals were dismissed and costs awarded against the appellants.

Tax

Taxation Proceedings – Anonymity – Lifting of Confidentiality Orders – Principles Applicable

Muir v Commissioner of Inland Revenue CA185/04 4 October 2004 was an appeal against judgments delivered by Venning J in the High Court discharging confidentiality orders in favour of the appellants in connection with taxation litigation in relation to what was known as the “Trinity scheme”.

The starting point for the Court was that the Judge was exercising a discretion and the scope for successful challenge to his decision was thus narrow (applying *May v May* (1982) 1 NZFLR 165). In light of this starting point the Court addressed the appeal primarily by reference to the two primary heads of argument advanced by counsel for the appellants, namely the contentions that:

- (a) The Judge was wrong to take the view that tax cases are subject to ordinary principles of open justice; and
- (b) The appellants have been subject to unacceptable unfairness.

In regard to the first contention the Court noted that the argument that there should be a special rule for tax cases is based largely on the premise that the tax system operates on the basis that confidentiality of taxpayer affairs is fundamental. There was also an associated argument that principles of open justice should be applied less rigorously in civil cases than in criminal cases.

In considering the issue the Court had regard to a number of important considerations. Proceedings before the Taxation Review Authority are conducted in private, and decisions of Taxation Review Authority which are published must be in a form which does not contain the names of the disputant or the objector. While such requirements bind the Authority, they do not bind the Courts; however such requirements have in the past been seen as supporting the view that tax litigation in the High Court should be subject to confidentiality orders. Also of significance was s 81 of the Tax Administration Act 1994 which provides for secrecy in relation to taxpayer information, but with exceptions. Because of the exceptions and nature of that provision it did not directly assist the appellants. On the other hand, *Fay, Richwhite & Co v Davison* [1995] 1 NZLR 517 in particular showed that general considerations of taxpayer confidentiality may be relevant, although not controlling, factors in determining whether to permit publication of evidence disclosing taxpayer information. And, of course, the Courts do not permit litigants to use the judicial process to obtain access to tax information associated with other taxpayers. Section 6 of the Tax Administration Act, which provides general obligations for those who administer the tax system, was seen as being of little relevance by the Court.

The Court also considered the principle of open justice, noting that the principle had been discussed in many recent cases in the criminal context. The Court said that while the situations which are said to warrant confidentiality in the context of criminal proceedings are likely to differ from those in which confidentiality is sought in civil cases, the principle was equally applicable to civil cases, given such cases necessarily involve the exercise of state authority. The Court added that while in the criminal sphere there was a legislative basis for the exercise of the power to issue orders suppressing publication of what happens in Court, the exercise of such power in civil cases depends on the common law. It was also noted that open justice considerations were reinforced by s 14 of the New Zealand Bill of Rights Act 1990.

Weighing such considerations the Court held that tax cases are subject to the ordinary principles of open justice. In coming to this conclusion the Court accepted (at least for the purposes of this case) that there was jurisdiction to make confidentiality orders despite the absence of statutory power to do so, and followed *Taylor v A-G* [1975] 2 NZLR 675. The Court noted that Courts have often made confidentiality orders with little or no discussion of the underlying basis (see for example *S v Commissioner of Inland Revenue* (1990) 12 NZTC 7,011, and on appeal (1991) 13 NZTC 8,253; *Z v Commissioner of Inland Revenue* (1991) 13 NZTC 8,103; *P v Commissioner of Inland Revenue* (1997) 18 NZTC 13,487; (1998) 18 NZTC 13,647). The Court acknowledged that the secrecy provisions relating to proceedings before the Taxation Review Authority have been influential in this regard, and that this has been particularly so where applications for review are brought in relation to Taxation Review Authority decisions (see for example *Commissioner of Inland Revenue v Taxation Review Authority* (2003) 21 NZTC 18,235). Moreover there will be cases in which confidentiality arguments associated with particular tax information will be strong and require careful consideration (as in *Fay*).

On the other hand the Court pointed to a number of considerations that militated against confidentiality:

- (a) Parliament has left issues of confidentiality in High Court tax litigation to be determined by the High Court. Thus it would be unsurprising if the

Court dealt with issues of confidentiality in terms of general principles associated with considerations of open justice.

- (b) The drift of cases was increasingly towards open justice and against confidentiality.
- (c) Tax cases in the High Court are now dealt with in the same way as ordinary litigation (*Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409).
- (d) It was not appropriate to reason by way of analogy from the Taxation Review Authority secrecy provisions.
- (e) Given the scale of the “Trinity scheme” it might be thought that the level of legitimate public interest in the litigation is far higher than is usually the case with civil or criminal litigation.

The Court went on to acknowledge that tax litigation is likely to involve evidence as to tax returns and other communications from the taxpayer to the Commissioner which may fairly be described as confidential, and in respect of which there is likely to be no legitimate public interest. In respect of such information, factors which are either personal or referable to maintaining the integrity of the tax system may favour the making of confidentiality orders. The Court however maintained that acknowledgement that tax cases may throw up genuine issues of confidentiality should not be allowed to obscure the reality that those issues nonetheless fall to be determined in accordance with open justice principles. The Court held there was no scope for arguments that tax disputes in the High Court ought presumptively to be subject to confidentiality or that a case concerning tax is in itself and without anything more an appropriate basis for making confidentiality orders. The Court emphasised that its approach did not mean taxpayer information could not properly be treated as confidential, and nor did the approach render irrelevant systemic considerations associated with the importance of taxpayer secrecy to the administration of justice as a whole. But, arguments require assessment in the context of open justice.

In regard to the second contention made by counsel for the appellants, the Court held that the fact that other litigants may have been fortunate to secure anonymity, either through procedural accident or strategic settlement, is not decisive of unfairness. The Court did admit concern that parties who settled may have been able to achieve confidentiality without any real assessment of the merits, however the Court found that was not a controlling consideration. As to the Commissioner’s negotiating stance the Court expressed unease at the prospect that unpleasant publicity may have been utilised as a negotiating technique in settlement discussions, however the Commissioner was not required to act as a champion of justice, and the Court was not particularly sympathetic to the appellants: Major litigation is for neither the faint hearted nor the thin-skinned. The appeal was dismissed.

Leave to appeal to the Supreme Court has been refused.

Goods and Services Tax – sale of redeemable preference shares conferring membership in a golf club – whether supply of “financial service”.

In *Commissioner of Inland Revenue v Gulf Harbour Developments Limited* (2004) 21 NZTC 18,915, the Court dismissed an appeal by the Commissioner of Inland Revenue

against the High Court decision deeming the sale of redeemable preference shares to be a supply of “financial services” and thus exempt from GST.

The issue on appeal was whether the sale of redeemable preference shares that conferred rights that included membership of a golf club were to be treated for the purposes of the Goods and Services Tax Act 1985 as the supply of “financial services” so that it was exempt from GST. The Court rejected the argument that what was supplied was membership to a golf club and that the equity security element was ancillary to or incidental to the supply of membership to the club. Rather, what was supplied was simply an “equity security”, an incident of which was the right to belong to and make use of the golf club, and as such the supply was of a “financial service” and exempt from GST.

The Court also rejected the argument that the transaction involved two supplies, one being the supply of an equity security and the other being the supply of a golf club membership, so that the supplies should be apportioned under s10(18) of the GST Act.

Both of the Commissioner’s arguments were defective in that it was effectively a “substance and reality” approach which had been expressly repudiated by the Court of Appeal in *Marac Life Assurance Limited v Commissioner of Inland Revenue* [1986] 1 NZLR 694.

Income tax – Assessable income – Taxpayer entities – Trusts – Charitable status of superannuation scheme

The appellants in *Hester v Commissioner of Inland Revenue* (2005) 22 NZTC 19,007 were trustees of a superannuation scheme for the employees of employers related to a church. They claimed charitable status for the scheme. The High Court held that the scheme was not a trust for charitable purposes and its income was not exempt from tax. The trustees appealed.

The Court held, on a proper interpretation, the two types of entities whose income is exempt from income tax under s CB 4(1)(c) of the Income Tax Act 1994 are “trust[s] for charitable purposes” and “any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual”. Any application of funds by a charitable trust is likely to be for the private pecuniary profit of someone, but it nonetheless has charitable status.

The Court discussed *Presbyterian Church of NZ Beneficiary Fund v CIR* [1994] 3 NZLR 363 and *Baptist Union of Ireland (Northern) Corp Ltd v CIR* (1945) 26 TC 335. It had no difficulty with the charitable status of a trust intended to meet stipends or other remuneration for ministers of religion. Similarly, the Court saw provision of superannuation-style benefits for ministers of religion and their families also being a charitable purpose. It said that this was because the natural and probable consequence of such provision is the advancement of religion. Alternatively the support of ministers of religion is itself an established subset of the purposes which are recognised as charitable as relating to the advancement of religion.

The Court saw *Baptist Union*, where a superannuation fund was held to be a trust for charitable purposes, as defensible on the basis that the superannuation fund overwhelmingly came from donations. On the other hand, in *Presbyterian Church Fund*, an appreciable portion of the funds held by the scheme came from contributions made by members of the scheme. The Court said that it was well open to question whether that case was correctly decided. It nonetheless thought that it was wrong to overrule that decision, given the broader tax context of that case.

The Court observed that trusts for the advancement of religion are accorded a preferential status denied to trusts for purposes which are not charitable, and it is not possible to avoid discrimination on religious grounds when implementing those aspects of the law of charities which relate to the advancement of religion.

Presbyterian Church Fund was distinguished by the Court. It held that while the church itself had the benefit of charitable status, the scheme did not, since the latter was not for the clergy. The Court said that if the scheme was awarded charitable status, the implications were likely to be serious. It would “start a ball rolling which, unchecked, would have the potential to dent the income tax system severely”. The appeal was dismissed.

An application for leave to appeal to the Supreme Court has not yet been determined.

Administration – Assessments – Confidentiality

The appellants in *Muir v Commissioner of Inland Revenue* (2004) 21 NZTC 18,894 were involved in tax litigation relating to the Trinity scheme. The confidentiality orders in favour of the appellants were discharged by the High Court. They then appealed, arguing that the tax system operated on the fundamental basis that taxpayers’ affairs were confidential. There was thus a special principle of confidentiality in tax cases which meant that the principles of open justice should be applied in an attenuated form. The appellants also complained that of the numerous possible cases, theirs were litigated as test cases and they were subject to the High Court’s publicity rules. In contrast, other taxpayers who were similarly placed, but whose proceedings remained in the Taxation Review Authority, had avoided publications of their details. This procedural accident, as well as the fact that other litigants had achieved strategic settlements with the Commissioner under which they retained anonymity, were said to cause unacceptable unfairness to the appellants.

The Court said that the systematic considerations associated with the importance of taxpayer secrecy to the administration of the tax system as a whole remained relevant. The Court also recognised that some information associated with the taxpayer could properly be treated as confidential. However, the Court said that while tax cases may throw up genuine issue of confidentiality, this should not be allowed to obscure the reality that those issues nonetheless fell to be determined in accordance with the principles of open justice. Confidentiality in tax cases is not to be approached differently from other civil cases.

The Court held that the appellant had not been subjected to unacceptable unfairness, although it expressed some unease that the prospect of unpleasant publicity might



have been used as a negotiating technique in settlement discussions. The Court noted that those who contemplate aggressive tax stances must accept that associated disputes may attract publicity. There was a legitimate public interest in the full reporting of the present litigation in the High Court. That other litigants might have been fortunate to secure anonymity either through procedural accident or strategic settlement was not decisive. The appeal was dismissed.

Leave to appeal to the Supreme Court has been refused.

Goods and Services Tax - Entitlement to input tax deduction

The sole issue in *Sea Hunter Fishing Limited v Commissioner of Inland Revenue* (2004) 21 NZTC 18, 569 was whether the savings provision in s 100(3) of the Taxation (GST and Miscellaneous Provisions) Act 2000 applied to entitle the appellant to its claimed input tax deduction.

Sea Hunter had sent a paper return to the Commissioner which passed initial checks but failed further checks. Audit staff put a halt on the computer to stop the notice of assessment and refund being activated for 15 days while further information about the claimed refund was sought from Sea Hunter. No further halt was put on the computer, however, and the cheque and notice of assessment were issued electronically at the end of the 15-day period and sent to Sea Hunter. Sea Hunter banked the cheque but the Commissioner stopped payment and issued a reassessment disallowing the input tax claim. It was common ground that the new sections 21E and 21F of the GST Act meant that Sea Hunter was not entitled to the claimed deduction unless it could bring itself within s100(3) on the basis that, by sending the cheque, the Commissioner had agreed in writing to the claim.

In the Court's view s100(3) fell to be interpreted in the context of a tax assessment regime which relies on a system of self disclosure through the filing of returns. A short window of 15 working days for the Commissioner to raise queries before issuing refunds did not, however, preclude further queries being raised and assessments being issued, as indeed occurred in this case. The wording of s100(3) was clear. It referred to an agreement in writing and not to payment. Here the notice of assessment and automatically issued cheque cannot be said to have indicated in any way that the Commissioner was satisfied as to the query it had raised since no reply had been received.

Tort

Privacy – Development of the common law – Freedom of expression – International jurisprudence and conventions – Elements of the cause of action

In *Hosking & Anor v Runting & Anor* [2005] 1 NZLR 1 the Court by a majority recognised the existence of a tort of privacy in New Zealand. The case concerned photographs which were taken of the Hoskings' 18 month old twins in the street, without their knowledge and with the intention that they be published in a magazine. Counsel for the appellants argued that, inter alia, there was an established tort of privacy in New Zealand law that would provide a remedy in this situation.

Gault P (Blanchard J concurring) noted that the law of civil liability was in transition, and needed to address the protection of human rights and accommodate developments in technology and changes in attitudes, practices and values in society. He also noted the need to develop the common law consistently with New Zealand's international obligations. Within this context, a tort of privacy was appropriate. That was essentially the position reached in the United Kingdom under the breach of confidence cause of action (though terming the action breach of privacy was more realistic), and was consistent with New Zealand's international obligations. It was a development recognised as open to the Courts by the Law Commission in its report on privacy, and the experience of the Broadcasting Standards Authority and similar British tribunals showed that enforceable privacy rights were workable. The tort would enable competing values to be reconciled, and could accommodate interests at different levels so as to take account of the special position of children.

The two fundamental requirements for a successful claim for interference with privacy were the existence of facts in respect of which there was a reasonable expectation of privacy, and publicity given to those private facts which would be considered highly offensive to an objective reasonable person. The primary remedy for a successful claim would be an award of damages. In terms of prior injunctive relief, the importance of freedom of expression was noted. An injunction to restrain publication would usually be available only where there was compelling evidence of a most highly offensive intended publicising of private information, and where there was little legitimate public concern in the information.

Tipping J supported the creation of the tort, although his formulation of the test to be applied differed slightly. He said it would be actionable as a tort to publish information or material in respect of which the plaintiff had a reasonable expectation of privacy (generally arising where publication would cause substantial offence to a reasonable person), unless that information or material constituted a matter of legitimate public concern justifying publication in the public interest.

The majority concurred with the High Court that there was nothing to suggest that there was a serious risk to the children if publication occurred. The photographs did not disclose anything more than could have been observed by any member of the public that day. The Court was not convinced that a person of ordinary sensibilities would find the publication of the photographs highly offensive or objectionable even bearing in mind that young children were involved.

Addressing the other grounds of appeal, the Court noted there was no cause of action in New Zealand law directed to unauthorised representations of one's image. No trespass occurred in taking of photographs here, nor was there an assault. Similarly, no foundation was laid for a claim of negligent infliction of emotional harm to the children.

Keith and Anderson JJ dissented in respect of the creation of the tort. In separate judgments, they emphasised freedom of expression, the array of privacy protections already available, the possible chilling effect on free expression and the absence of a pressing need for the tort.

Professional negligence

Benton v Miller & Poulgrain (A Firm) [2005] 1 NZLR 66 involved an appeal and cross-appeal from a High Court decision awarding Mr Benton damages of \$37,800 for loss suffered as a result of the negligence of Mr Poulgrain, his solicitor. Mr Poulgrain had negligently failed to advise Mr Benton and his then-wife about the impact of the Matrimonial Property Act in 1985 when Mr Benton purchased a 71% share in Mrs Benton's Pauanui house (in which he already held the other 29% share). Particularly, Mr Benton had never been told about the potential availability of an agreement under s 21 of the Matrimonial Property Act declaring the Pauanui house to be his separate property. When the marriage broke up, a Family Court order was made declaring that Mrs Benton had a 50% interest in the Pauanui property and requiring Mr Benton to pay \$90,000 to Mrs Benton to retain the property.

The Court unanimously agreed that Mr Benton should be awarded \$90,000 in damages plus interest, but there were differences in the reasoning behind the award.

Glazebrook and William Young JJ considered that there are two approaches to quantifying loss where there is uncertainty as to the way in which events would have panned out if appropriate legal advice had been given.

The "all or nothing" approach is applicable to cases that turn on how a plaintiff would have acted in the absence of the negligence. Where the plaintiff establishes, on the balance of probabilities, that it is more likely than not that he or she would have acted in a particular way, the Court awards damages on the assumption that this is the way the plaintiff would have acted, and the plaintiff accordingly recovers "all" his or her claimed loss. For negligence that consists of some positive act or misfeasance, only the positive act or misfeasance must be proven by the plaintiff to recover in this way.

In cases where the plaintiff's loss depends on the hypothetical action of a third party, damages are awarded on a "loss of chance" basis. The plaintiff can only succeed by showing that there was a substantial chance rather than a speculative one that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff. In the context of loss of a chance principles, a possibility is only able to be ignored as "speculative" if it is at the unlikely end of the probability spectrum. In this case the likelihood of Mrs Benton signing a s 21 agreement was not so speculative as to preclude even a low award of damages on a loss of a chance basis. On the majority's calculations, loss of a chance principles would produce a damages figure of \$67,500 assessed at 1998. A detriment approach would produce a \$49,700 assessment as at 1985. Taking into account interest on the two figures, a final award of \$90,000 was considered appropriate to do justice in the circumstances.

Hammond J reached the same result, but by a different route. He noted that solicitors' negligence cases require consideration of the terms of the relevant retainer. There is an important distinction to be drawn between a duty to provide information and a duty to give advice. In the case of the former, liability will be limited to those losses properly attributable to the information being inaccurate. In the latter, liability is much wider and extends to all foreseeable consequences of reliance upon the advice. On the facts of this case, Mr Poulgrain owed a clear duty to give advice, and as a

result of his failure to do so Mr Benton had no alternative but to pay out \$90,000. This was a direct form of loss that flowed from Mr Poulgrain's breach of duty.

Negligence - Duty of care – Pure economic loss

In *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd and Genesis Power Ltd* [2005] 1 NZLR 324 the predecessor to Genesis Power had contracted to procure the building of a co-generation plant at Carter Holt's paper mill at Kinleith. Carter Holt claimed that the plant was defective. It sued Genesis in contract and Genesis's subcontractor, the appellant, Rolls-Royce, in negligence. Rolls-Royce appealed against a decision refusing to strike out the negligence claim. It submitted that the claim by Carter Holt was in effect that Rolls-Royce breached a duty to perform its contractual obligations with Genesis. Carter Holt was not a party to that contract. Rolls-Royce contended that such a duty in tort was not recognised in New Zealand and argued that the responsibilities and obligations of all parties were regulated by the detailed contractual provisions.

The Court found that the claim could not succeed in its present form. There was no duty to take reasonable care to perform a contract. At most, there was duty to take reasonable care in, or while, performing the contract. A duty formulated in such terms was essentially contractual in nature and could not be owed to someone who was not a party to the contract. Even where the duty alleged was couched in more general terms, the loss was linked for the most part to losses arising from the failure to meet the contractual specifications. The Court noted the difficulty in setting a standard of quality that did not relate specifically to contractual standards. Assuming that the claim could be re-pleaded, the Court considered that the strongest factor pointing towards a finding of proximity was that of foreseeability. A second factor was the very high degree of direct contact between Carter Holt and Rolls-Royce before the entry into the turnkey contract. The strongest factor pointing away from a proximity finding was the very contractual structure that made the loss to Carter Holt foreseeable. Various aspects of the contracts pointed against a duty of care being imposed.

The main policy factor militating against a duty of care was the need for commercial certainty. In addition, there had been numerous comments in New Zealand cases suggesting that tort liability with regard to defects in quality would not extend to commercial construction cases. In addition, none of the jurisdictions surveyed recognised liability for commercial parties with respect to quality defects, except in very limited circumstances. The Court accepted that consideration of whether a novel duty existed would normally wait until trial. In this case policy considerations were capable of identification and assessment and the role of each of the parties and the responsibilities attached to each role was well understood. The Court held the claim must be struck out, except to the extent that the duty pleaded rested on the alleged negligent misstatements made by Rolls-Royce to Carter Holt, both before and after the entry into the contracts.

The Court confirmed that its approach to the question of when a duty of care will be recognised will continue to be based on two broad fields of inquiry. These would however provide a framework rather than a straightjacket. The first area of inquiry is as to the degree of proximity or relationship between the parties. The second is

whether there are other wider policy considerations that tend to negative, restrict or strengthen the existence of a duty in the particular class of case. At this second stage, the Court's inquiry is concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society.

In determining whether there was proximity, the Court favoured an incremental approach with the inquiry reflecting a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from undue restrictions on its freedom of action and from an undue burden of responsibility. The Court also drew on the Australian approach of allowing consideration of the extent to which the plaintiff is in a vulnerable position and the availability of other remedies. Also relevant was the nature of the damage (economic loss or physical damage to property). The statutory and contractual framework might also be relevant both to issues of proximity and policy.

Trusts and Estates

Fraud on a Power – Legality of distributions made by trust – Whether distributions capital or income

In *LS Wong & Ors v LW Burt & Ors* [2005] 1 NZLR 91 the Court considered whether two distributions from a trust amounted to fraud on a power in equity. The case also involved a cross appeal, which raised the issue of whether certain distributions were capital or income.

The late William Wong's will provided that, after his widow Estelle's death, the net annual income of the estate was to be paid to his two daughters who were still alive. If one of his daughters predeceased Estelle, all of the income was to be paid to the surviving daughter. The will also conferred, in clause 6, a broad discretion upon the trustees to pay Estelle sums out of the capital of the estate.

Following the death of one of the daughters, Estelle became concerned at the lack of provision for the deceased daughter's children. To overcome this, the trustees of the estate distributed \$250,000 of the estate's capital to Estelle in reliance on their powers in clause 6. This money was then lent to an *inter vivos* trust of which the excluded grandchildren were the beneficiaries.

It was contended that the exercise of the discretion by the trustees was for an improper purpose, in that it was designed to circumvent the plain meaning of the will. This was also said to be because the distribution was made to benefit a person who was not an object of the clause 6 discretion.

The Court emphasised that the *sine qua non* that makes the exercise of a discretion or power improper is the improper intention of the person exercising it. As the facts of this case revealed a deliberate and pre-conceived device to circumvent the intention of the will, the Court concluded a fraud on a power had occurred.

The Court then considered whether the trustees were personally liable for the restoration of the \$250,000 in light of s73 of the Trustee Act 1956. This section provides the Court with a discretion to relieve trustees from personal liability if it is

satisfied that, although acting in breach of trust, the trustees nevertheless acted “honestly and reasonably” and “ought fairly to be excused”. The Court concluded that the trustees could not avail themselves of the benefit of this section, as although the trustees genuinely believed their actions were morally justified, their conduct was clearly unreasonable and dishonest.

The cross-appeal related to an allegation that the trustees of the estate had wrongly apportioned (as between income and capital) money received from the sale of the assets of certain companies. In the High Court, the Judge made a declaration that the distributions were capital. The cross-appellants sought to have this set aside on the grounds that the allegation was not adequately pleaded in the High Court. The Court resisted this application, concluding that a “fair reading” of the pleadings put the subject matter of the declaration in issue. Further the Court noted that were the issue to be re-opened in the way suggested, a new trial in the High Court would be required. Consequently, the Court was not disposed to interfere with the declaration, and the cross-appeal was dismissed.

Leave to appeal to the Supreme Court was sought. Subsequently, notice of abandonment was given, and the appeal was dismissed.

Wills, Probate and Administration

Probate and letters of administration

In *Public Trust v Whyman* CA76/04 17 December 2004, there were competing applications for administration of the estate of the late John Russell. Most of Mr Russell’s assets had passed by survivorship to the deceased’s de facto partner, Ms Whyman. The Public Trust sought administration so that it could make a claim against Ms Whyman under the Property (Relationships) Act 1976. The High Court granted administration to Ms Whyman. The Public Trust appealed.

The Court said that the key issue in the case was whether there could be a credible claim by the estate of the late Mr Russell against Ms Whyman under the Property (Relationships) Act. If so, Ms Whyman would have a conflict of interest and duty which warranted the appointment of the Public Trust as administrator. The Court said that it had to consider first whether s 95 of the Act precluded a claim by the administrator of Mr Russell’s estate against Ms Whyman, and, secondly, whether an application by an administrator under s 88(2) would be unlikely to succeed.

The Court accepted that there were difficulties with s 95, but held that the election of Ms Whyman of “option B” under the Act did not preclude a claim by the administrator of Mr Russell’s estate. If leave was required under s 88(2), the Public Trust as administrator would have a good claim. The Court said that it was open to inference that Mr Russell sought to structure his affairs to avoid fulfilling what would otherwise have been his moral duty (as that term is applied in family protection litigation), and to defeat what would otherwise have been the statutory rights of his children associated with that breach of moral duty. The appeal was allowed.

Leave to appeal to the Supreme Court has been granted.



B IMPORTANT CRIMINAL CASES

Adequacy of Directions/Summing Up

Whether Judge's remarks to jury in retirement imposed a time limit on its deliberations.

In *R v A* CA96/04 23 September 2004, the Court allowed an appeal against conviction and ordered a retrial on the sole ground that the Judge improperly imposed a time limit on the jury's deliberations.

A faced two charges of sexual violation and one of attempted sexual violation against a 19 year-old Pakistani national that resided with A at an address in Auckland. On 23 February 2004, a jury found A guilty of all three charges.

The appeal concerned the Judge's remarks to the jury in retirement. After approximately eight hours of deliberations, the Judge recalled the jurors to check whether they felt they were making progress and whether they were confident of reaching verdicts. The jurors responded that they were. Approximately 50 minutes later the Judge addressed counsel and stated that he would discharge the jury if they had not yet reached a verdict. The jury was then summoned. The foreman stated that they were close to reaching a decision but that they needed "a few more minutes, about 15 minutes". The jury was not unanimous on any of the three counts at that time. The Judge expressed a degree of surprise, exasperation and criticism at the jury having taken so long. The Judge indicated that if there was disagreement he would discharge the jury but that he would be willing to give the jury 15 minutes if the foreman could assure him that a unanimous decision could be reached. The jury retired and eight minutes later, returned and convicted the appellant on all three counts faced.

The Court applied the principles set out in *R v George* [1984] 1 NZLR 272 and *R v Carter* CA319/97 3 December 1997. It held that although the repeated references to "15 minutes" initially stemmed from the foreman's remark, the Judge, by picking up on it and referring back to it on a number of occasions in the context of seeking an assurance from the jury, was understood by the foreman as requiring the jury to reach unanimity or signal its disagreement within that period. This infringed principles (i) and (ii) from *George*. The Court held that in such circumstances the appropriate course was to allow the appeal and order a retrial.

Self-defence - direction

In *R v Sadaraka* CA274/03 27 May 2004, the Court allowed an appeal against a conviction for murder on the basis that there had been a material misdirection on self-defence. The Judge had directed the jury that "a person acting under self defence must act purely out of self-defence and not for motives of punishment, vengeance, anger etc". The Court had earlier, in *R v Howard* (2003) 20 CRNZ 319, reaffirmed the principle that someone who was angry or spiteful might nonetheless act in self-defence, fearing a present assault.

The Court concluded that the misdirection made the conviction unsafe, as there was ample evidence that the defendant had been provoked and angry prior to the lethal assault. While there had been problems with the defence, the Court could not be certain that the jury would have convicted. Credibility was ultimately the essential issue. It followed that the conviction was set aside and a new trial ordered.

Directions as to credibility

In *R v Webb* CA13/04 17 June 2004, the appellant was convicted on four historical sex charges involving a young child, and was sentenced to four years imprisonment. He appealed against conviction and sentence. He argued that the Judge's summing up did not make it clear that the jury should make an overall evaluation of credibility. He also challenged the restrictions which the Judge imposed on the expert evidence relating to memory, false allegations of sexual abuse and child interviewing techniques. Finally, he alleged that since he had been acquitted on 11 counts, the verdicts were inconsistent.

The Court held that the summing-up was adequate, that the evidential rulings were appropriate and there was a rational basis for the pattern of verdicts. The appeal against conviction was dismissed. However, the Court allowed the appeal against sentence as the Judge had given no allowance for the mitigating factors. Some allowance had to be made for the time which had elapsed between the offending and sentencing since the appellant had lived a worthwhile life during this period. It was also inappropriate to exclude good character as a mitigating factor merely because the appellant had committed the offences for which he was sentenced. To hold otherwise would mean that good character would never be relevant. A sentence of three years imprisonment, being more appropriate, was substituted.

Undermining heart of the defence

R v Rubick CA35/04 7 July 2004 was an appeal against one conviction for sexual violation by unlawful sexual connection. There were five grounds of appeal, including an allegation of trial counsel incompetence. However, the Court was satisfied that there was no factual basis for these allegations.

The case therefore turned on the Judge's direction, in summing up, in relation to evidence that the appellant had sent the complainant pornographic emails. The defence claimed that the complainant downloaded the images on the appellant's computer, that the complainant requested the appellant to send them to him, that the appellant sent them unwillingly and then requested that the complainant erase them. The Judge, in commenting on the evidence, wrongly said that there had been no cross-examination of the complainant on whether he had been told to delete the emails. The jury may have concluded that the appellant's story was a recent fabrication, and that may have affected their assessment of Mr Rubick's credibility. The Judge also failed to balance a statement that the complainant had not opened the email with the defence position that he had downloaded the pictures earlier. There was a further comment suggesting that the appellant's activities with the complainant were "secretive", and also some material putting a pejorative cast on the defence, which enhanced concerns about the verdict.

While none of these matters was central to the conviction, the case turned primarily on credibility and the Judge's comments could have influenced the jury's views. It followed that the conviction was quashed and a new trial ordered.

Separate Charges – Nature of direction required – Full transcript not preserved

In *R v Waimotu* (2004) 21 CRNZ 187 the Court quashed Mr Waimotu's convictions for a number of sexual offences and ordered a re-trial.

Mr Waimotu faced trial on charges relating to two complainants. The trial was not run on a similar fact basis, and was described by the Court as "orthodox". In the circumstances, the Court considered that it "was a matter of the greatest import that the jury be adequately directed not just on the necessity for separate trials, but on the dangers of allowing the evidence of one complainant to be utilised with respect to the other complainant and illegitimate notions of propensity or prejudice against the accused had to be warned against".

Through no fault of the trial Judge a full transcript of the summing up was unavailable. A report was obtained from the trial Judge, and the Court considered that it could safely assume that a set of standard directions were given to the jury. At one point, the Judge told the jury that they must "apply that test to each charge – I will comment on this in more detail in a minute or two". However, there was nothing in the Judge's report to indicate that she did return later to the topic.

The Court considered that the absence of a summing up (or part thereof) does not of itself render a verdict unsafe or unsatisfactory, although the Court is entitled to have regard to such matters (referring to *R v Hooker* (1998) 15 CRNZ 551, 554 (CA)). However, the Court considered that on the face of the record it could not be satisfied that a suitable direction as to the use of the evidence was given. The Court therefore concluded that the verdicts were unsafe and ought to be set aside.

Direction as to intent

In *R v Laird* CA154/04, the appellant successfully appealed out of time against a conviction under s 192 of the Crimes Act 1961 for assault on a constable with intent to obstruct the constable in the execution of his duty. The appellant's co-accused at trial successfully appealed both his conviction and sentence in October 2001 on the basis that the trial judge had failed to direct the jury as to the need to assess the two defences of lack of intent under s 192(2) and s 48 separately, with the result that the jury was inadequately directed as to the requirement of intent under s 192. The appellant, whose defence at trial had been identical, served his sentence of four months periodic detention and travelled overseas. Shortly before the appellant left New Zealand he learned that his co-accused's appeal had succeeded. As the appellant had left to travel before his appeal was prepared there were some difficulties in completing the documentation with the result that the appeal was not filed until the appellant returned to New Zealand in late 2003.

The Court accepted that the appellant's position at trial was the same as that of his co-accused, with the result that the jury directions had been inadequate on the



requirement of intent under s 192. It was therefore appropriate to grant leave to appeal out of time and to allow the appeal. The Court remarked that the delay, although lengthy, resulted in significant part from counsel delay, and the merits of the appeal were so strong that the appellant would be justified in feeling a sense of unfairness if this conviction, his only one, was to stay on his record while his co-accused had had the slate wiped clean. There was no prejudice to the Crown in these circumstances as the Crown did not seek a retrial.

Counsel Incompetence

Radical mistake - inadequate cross-examination

The appeal in *R v Teko* CA360/03 14 October 2004 involved allegations of counsel incompetence in preparation for trial and cross-examination, as well as an allegation of a conflict of interest on the part of the appellant's trial counsel. The Court took the opportunity to restate the principles governing appeals on the ground of incompetent cross-examination.

The Court held that more than a mere tactical mistake had to be demonstrated. There had to be a radical or fundamental error. The threshold was a high one. Because decisions as to cross-examination had to be made quickly and in the atmosphere of the particular trial, the Court would accord counsel a wide margin of appreciation. If there was a reasonable explanation for counsel's actions no appeal would lie even if the Court considered another course might have been preferable.

In hindsight it appeared that counsel had little to lose in canvassing the matters the appellant said should have been raised. Nonetheless, the Court accepted that that decision did not amount to a radical error, having regard to her explanation that further questioning carried the risk of damaging responses and it seemed best to avoid the topics.

As the other grounds of appeal failed on the facts, the appeal was dismissed.

Alleged counsel error – recent complaint and consent in summing up – inconsistency of verdicts.

In *R v H* CA177/02 21 September 2004, the Court dismissed an appeal against conviction on charges of unlawful detention, threatening to kill, sexual violation by rape, and sexual violation by unlawful sexual connection.

H and the complainant had lived together in a relationship for three years. Evidence showed the relationship was characterised by violence and H was a very controlling person. H was convicted on five counts relating to offending alleged to have occurred on 21 and 22 March 2001, and sentenced to 10 years' imprisonment. He was found not guilty on a further three counts. H appealed on the grounds that there was counsel error at trial, error in the Judge's summing up and inconsistency of verdicts.

H contended trial counsel failed to give the Judge sufficient information at a pre-trial conference, failed to apply for a ruling to prevent the Crown from calling evidence

concerning past violence between H and the complainant, and failed to follow H's instructions as to how the Crown witnesses were to be cross-examined. H also contended that counsel failed to apply for a mistrial after evidence was given showing H had previously been in prison, and refused to permit H to give evidence. The Court held H's trial counsel did not make any fundamental errors at trial and that the trial Judge rightly considered that counsel performed competently.

The Court also rejected H's complaint against the Judge's direction as to recent complaint evidence. It found that the Judge explained the limited relevance of recent complaint evidence, and made clear that its only relevance was that it may show consistency between what the complainant said and did soon after the event and what she said about it at trial. It also rejected H's complaint with respect to the Judge's direction to the jury on consent. The Court found that it would have been obvious to the jury that not all evidence was relevant to whether consent had or had not occurred.

The Court noted that the mixture of guilty and not guilty verdicts was explicable due to the nature of each count H was charged with. Also, the fact that the complainant had had an orgasm on two occasions meant the jury had reasonable belief that the complainant consented to sex on those occasions.

Criminal Procedure

Search of Court records – Criminal Appeal Briefs prepared by Judge's clerks – Judicial privilege

R v Dean (2004) 21 CRNZ 77 was an application to search court records in respect of a pre-*Taito* ex parte dismissal of an appeal. The question was whether the Criminal Appeal Brief prepared by a Judge's clerk, and containing judicial notations, was searchable, or protected by judicial privilege. The Court held that the true nature of the sheet and notations, in the context of pre-*Taito* ex parte dismissal procedures, was in fact a record of the reasons for declining aid and therefore, although a recommendation, was effectively part of the record of the determination. It followed that the sheet and notations were searchable. However, the Court made it clear that post-*Taito* criminal appeal briefs would not be searchable, as their function was quite different. Such briefs are prepared for the consideration of Judges and protected by judicial privilege.

Appeals Out of Time – Extension of Time

In *R v Lory* [2005] 1 NZLR 462 the Court declined an application for leave to appeal out of time against a sentence that had been imposed more than seven years earlier.

Lory was convicted of six counts of manslaughter in 1996, following the deliberate arson of a Hamilton hotel. Six people died and many others were injured. Lory had numerous previous convictions, including causing death through driving with excess breath alcohol and wilful arson endangering life. The High Court imposed a sentence of life imprisonment for the manslaughter charges. Lory did not appeal the sentence at the time. Seven years later, after talking to a fellow prisoner, Lory decided to

appeal. Lory stated that he had not appealed earlier because of legal advice that his sentence might be increased if he was unsuccessful.

The Court held that the seven-year delay in filing the appeal against sentence was unusual and no light matter. Finality was of high importance, and the Court would require much persuasion before deciding to re-open the case.

The sentence of life imprisonment was not excessive. The appellant's offending had been at the top end of conceivable culpability, and was at least comparable to that of many persons convicted of murder. Since the appellant's offending was uniquely serious in a New Zealand context, it had been appropriate for the trial Judge to have regard to United Kingdom sentencing practices, and to the appellant's parole eligibility.

Defences

Insanity: "Disease of the mind" inquiry - Summing up: Differentiation between verdicts "not guilty" and "not guilty by reason of insanity"

In *R v Lipsey-McCarthy* CA237/03 28 October 2004, the appellant appealed against her conviction for various offences committed whilst in a psychotic state. The evidence disclosed that her psychosis at the time of offending was caused by a combination of pre-existing mental illness and the ingestion of a large quantity of pure methamphetamine. At trial the essential issue was whether, on the balance of probabilities, the appellant was insane in terms of s23 Crimes Act 1961. The jury rejected this defence.

The Court of Appeal found that the jury's verdict was not unreasonable. The crucial matter for the jury's consideration was whether appellant's psychotic state was a "disease of the mind", or a transient mental disorder caused by methamphetamine abuse. The Court stressed that the term "disease of the mind" was not a medical expression but a legal concept which embraced more than medical science. Though the appellant's behaviour and the psychological evidence supported a possible conclusion of insanity, the Court said it was not determinative of it.

Also at issue was the Judge's summing up in relation to the question of whether the appellant had been rendered incapable of knowing that her acts were wrong. The trial Judge had directed that "incapable" means "not able to do it at all". The Court thought the argument that the direction did not take account of degrees of capability was misconceived. It said incapability is an absolute, not a relative concept, and speculated that counsel had confused the standard of probability required to establish the defence and the standard of incapability which is one of the elements of the defence.

A further issue was the trial Judge's differentiation between the verdicts of 'not guilty' and 'not guilty on account of insanity' in summing up. The Court thought it desirable that the qualitative difference between these verdicts and their substantially different consequences be emphasised to the jury. The Judge at trial could have gone further than she did in this regard. However, as there was no suggestion that the

defendant did not commit the acts in question, the essential issue was ‘guilty’ or ‘not guilty on account of insanity’, and the Judge’s direction were adequate in this instance. Accordingly, the appeal was dismissed.

Defence of another / Self defence.

In *R v Ronaki* CA451/03 13 May 2004, the Court allowed an appeal against conviction on the ground that the Judge erred in refusing to put the defences of defence of another and self defence under s 48 of the Crimes Act 1961 to the jury.

It was alleged that the appellant wounded the complainant with intent to cause him grievous bodily harm. The appellant and his friend got into a fight with the complainant. The appellant allegedly pulled the complainant away from his friend and, then together with his friend, kicked and punched the complainant. A second attack followed where the complainant was kicked and punched, and hit around the head with a lightweight curtain rod and a chest expander (a heavier metal bar with a flexible middle section). The complainant suffered serious head injuries and was hospitalised for several weeks.

The appellant conceded in cross-examination that the blows he admitted to striking were struck after the threat to his friend had passed. In his evidence in chief, the appellant stated for the first time that as the complainant was getting to his feet he threatened to kill the appellant, thus introducing self-defence.

The Judge ruled that neither defence of another nor self-defence would be left to the jury for its consideration. The Judge relied upon two matters in reaching the view that neither defence was available. These were the appellant’s concession that any peril which the complainant posed to his friend had ended before the major violence began, making the force gratuitous in nature, and the availability of alternative courses of action (restraining the complainant or leaving the scene).

The Court asked whether it was reasonable for the Judge to conclude that there was no credible or plausible narrative evidence which could lead the jury to entertain the reasonable possibility of defence of another or self defence. It held that it was possible for the jury to view the appellant’s blows to the complainant as a response to the threat posed to his friend during the fight between his friend and the complainant. The Court further noted that there was an issue as to the causation of the complainant’s injuries and whether his main injuries were caused by the friend acting jointly or alone. This issue was said to complicate the question of self-defence because resolution of this question is required as a step in determining whether the appellant acted in self-defence. The reasonableness of the appellant’s response fell to be assessed in light of what the appellant had done, including the injuries caused. The Court concluded that such factual questions were not for the Judge and it was therefore inappropriate for the Judge to withdraw the s48 defences from the jury. A re-trial was ordered.

Provocation

R v Timoti [2005] 1 NZLR 466; (2004) 21 CRNZ 90 was a rehearing of an appeal against conviction for murder following *R v Taito* [2003] 3 NZLR 577. The

appellant, allegedly provoked by his parents, had set fire to the family home. He caused the death of an uncle who had not offered any provocation. Mr Taito was acquitted of attempting to murder his parents, but was convicted of murdering his uncle.

The Court held that the partial defence of provocation under s 169 of the Crimes Act 1961 is broad enough to apply to any case of murder. It is thus available as a matter of law to a charge founded on s 167(d). Section 167(d) serves the policy of felony murder by elevating what would otherwise be manslaughter to murder. Provocation under s 169 reduces murder to manslaughter. The two are not mutually exclusive. Further, it would be illogical to exclude provocation in a s 167(d) situation but allow it for every other murderous intent envisaged by s 167.

Section 169(6) makes it plain that the provocation does not need to emanate from the person killed, and the defence is available in circumstances where an innocent person is killed by accident or mistake. However, offenders may not rely on provocation by one person to excuse the killing of innocent people whom they have knowingly endangered in s 167(d) circumstances, since knowledge of the likelihood of death being caused relates to the circumstances in which the act is to occur, and any person or class of persons whom the offender knows is likely to be killed cannot be the object of accident or mistake.

The Court held that provocation was untenable on the facts of the present case. It also held that the verdicts were not inconsistent. The acquittals were explicable on the basis that there was no adequate proof of specific intent to kill, whereas the guilty verdict on the murder count was supported by reference to s 167(d). The Judge's direction on provocation did not amount to a miscarriage of justice, and the other grounds of appeal based on the alleged wrongful admission of evidence were rejected. The appeal against conviction was dismissed.

The Court observed that the judgments in *R v Rongonui* [2000] 2 NZLR 385 diverged on the crucial issue of whether "the power of self-control of an ordinary person" is a mandatory, objective imputation to an accused, or whether it is an objective reference which may then be subjectively attenuated or qualified by the accused's characteristic(s). This was indicative of the wholly unsatisfactory nature of the statutory concept of provocation. The "power of self-control" is an amalgam of all personal inhibitions upon or encouragements to conduct, but is nonetheless indicative of expected, normative responses to emotional stimuli. However, the Court was reluctant to overrule *Rongonui*.

The Court also observed that provocation is a matter of fact and the relationship between the mode of resentment and the provocation given must have a factual relevance. Because a jury might think that as a matter of law there must be a proper or reasonable relationship between the two, a reference to proportionality will generally be unhelpful unless its relevance to the issues in the case is identified. Thus, proportionality may inform the inquiry whether the conduct of the accused had the character of a violent response under the spur of provocation or of something else. A seemingly disproportionate response to provocation may also be evidence of an actual loss of self-control. In addition, it will inform the question of whether, absent any



relevant characteristic, the provocation was sufficient to overcome the self-control of an ordinary person.

Leave to appeal to the Supreme Court was granted. The appeal has been heard and the decision thereon is reserved.

Elements of Offences

Criminal Nuisance

The appellant in *R v Andersen* (2004) 20 CRNZ 1086 was the organiser of a mass participation cycling event in which one of the competitors died. She was convicted of criminal nuisance under s 145 of the Crimes Act 1961. She appealed against conviction.

The Court observed that the Judge had not followed the literal words of s 145 and directed the jury on the basis that the offence was one of negligence when the mens rea required was recklessness. Although Parliament had proceeded on an incorrect assumption on the scope of s 145 when it enacted s 150A in 1997, that could not be regarded as overriding the actual intention of Parliament when it had introduced s 145 in 1961 and did not change the scope of the offence. There was no particular difficulty with the concept of a reckless breach of duty. As the jury was misdirected on a key issue in the case, the Court allowed the appeal and quashed the conviction.

Fraud

The appellant in *R v Simcock* [2004] 3 NZLR 433 was the executive chairman of a company, a subsidiary of which managed a trust operated under the Unit Trusts Act 1960. The appellant obtained benefits from transactions involving the trust. He was tried before a Judge alone, and was convicted on three charges of fraud. He appealed against conviction, on the grounds that the Judge wrongly concluded that he had an intent to defraud, wrongly analysed the trust deed and Act, and made findings of fact relating to the lack of disclosure to the trustee, the absence of honest belief and fraud that were incorrect. The appellant also argued that without a finding that he took dishonest steps to conceal his breach of fiduciary duty, he could not be guilty. It was further contended that the Judge's finding of fraud was wrong in light of the absence of prejudice to the economic interests of the trust.

The Court held that the appellant breached his legal obligations by structuring the transactions involving the trust in such a way as to produce personal benefits. He did not disclose to the trustee the relevant features of the underlying transactions, namely the benefits to himself. Full disclosure was required where a fiduciary relied on disclosure to avoid what would otherwise be liability for breach of fiduciary duty. The Court also said that the Judge's conclusions as to absence of honest belief and fraud were open to her. The Judge's finding that the appellant had acted in breach of fiduciary obligation did not, in itself, necessarily carry with it the conclusion that he did so knowingly and dishonestly. However, the appellant was a solicitor and was expected to know the law.

The Court further held that where there is a breach of fiduciary obligations, a dishonest concealment is not required to establish fraud. Here, it was sufficient that the appellant consciously disregarded his fiduciary obligations and deliberately created and took an illegitimate benefit. The essence of the crime was fraudulently obtaining a benefit, not fraudulently causing a loss, and there was thus a sufficient economic basis for the conclusion that the appellant's dishonesty was fraudulent. The appeal was dismissed.

Leave to appeal to the Supreme Court was sought. This application was later abandoned, and the appeal was dismissed.

Defrauding the Revenue – interpretation of s81 Tax Administration Act 1994.

In *R v Morris* CA120/04 4 November 2004, the Full Court considered the correct interpretation of s81 of the Tax Administration Act 1994.

The Crown Solicitor charged the respondent with 67 counts of using documents, namely IR3 tax returns, with intent to defraud, contrary to s 229A of the Crimes Act 1961. During the trial the prosecutor called an investigations officer employed by Inland Revenue to give evidence. The respondent's counsel objected on the ground that the investigation officer's giving evidence would infringe the confidentiality requirements of s81 of the Tax administration Act 1994. The Judge gave a ruling concerning s 81 but the Crown was unhappy with it. The Judge, under s 380, reserved a question of law for the consideration of the Court of Appeal and directed the jury to return verdicts of not guilty on all 67 charges, resulting in a technical acquittal.

The Court held that provided the proposed evidence by the investigations officer was admissible under the general law, s 81(1) did not prevent him from giving evidence because his purpose in giving the evidence was to carry into effect the Tax Administration Act. The Court noted that it was irrelevant that the alleged fraud on the revenue had been charged under the Crimes Act rather than the Inland Revenue Act. Further, the specific exceptions provided in s 81(4) do not assist in determining the scope of the general exception contained in s 81(1).

Section 81(3) was irrelevant in this particular case, not because it was a "tax prosecution brought under the Crimes Act" but rather because neither the Commissioner of Inland Revenue nor the investigations officer sought to exercise privilege against production by that subsection.

The Court directed a new trial pursuant to s382(2) of the Crimes Act.

Drink-driving offences – definition of driver

The question for the Court in *Wynn-Williams v Police* CA400/03 15 June 2004, was whether a person was a driver of, or attempting to drive, a motor vehicle for the purpose of s68(1)(a) Land Transport Act 1998, when, at the time of being spoken to by an enforcement officer, the person was not in the motor vehicle and had not been in the motor vehicle or driven the motor vehicle for some 20 to 35 minutes.

The Court held that the question of whether someone is a driver was a question of status. In ordinary English parlance a person might say that they were a driver of a car, even if it was sitting in the driveway of their home and they had not driven it for some time. The addition of the words "on a road" in s68(1)(a), however, meant that there must be a proximate connection to actual driving on the road for a person to be a driver. This meant that there must be no such intervention of time, circumstance and conduct that the person must be seen as separated from the road and the act of driving. This view also fitted in with purpose of the legislation which was to allow random breath testing of motorists on the road but not to allow testing to be required of, for example, a person at home merely on the basis that they were the driver of a car some hours previously.

The question put to Court in the leave application was not capable of a definitive answer as the Court said it would depend on the factual circumstances as to whether the gap of 20-35 minutes broke proximity. However, in the circumstances of this case, the appellant was so separated in time, conduct and circumstance from his driving on the highway some 20-35 minutes before being spoken to by the enforcement officer, that he was not a driver for the purposes of s68(1)(a). The appeal was allowed and the conviction quashed.

Drug-dealing - Rebutting the presumption – Juror unanimity required for presumption to be rebutted

R v Siloata [2005] 1 NZLR 182 was an unsuccessful appeal against a conviction for possessing cannabis for supply. The amount possessed triggered the statutory presumption of supply for a prohibited purpose. The question raised was whether the jury had to be unanimously satisfied that the presumption was rebutted in order for there to be an acquittal. The Court held that once the Crown had proved (i) the fact of possession, (ii) the quality of the controlled drug and (iii) the specified quantity, then, absent a special defence, a guilty verdict must follow unless the accused was able to prove on the balance of probabilities that possession was not for the prohibited purpose. Such proof would require unanimous acceptance by the jury. In other words, if the jury is unanimous that the Crown has made its case on the other elements, but splits on whether the defence has rebutted the presumption, the presumption has not been rebutted, and the jury should vote unanimously to convict. In this case there was no misdirection and no reason to believe that the jury was not unanimous on guilt.

Leave to appeal was granted. The Supreme Court rejected the Court of Appeal’s view of the legal effect of the statutory presumption but dismissed the appeal on other grounds (SC CRI 8/2004).

Securities Act – “Selected otherwise than as a member of the public”

The Securities Act 1978 creates a criminal offence where securities are offered to the public without a prospectus being issued. The Court in *Lawrence v Registrar of Companies* [2004] 3 NZLR 37 was required to consider what constituted an offer of securities to the public. Section 3(1)(a) of the Securities Act provides that any reference to an offer of securities to the public includes “A reference to offering the securities to any section of the public, however selected”. Section 3(2), however,

provides that offers to relatives, close business associates, persons in the business of investing money, and, in 3(a)(iii), “Any other person who in all the circumstances can properly be regarded as having been selected otherwise than as a member of the public”, did not constitute an offer of securities to the public.

The Court reconciled these provisions by indicating that s3(a)(iii) was related to the other categories excluded from the public by s 3(2), so a person would be “selected otherwise than as a member of the public” if their position, with regard to the offeror, was similar. Persons chosen on the basis of a close relationship such that they did not require the protection of the Act, or their expertise in investment, would not fall within “the public”. No relevance was attached to the individual selection of offerees, and the size of the class was of only marginal relevance.

The Court therefore concluded that an offer made to the clients of a particular investment advisor was made to “the public”, even though in each case a judgment was made that the investment was appropriate for the particular investment. The appeal against conviction accordingly failed.

Test for manslaughter under ss 150 and 151 of the Crimes Act

R v Hamer (2004) 21 CRNZ 108 was a criminal appeal against conviction for manslaughter, and against the imposition of a sentence of 10 years imprisonment with a minimum non-parole period of 5 years. Mr Hamer was convicted under ss 150 and 151 of the Crimes Act on the basis that he failed, without lawful excuse, to provide his wife with the necessaries of life, such omission causing death. Mrs Hamer had consumed between 100 and 150 mgs of Mr Hamer’s methadone. Mr Hamer called for an ambulance more than 17 hours later. At this point she was deeply unconscious and was propped up in bed with a number of pillows which caused her airways to be partially blocked. Mrs Hamer was hospitalised for 3 weeks but after she discharged herself, her condition deteriorated and she later died of severe brain damage caused by the oxygen deprivation suffered as a consequence of her methadone ingestion. The sole issue for the jury was whether Mr Hamer’s omission constituted a major departure from the standard of care expected from a reasonable person in the circumstances.

On appeal, counsel for Mr Hamer argued that the trial Judge erred in determining that the test for whether an omission to discharge a legal duty was a major departure from the expected standard of care, was an objective one. Counsel submitted that s 150A required that the jury consider the case from the eyes of Mr Hamer, having regard to his actual state of mind which was influenced by factors such as his drug addiction and depression. The Court rejected this argument, concluding that the test which must be applied in determining whether an accused has been negligent, and whether the negligence has been a major departure is, in both cases, an objective test. Personal characteristics could not be engrafted onto the “reasonable person”, unless they were characteristics that rendered the defendant incapable of appreciating the nature and quality or the consequences of his acts or omissions. The explanations for Mr Hamer’s conduct based on personal characteristics, the Court said, appeared to be more logically directed at a defence of lawful excuse, but it had already been conceded that there was no such excuse available.

The second argument raised on appeal was whether the trial Judge erred in permitting the Crown to argue that Mr Hamer's conduct involved certain wilful actions or omissions (particularly his refraining from calling an ambulance until too late, and his placing pillows behind Mrs Hamer's head). The Court rejected this contention, saying that the evidence of wilfulness would go to Mr Hamer's actual foresight of the risk.

A third argument was that Mr Hamer's drug addiction and chronic depression were relevant to this issue of wilfulness. The trial Judge accepted that Mr Hamer's nursing training and his personal knowledge of drugs as a result of his addiction were relevant in considering the wilfulness of his actions. The Court disagreed with the Judge in finding that the personal characteristics noted above were also relevant to this particular issue. There had been no miscarriage of justice, however, because the jury did in fact hear evidence about Mr Hamer's judgment being blurred because he had himself taken methadone, and also evidence about his attention deficit hyperactivity disorder and depressive state.

In relation to the appeal against sentence, the Court did not accept criticisms of factual findings made by the Judge that were adverse to Mr Hamer. They were based on the evidence heard at trial, and the Judge was well placed to assess Mr Hamer's credibility. There were very significant aggravating features in the offending, and a lack of any mitigating features. While the sentence was near the top of the available range, it could not be said to be manifestly excessive.

Evidence

Challenge to s23G evidence – lack of direction to jury – scope of s23G evidence

In *R v A* CA123/04 17 December 2004 the Court allowed the appellant's appeal and ordered a new trial following a concern that, in the absence of proper guidance from the trial judge, the jury may have jumped to a conclusion that the complainant (a young girl who had exhibited unusually sexualised behaviour) had been abused and then to a conclusion that the appellant (a boarder for a time at the child's address) was the perpetrator. Because of the order of the Crown's case, in which the jury heard evidence of the child's sexualised behaviour before they heard evidence of what was actually alleged against the appellant, the Court was concerned that the jury may then have jumped to a conclusion that the charges were proved, without a proper concentration on the elements of the actual charges faced. The Court also expressed concern that the jury may have been overly impressed with very high statistics given by the prosecution's expert witness (of those children showing intrusive sexual behaviour, studies had variously shown 75%, 80% or 100% had been abused) without clear justification and substantial explanation and therefore discounted without proper consideration the other explanations for the child's behaviour suggested by the defence, such as access to pornography or seeing the mother's sexual behaviour with her partners. The combination of these matters raised a real risk that there had been a miscarriage of justice.

The Court also discussed the scope of s23G, noting that it provided for a careful limitation of the role of the expert when giving evidence. The most important point is that the expert must not comment on the complainant's credibility. This means that the expert cannot give an opinion under s23G(2)(c) as to whether or not the child has been sexually abused and certainly not on whether or not the accused is the perpetrator. Under that section, the expert is may give evidence of the consistency or otherwise of the behaviours described in evidence with those shown by sexually abused children of the same age group. Further, evidence given under s23G(2)(c) must be related to behaviours described in evidence by a witness other than the expert. It follows therefore that before s23G(2)(c) evidence can be given there must be admissible evidence of behaviours, which, to be admissible, must be relevant to an issue in the case. Section s23G(2)(c) evidence would not be needed where the behaviours to be commented on are within the ordinary collective knowledge of the jury. When, however, evidence is given of behaviours that may be seen to be outside the normal competence of jurors, such as those relating to the sexual behaviour of young children, it is likely that s s23G(2)(c) evidence will be required before the Crown can rely on the evidence of such behaviours to bolster its case. It may also be of benefit when the behaviour may seem counter-intuitive, for example, in this case, that the complainant still liked the appelland and sought him out.

The Court also noted that, as evidence under s s23G(2)(c) is limited to evidence of consistency or inconsistency, it was implicit that, not only must the evidence say whether there is consistency or not with the behaviour of sexually abused children of the same age group but the expert must articulate how consistent it is and also say if it is consistent with other factors, for example a trauma in the child's life. As well, the proper use of statistics in an expert's s23G evidence is important. If statistics show nothing of probative value then they should not be given at all. Limits of statistics should be explained to the jury. Properly set in context, statistics may be used as one factor that the jury can consider in coming to its conclusion as to whether or not the charges have been proved.

Finally, the Court observed that while there had been comments in cases that some had taken as suggesting that s23G evidence should not now be given, Parliament had said it can be given (and the Law Commission has recommended retention of the section in its proposed Evidence Code) and there will be cases where such evidence is needed. Given the issues that may arise with s23G evidence, the Court said it would be preferable for questions of the admissibility of behaviours and the extent of any s23G evidence to be dealt with pre-trial on a s344A application.

Recent complaint evidence – admissibility of audio taped discussion – whether audio taped discussion amounted to a single incremental complaint or evidenced a separate complaint

In *R v S* (2004) 20 CRNZ 906, the Court dismissed S's appeal against conviction. In December 2002 S was convicted by a jury on one count of indecent assault of a girl under the age of 12 years and one count of sexual violation by unlawful sexual connection occasioned by digital penetration of the genitalia, in respect of the same girl. S was sentenced to 2 years imprisonment. S appealed against his conviction.

The Court granted S leave to appeal out of time on the basis that his case raised a seriously arguable point relating to the admission at trial of an audio tape recording of the victim's complaint.

S is the complainant's aunt's partner. It was alleged that S had committed the offences when staying at the complainant's family home. She had immediately told her father what had happened. The father rang Child Youth & Family Services, following which it was decided that the girl would explain what had happened on an audio tape recording. The taping began approximately one hour and ten minutes after the initial complaint.

S submitted that the audio tape was inadmissible on four grounds. First that it constituted a second complaint, secondly that it was staged, leading, repetitious and not spontaneous, thirdly that it contained irrelevant and otherwise inadmissible material, and finally, that its prejudicial effect outweighed its probative value.

The Court held that in the particular circumstances the audio tape was admissible as recent complaint evidence. The initial complaint made to the victim's father and that evidenced by the recording constituted a single complaint developed incrementally at the first reasonable opportunity. Further, the questions were not leading and did not detract from the spontaneity of the complaint.

The Court did however express considerable diffidence about the practice of producing an audio tape recording of a recent complaint. It suggested that, should a similar case occur in the future, then on the application of counsel or of the Judge's own motion, the circumstances in which a permanent *viva voce* recording was made ought to be examined on a *voir dire* to determine whether the complaint could fairly be regarded as spontaneous, unrehearsed and an element in a single recent complaint. The caution would apply also in respect of attempts to produce *viva voce* permanent records seeking to display alleged distress or other behaviour about which evidence would normally be given as part of the *res gestae*.

Issue of search warrant – admissibility of evidence

R v Hepi and Poihipi CA382/03 402/03 5 April 2004 concerned the execution by police of a search warrant on the residential property of Hepi and Poihipi. That search and subsequent admissions led to them jointly being charged with selling cannabis and possession of cannabis oil for the purpose of supply.

Hepi and Poihipi challenged the lawfulness of the search warrant, submitting that the affidavit in support of the application for it made by the Police was invalid because it lacked specificity. They alleged that it did not detail the circumstances in which the information was obtained by the police officer and that there was no evidence as to the reliability of the informant. The statements were also conclusory and did not contain primary evidence. The District Court held that the warrants were lawfully issued and the evidence obtained was admissible. Hepi and Poihipi appealed.

The Court held that while there were some deficiencies in the application and in the warrant made pursuant to it, the warrant was issued in conformity with the statutory test prescribed by s 198 of the Summary Proceedings Act 1957. It noted however that

it is desirable that the application should set out why information is reliable, why hearsay was resorted to, and should not contain “cutting and pasting” from other applications. Further, it is desirable in affidavits that direct speech be used rather than reported speech.

Admissibility of evidence - whether car lawfully stopped under ss 314B and 227B of the Crimes Act 1961

In *R v Waara and Thompson* CA66/04, 81/04 15 July 2004, the Court dismissed an appeal by Waara and Thompson against a District Court decision, on a s344A application, that a constable had searched their vehicle lawfully.

In March 2003, Police were informed of offenders breaking into a number of cars on a single street. A witness was able to describe the make of their vehicle and the approximate number of offenders involved. Police communications ordered an Officer to drive to a certain roundabout and look for a white Honda Accord with at least four occupants. The Officer stopped the white Honda Accord that Waara, Thompson and three others were in. On approaching the vehicle the Officer saw that the boot was open and noticed that a car stereo with its wires cut was inside.

The appellants submitted that the Officer had a mere “suspicion” that the vehicle was the getaway car and not a “reasonable belief” as required by s 227B of the Crimes Act. The Court held that the Officer knew the make of the vehicle, that there were at least four occupants, the location of the offending and the fact that there were only two exits from that area, one of which he was covering. It held that the actions of the Officer were reasonable and justified in the circumstances and that the stopping of the vehicle was lawful.

Similar Fact Evidence – Identification Evidence - Prejudicial Comments by Crown Witness – Expert Evidence Directions

In *R v Guild* CA 219/04, 11 October 2004 the Court dismissed Mr Guild’s appeal against conviction and sentence for offences arising out of the death of two, and the injury of another, of Mr Guild’s passengers following a high impact collision at traffic lights near Lower Hutt. Mr Guild was found to have made a deliberate turn against a red light into the path of Mr Sika, who had himself run through lights changing from amber to red. Mr Sika was charged with careless driving causing injury and death. Mr Guild was convicted of two counts of manslaughter and one count of recklessly operating a motor vehicle and thereby causing injury. He was sentenced to three and a half years imprisonment, and disqualified from driving for five years, on each of the manslaughter counts.

The case had already been before the Court on a pre-trial matter relating to the admissibility of similar fact evidence at trial (CA 84/04, 7 April 2004). As a result of that appeal, the evidence was admitted. In this appeal, the Court dismissed Mr Guild’s complaints about the way that the Judge dealt with similar fact evidence. The Court held that the trial Judge gave careful and clear instructions to the jury regarding the relevance of the evidence. The evidence could only go to the likelihood of Mr Guild driving through a red arrow on the day of the accident, and not whether such conduct amounted to a major departure from the reasonable standard of care

required. In relation to other similar fact evidence, the Court held that there was no need for the Judge to warn the jury under s 344D of the Crimes Act 1961 of the “special need for caution before finding the accused guilty in reliance on the correctness of such identification”. Section 344D only applies where the issue relates to the identity of the accused on the occasion charged.

The Court also considered whether a mistrial should have been declared in circumstances where a Crown witness had made allegedly unfairly prejudicial comments. The Court noted that the character of what the Crown witness said was not as bad as sometimes emerges, and was quite unconnected with the events that were actually before the Court for consideration. The Court held that the Judge had responded appropriately in giving a strong and specific warning in summing up to the jury.

In relation to the Judge’s summing up, the Court said that failure to instruct a jury as to the effect of expert evidence does not automatically lead to a miscarriage of justice. Whether a direction as to expert evidence is required depends on the circumstances of the case. If there are matters which are clearly in dispute on which expert evidence is led, then it will be most unusual for direction as to the use of that expert evidence not to be required, and given. In this case, the expert opinion evidence was of a very limited character, and defence counsel had not intervened although he had had the opportunity to do so in the High Court.

The Court dismissed a complaint that the Judge gave a biased summing up. A Judge is entitled to express a view on the facts and even express it in strong terms, provided it is made clear to the jury that it is for them to decide the issues of fact.

The Court found that the Judge did properly traverse the defence and the evidence relevant thereto in the summing up. This ground of appeal comes down to whether there was something in what counsel for the appellant had said which was of such distinct importance to the defence that it ought to have been specifically raised with the jury or enlarged upon by the Judge. The Court was satisfied that there was no miscarriage of justice here.

The appeal against sentence was based on disparity with the sentence imposed on Mr Sika. The Court dismissed this appeal. The mere fact that one of two co-offenders has received a short sentence is not necessarily a ground for interference. Mr Sika and Mr Guild were not co-offenders in the normal sense of that term, and Mr Sika faced the lesser charges of careless driving causing death and injury. Given Mr Guild’s personal circumstances, his previous convictions, and the degree of his culpability, an independent observer would not consider that something had gone wrong in the circumstances of this case by the disparity between the sentences.

Leave to appeal to the Supreme Court has been refused.

Searches pursuant to search warrants - New Zealand Bill of Rights Act 1990

In *R v Poelman* (2004) 21 CRNZ 69, the Court dismissed an appeal against a pre-trial ruling, which had held evidence obtained pursuant to search warrants to be admissible.

In November 2002 and June 2003, two searches were executed on a property where Poelman was living. Police found cash, drugs, drug paraphernalia, and a record of drug debts and debtors. Poelman was charged with supplying, and possessing for supply, methamphetamine. He asserted that both searches were unreasonable under s 21 of the New Zealand Bill of Rights Act and that the evidence resulting from them was inadmissible. Poelman appealed against a pre-trial ruling holding the evidence to be admissible.

The Court ruled that both drug searches were reasonable and the evidence obtained admissible. Poelman's appeal was accordingly dismissed.

The Court made a number of observations about issuing search warrants. First, the appropriateness of the Deputy Registrar's decision to issue a warrant should have been considered solely on the basis of the sworn application before him, not on the actions of the detective who drafted the search warrant application. Second, the Police could have avoided this challenge by improving their drafting technique for search warrant applications. The Court noted that it is preferable to support applications by direct testimony rather than rely on hearsay; deponents should use direct speech wherever possible, not reported speech; and deponents should use active voice rather than passive expressions. Further, the Police should draft applications and affidavits with as much specificity as possible. Finally, the Court observed that the Judge considering a challenge of this kind should read the unedited affidavit.

Admissibility – Breach of rules 2 and 9 of the Judges' Rules

In *R v Ritchie* CA284/04 15 October 2004, the Court restated the role of the Judges' Rules. The Court noted that the New Zealand Bill of Rights Act 1990 has largely rendered the Rules obsolescent. The general approach should be to rely upon the Act, but courts retained a general discretion to exclude evidence on the ground of unfairness, as to which the Judges' Rules remained a helpful guide.

The case concerned the admissibility of evidence of statements made by the appellant to police while they were searching his house after an alleged domestic incident. The challenge was, first, to the absence of a caution. It was submitted that when the appellant made the statements, the officers had already or objectively should already have, decided to charge him. A caution should therefore have been given under rule 2 of the Rules. The Court concluded on the facts that the officers had not decided to charge the appellant, and that the circumstances were not such that objectively they should have given the caution. There was therefore no unfairness in admitting the evidence.

The second challenge was to the failure to seek the appellant's signature on the Officer's record of the admissions. The Court concluded that rule 9 applied to statements made following the customary caution, which had a degree of formality. That was not the present situation. Approaching the matter in terms of fairness there



was nothing capable of justifying the exclusion of the evidence. The appeal was therefore dismissed.

Foreign Diplomat – Vienna Convention on Diplomatic Relations – Meaning of “Inviolable”

In *R v X* CA299/04 18 October 2004, the Court considered an appeal by X against a pre-trial ruling admitting certain evidence in his trial on a charge of indecent assault.

X is a diplomat. X is alleged to have committed an indecent assault on a young woman who had been working for him as a nanny. X had been charged with indecent assault, and diplomatic immunity had been waived with respect to the charge. A semen sample was taken from the complainant’s hair.

This appeal relates to a ruling on a s 344A application by the Crown to admit the hair and semen sample. X argued that the semen, being a fluid from the body of a diplomatic agent, should not be held or used without consent by the Police (who are agents of the receiving state). This argument was based on Article 29 of the Vienna Convention on Diplomatic Relations, which states, inter alia, that “the person of a diplomatic agent shall be inviolable.”

The Court upheld the pre-trial ruling admitting the evidence, considering that the “start and end point” of the issue lay in the proper construction of the word “inviolable” in Article 29. The Court concluded that both the literal meaning and spirit of the term could not appropriately be seen as bearing a meaning other than “freedom from executive or from judicial violation, interference or constraint”.

Applying that to the situation before it, the Court held there was no breach of Article 29. This was because the receiving state had done nothing to detain, arrest or otherwise constrain X to obtain the sample. The Court also noted that while the ownership of genetic material is a complex area of the law it would have, were it required to do so, held the semen to have been “abandoned” or “discarded” by X.

Admissibility of inculpatory statements – Breach of Bill of Rights Act and unfairness – Requirements for detention – Scope of obligation to inform accused of availability of legal advice

R v Fukushima & Ors, CA128/04, CA130/04, CA134/04, CA170/04 13 September 2004 involved pre-trial appeals by four men accused of the murder of a Japanese student at a West Auckland academy. A group of students assaulted the victim over a period of several hours, and his death resulted from the injuries sustained in the assaults. When police arrived, they moved those people present at the academy onto the driveway, and then into a nearby garage away from the crime scene. They were then taken to the police station where the four appellants each made statements to the police. The pre-trial rulings involved various allegations of breaches of the New Zealand Bill of Rights Act.

In relation to Mr Fukushima the Court accepted the findings of the High Court Judge that there had been no communication or manifestation by the police of an intention to apprehend or hold him sufficient to constitute an arrest up until the time at which he

was advised of his rights. Therefore, at the time he admitted his involvement in the assaults, he was not detained and there was no obligation to advise him of his rights under s 23. While the police had acted authoritatively in directing people to assemble in the garage, this was in order to seek co-operation and to protect the crime scene, not to detain those present.

The Court further concluded that there were no circumstances in the present case calling for the police to make further inquiry as to whether or not Mr Fukushima understood his rights. The police were entitled to take his answer that he understood his rights at face value. There was no need to establish a generalised approach whereby access to an interpreter should automatically be offered to any suspect who does not have English as a first language. The approach in *R v Mallinson* [1993] 1 NZLR 528 should suffice, so that the focus is on the degree of understanding of the particular accused person, and whether the Crown has proved that the person understood the substance of his or her s 23(1)(b) rights. Mr Fujita's position was the same.

The Court also indicated, contrary to the view taken in *R v Kai Ji* [2004] 1 NZLR 59, that the law had not reached the point whereby advice as to the existence of the Police Detention Legal Assistance scheme was a prerequisite to police questioning.

The Court also concluded that Mr Oshima had not been detained for the purposes of s 23, but noted that had s 23 applied, the police would have been in breach of their duty to facilitate the exercise of his right to a lawyer. He had indicated that he wanted to talk to a particular lawyer, but was unable to tell the police officer the lawyer's name. However, he did give information that would have allowed the lawyer to be identified after reasonably simple inquiries. Nonetheless the interview proceeded without any effort being made to contact the nominated lawyer.

In relation to the fourth accused, Mr Hiraki, the Court adopted the reasoning of the High Court Judge that he had waived his right to legal advice, knowing the jeopardy he faced. He knew that the victim had died and that he had some involvement in the death. There was no indication that Mr Hiraki did not understand that he was entitled to a lawyer immediately, or that the right was only exercisable after he had answered questions. The exchanges between Mr Hiraki and the police officer were all translated into Japanese for him.

As a result, all four appeals were dismissed.

Admissibility of DNA evidence

In *R v Hanna* [2004] 2 NZLR 301, the Court considered an appeal against a s 344A ruling that DNA evidence was admissible at the trial of the appellant on charges of aggravated robbery and kidnapping. Samples of blood found at the crime scene were subjected to DNA analysis. This resulted in matches with the appellant's DNA extracted from a blood sample that had been obtained pursuant to a databank compulsion order made under the Criminal Investigations (Blood Samples) Act 1995. Largely on the basis of this match, the High Court Judge made a suspect compulsion order against the appellant and this resulted in a further blood sample being obtained. The Crown intended to lead this evidence of DNA matching at trial. The appellant

objected on the basis of flaws in the form of the original databank compulsion order, and the circumstances in which the order was executed.

The Court accepted that the blood sample for the databank was taken otherwise than in accordance with the Act because the police did not comply with the s 50 obligation to take reasonable steps to ensure that the appellant's lawyer was present at the taking of the sample. The next issue was whether the taking of the sample was in breach of s 21 of the New Zealand Bill of Rights Act. While this was finely balanced, the Court adopted the conclusion of the High Court Judge that it was unreasonable. This was particularly because the appellant had protested at the absence of his lawyer at the time, and no steps were taken to clarify why he was not present.

In considering whether the Judge was nonetheless entitled to have regard to the databank sample in deciding whether to make a suspect compulsion order, the Court acknowledged that there is no direct right of appeal against the grant of the suspect compulsion order. However the Court was prepared to assume that the decision was subject to review on an appeal against a subsequent s 344A ruling. In *R v T* [1999] 2 NZLR 602, the Court of Appeal held that the language of the Act as a whole implied that a blood sample taken otherwise than in accordance with the Act could not be used in evidence. This did not require a conclusion, however, that the blood sample had to be disregarded on an application for a suspect compulsion order. The position of a suspect was capable of fair protection by reliance on s 21 of the New Zealand Bill of Rights Act. It would be highly destructive of the utility of the databank scheme to conclude that in circumstances where there was a breach of the Act when the sample was taken, that sample cannot be taken into account for the purposes of a suspect compulsion order application or a search warrant application.

In this case, on an application of the balancing test in *R v Shaheed* [2002] 2 NZLR 377, it was inevitable that the evidence would be admitted. The deviations from the procedure laid down by the Act were not causative of the blood sample being taken. If the police had complied with the procedures in the Act to the letter a sample would in any event have been taken. The appeal was dismissed.

Sexual offending – admissibility of video statement – Evidence Amendment Act (No 2) 1980 – Health Information Privacy Code 1994

In *R v Matthews* CA370/03 8 March 2004, the Court dismissed an appeal against a pre-trial ruling finding a video statement made by Matthews to the Police to be admissible.

Matthews was said to be a paedophile suffering from bipolar affective disorder. He was previously subject to a compulsory treatment order. In May 2002, after being discharged from the psychiatric ward at Rotorua Hospital, he attended the hospital again as an outpatient. During this visit, he disclosed to a doctor that he had had sexual contact with a young boy, a relative of the person at whose house he was staying. Matthews said that he was distressed by what he had done and needed help. Thinking there was a child at risk, the doctor sought and obtained Matthews' permission to involve the Police. Matthews gave a video interview to the Police in which he made admissions capable of supporting the charges he now faces.

The appellant challenged the admissibility of the video statement on the ground that there had been a breach of s 33 of the Evidence Amendment Act (No 2) 1980. The District Court found the evidence to be admissible. He appealed against that ruling.

The Court found that s 33, which prevents a medical practitioner from, in any criminal proceeding, disclosing protected information given to him by a patient, except with the consent of the patient to be inapplicable since the information the doctor divulged was given at the “pre-proceeding” stage.

The Court further found that the evidence could not be ruled inadmissible on the ground that it had been unfairly obtained. The evidence was said to be unfairly obtained by virtue of the fact that the doctor’s divulgence of the information was inappropriate in light of s 33, and that there was a nexus between that disclosure and Matthews’ statement. The Court found that given that Matthews was given the appropriate caution and accorded his rights under the New Zealand Bill of Rights Act, there was no nexus between the doctor’s disclosure to the Police and Matthews’ statement. In any event, there was no breach of s 33.

Finally, the Court rejected the argument that the doctor disclosed the information in breach of the Health Information Privacy Code 1994. The Court found that the doctor did have the appellant’s authorisation to contact the Police, and that even if he did not, his actions were justified by reason of the imminent threat to another person.

The Court expressed one reservation. It observed that the lower court did not explore the issue of whether Matthews’ rights were properly brought home to him in light of his mental disorder. It noted that in certain circumstances, more than a bare statement of s23 rights may be necessary in cases where the suspect has a mental disorder or physical disability which could interfere with his comprehension of the rights.

Intercepted Text Messages – Admissibility

R v Cox (2004) 21 CRNZ 1 was an appeal against a pre-trial ruling relating primarily to the admissibility of text messages obtained by the police from Vodafone prior to the 2003 enactment of legislation dealing with the issue.

Vodafone maintains electronic records of text communications for up to 32 hours, after which it deletes them. However, electronic text messages involving a particular telephone number can be retained by “pre-loading” that number. Pre-loading aborts the deletion process and the electronic information as to all texts associated with that number are automatically transferred each day into a separate database for indefinite storage.

The Court said that pre-loading does not involve interception, either in its ordinary sense or as defined in the Crimes Act 1961 and the Misuse of Drugs Amendment Act 1978. Equally, the daily generation and preservation of information relating to text communications is not an interception.

The appellants argued that the dissemination of information relating to the text communications was prohibited by what were then ss 114 and 115 of the Telecommunications Act 2001 (which have since been amended). The Court said that

the pre-loading process and the prior generation of electronic information relating to text messages were not an interception for the purposes of s 114. The concept of interception in this context referred to processes that occur simultaneously with a communication and/or its transmission.

The Court further held that the interception of a telecommunication is not rendered illegal under s 216B(1) of the Crimes Act, which applies only to oral communications. The Court was also reluctant, on policy grounds, to find in the legislation an implied prohibition on police or court access to text records.

The Court was prepared to accept that those who use texting transmission facilities would expect the network operator to maintain confidentiality in relation to those communications. However, it said that there was no confidence in iniquity, and it found difficulty in seeing how any implied obligations of confidentiality could have been breached in communications which appeared to have occurred in the context of drug dealing activities. Similarly, the Court noted that the information privacy principles under s 6 of the Privacy Act 1993 were subject to an exception associated with the detection and investigation of offences, and in any event do not confer legally enforceable rights.

The Court was also prepared to accept that when Vodafone retained and later gave the relevant electronic information to the police, this involved a search and seizure of correspondence (even though this point was not entirely free from doubt). On this basis, the Court said that there was sufficient police involvement and instigation to engage s 21 of the New Zealand Bill of Rights Act 1990.

The Court said that the interception warrant procedures provided under the Crimes Act and Misuse of Drugs Amendment Act only apply to oral communications and could not be used to obtain texting information. Equally, a call data warrant permits the collection of much information associated with text communications, but not its actual content. On the other hand, although a search warrant is ill-suited to the obtaining of electronic information, it is of broad reach and would permit the seizure of material storing and recording electronic information as to texting communications. The Court said it was common under modern police practice for information stored electronically to be provided in response to search warrants and by processes which necessarily involve a high-level of cooperation by those to whom the warrants are addressed. There was no basis for concluding that such cooperation invalidated the grant or execution of a search warrant. The Court held the text information was appropriately obtained under warrant.

The Court observed that the ability of the police to obtain the relevant information by other statutory processes was not entirely clear and also not without difficulty. However, it was possible that Vodafone, which had been in possession of the relevant information, was merely as a good corporate citizen cooperating with the police in legitimate enquiries. Vodafone could fairly have concluded that there was a legitimate basis for the police operation, and this would have alleviated confidentiality concerns. The Court thus held that the texting information not obtained pursuant to a warrant was done so under what was probably official search and seizure, and this was in any event both lawful and reasonable. The appeal was dismissed.

Admissibility of evidence of complainant's good character

In *R v W* CA235/04 30 August 2004 the appellant had been convicted of two charges of indecent assault of a nine year old boy which took place after the appellant began living in the boy's home as a boarder. The sole ground of appeal was that, during the course of the trial, the Crown should not have been allowed to lead evidence from one of the complainant's teachers as to the complainant's general honesty and reliability when the complainant's credibility was effectively the only issue for the jury. The Crown's position was that in a video interview with the Police the appellant had put the complainant's character sufficiently in issue to allow rebuttal evidence to be led.

The Court observed, however, that the appellant's attack on the complainant's honesty was made in a video interview that was conducted without legal advice and in response to a quite improper line of questioning by the police officer. The Court noted the appellant is also of limited intellectual capacity. In such circumstances it was not possible to view the comment made in that interview, to the effect that the complainant was a known liar, as displacing the normal rule that evidence to boost the credibility of a witness is inadmissible. As the trial depended on an assessment of the complainant's credibility, anything that improperly enhanced that credibility in the eyes of the jury must be seen as having led to a miscarriage of justice, in particular as the Judge had in summing up clearly directed the jury that the teacher's character evidence could be a matter they could take into account in assessing the complainant's credibility and stressed the independence of her evidence.

The Court set aside the convictions and ordered a new trial.

Sentencing

Appeal procedure – Requirement for legal representation at sentencing

The appellant in *R v Condon* (2004) 21 CRNZ 124 appealed against convictions for threatening to kill and attempting to defeat the course of justice. He had fallen out with counsel shortly before trial and since counsel was granted leave to withdraw, the appellant was required to appear for himself at trial, which he was accustomed to doing. He argued that he was unrepresented, and the Judge should have adjourned the proceedings once counsel was given leave to withdraw.

The Court considered s 24 of the New Zealand Bill of Rights Act 1990, which sets out the rights of persons charged, and s 30 of the Sentencing Act 2002, under which imprisonment is not to be imposed without an opportunity for legal representation. The Court held that if construed literally, s 30(1) imposes a jurisdictional bar on imprisonment. The Courts, however, have acted on the basis that legal representation is not limited to appearances by counsel in Court. This interpretation is not inconsistent with the New Zealand Bill of Rights Act. The Court held that in this case, the involvement of counsel prior to trial, which included a full exploration of the availability of defences and the advantages of a guilty plea, satisfied the requirements of s 30(1), and there was not otherwise a miscarriage of justice. The appeal was dismissed.



Sexual offences with underage girls - Appropriate range of sentence and discount – Use of internet to find victims

In *R v Boyd* (2004) 21 CRNZ 169, the Court allowed an appeal by the Solicitor-General against a sentence of 2 years imprisonment imposed on the respondent for six counts of sexual offending against six teenaged girls. The respondent was a junior doctor who sought female company via internet chat rooms, resulting in a series of meetings with teenaged girls – including the victims, who were between the ages of 13 and 15 at the time. This led to unlawful sexual encounters on about twenty occasions.

The Court noted that the nature of the legislation involved was prophylactic, and therefore the fact that the conduct could be described as “consensual” was of no moment. Further, the Court referred to recent English Court of Appeal statements noting the long-term psychological effects on young girls who become enmeshed in sexual activity with men significantly older than they are. The Court also endorsed comments of the English Court of Appeal that the use by older men of internet chat rooms for sexual purposes is to met by a clear message of disapproval by the Courts.

Noting comparable English and Australian sentences, the Court commented that the sentence in this case was “decidedly too low”. Bearing in mind that the appeal was by the Solicitor-General, the Court took a starting point of 4½ years, but noted that had the matter been before the Court *de novo*, a starting point of at least 5 years would have been likely. In the result, a discount of 1½ years was allowed for mitigating factors, and the respondent’s sentence was increased to one of 3 years imprisonment.

Level of sentence for serious assaults on young child

In *R v Wilson* [2004] 3 NZLR 606, the Court allowed an appeal by the Solicitor-General against the sentence imposed on Mr Wilson for a series of serious assaults against his very young daughter.

Mr Wilson was sentenced for injuring with intent, causing grievous bodily harm with intent and four counts of causing grievous bodily harm with intent to injure. These related to events that had occurred during a six-week period where his daughter was between six and twelve weeks old. She received significant injuries as a result of the assaults – her forearm, ribs, collarbone and leg were broken and her skull fractured. Mr Wilson was sentenced to concurrent sentences of 3½ years imprisonment for causing grievous bodily harm with intent, 2 years 4 months for causing grievous bodily harm with intent to injure, and 12 months for injuring with intent. The Judge declined to impose a minimum non-parole period.

The Court noted that the sentencing range for manslaughter of a child in comparable circumstances has increased markedly in the past decade. Given this, it considered it appropriate to review what constituted an appropriate sentence for cases of serial violence against young children.

The Court considered that the overall sentence in the present case must reflect the fact that there were a series of assaults on a very young and defenceless child and that these caused serious injury to the child. This, in the Court’s view, brought the

offending into the most serious category of offending against children. The criminality was not diminished by a claim that the danger was not appreciated by the perpetrator. The provisional view of the Court was that similar offending could well attract a starting point of 8 years imprisonment, as the only distinguishing feature between this situation and that of manslaughter was that “fortuitously” the victim survived. These conclusions were buttressed by comparative sentencing levels and principles in England and Australia.

In this particular case, the Court concluded that the lead sentence should have been in the 8-year range, with a discount of perhaps 1 year for mitigating circumstances. Given that the appeal was brought by the Solicitor-General, the least possible sentence was imposed – one of 6 years imprisonment. The Court also concluded that the circumstances of the case made it clearly one for which a minimum period of imprisonment was appropriate, and a 3 year minimum period was set.

Murder – Presumption of 17 year minimum term unless “manifestly unjust”

R v Williams CA64/04 and *R v Olson* CA117/04 20 December 2004 were Solicitor-General appeals against sentences of 15 years imposed for murder. In each case, s 104 of the Sentencing Act 2002 applied because specified aggravating features were present. That section required a minimum term of imprisonment of at least 17 years, as well as a life sentence, unless that was “manifestly unjust”. The Court discussed the proper approach to sentencing governed by the section.

The first step should normally be to compare the gravity of the offending with that which would attract the statutory norm of a 10 year minimum period. The Court should have regard to the legislative policy that murders with specified features should normally attract a 17 year minimum term. That approach would lessen the problem of double counting aggravating features in assessing culpability.

If the Court concluded that the gravity of the offending did not warrant a term of 17 years, the next step was to consider whether it would be “manifestly unjust” to impose a 17 year term. That requirement limited the discretion of the sentencing Judge to impose a lesser sentence. One could be imposed only if injustice was clear having regard to all the circumstances of the offence and the offender. In that sense, cases attracting a lesser term would be exceptional, but there was no requirement of rarity. The Court held that all mitigating factors, including a plea of guilty, could be taken into account when determining whether injustice was manifest. A real discount must normally be given for a plea, but it need not be the full discount that would have been given but for s 104.

This approach was applied to the two appeals. In *Williams*’ case, the Court concluded that the Judge had taken the wrong approach to assessing his culpability, concluding that the qualifying factor under s 104 could not justify increasing the minimum term above 17 years. The vulnerability of the victim, who was the child of *Williams*’ partner, combined with other factors, meant that a starting point of 20 years should have been adopted before mitigating factors were considered. The most significant of these was the guilty plea, which justified a reduction at least to 17 years. As that term incorporated a real discount for the plea, the Court concluded it would not have been manifestly unjust to impose a 17 year minimum term. The appeal was therefore allowed and a 17-year term was substituted.

In Olson's case, the Court said that s 104 applied only by a narrow margin and that the aggravating factors did not markedly increase his culpability. A starting point of around 17 years was appropriate, with a real discount having taken the term down to 15 years. The Court held that the sentence was neither wrong in principle nor manifestly inadequate, and dismissed the appeal.

Manslaughter – Whether 2 years' imprisonment manifestly inadequate – Appropriateness of starting point – Whether the Crown should be permitted to adopt a stance different from that taken at first instance

In *R v Maposua* CA131/04 3 September 2004, the Court granted leave to the Solicitor-General to appeal against the sentence imposed on the respondent. The respondent had hit the deceased on the head with a broom, causing a severe laceration, irreversible brain damage and subsequently death. He pleaded guilty to manslaughter and was sentenced to 2 years imprisonment.

At sentencing, following arguments by the Crown for a starting point of between 4 to 6 years imprisonment, the Judge adopted one of 4 years. He later reduced it by 50% for the significant mitigating features. On appeal, the Solicitor-General did not challenge the 50% reduction. Rather, contrary to the Crown's submissions at first instance, he submitted that the starting point adopted was manifestly inadequate. In accordance with *R v Tipene* [2001] 2 NZLR 577, this Court held that the Crown is not debarred from taking a different stance on appeal from that taken at first instance. It held that the starting point adopted and the sentence to which it led to were manifestly inadequate in the circumstances.

A starting point of 5 years imprisonment was substituted. The Court noted that given that this was a Solicitor-General's appeal, the sentence must be adjusted no more than the minimum extent necessary to remove the element of inadequacy.

The Court was satisfied that a different sentence should have been passed in terms of s 385(3) of the Crimes Act 1961 and the original sentence was quashed and substituted with one of 2½ years imprisonment.

Proceeds of Crimes Act

In *R v Jury* [2004] 2 NZLR 457, the Court held that an application for a pecuniary penalty order under s 8 of the Proceeds of Crime Act 1991 is made when the notice of application is filed. Under s 9, the notice must "identify the benefits that are alleged to have been derived from the commission of the offence" with sufficient particularity to enable the convicted person to identify the type of benefit alleged. However, it is not necessary to precisely quantify the benefits. Where it is not possible to quantify the amount of the benefit with exactitude, the alleged method or alternative methods of calculation should be specified. It is not sufficient to identify them by reference to other documents or material.

Non-compliance with the Act does not necessarily render an application a nullity or deprive the Court of jurisdiction to make the pecuniary penalty order. Where non-compliance does not cause prejudice to the convicted person, that person is not

granted immunity, but may apply for further particulars. To hold otherwise would defeat a purpose of the Act, which is that a person who engages in criminal activity should pay the profits from that activity, either by a forfeiture or pecuniary penalty order.

It is not the policy of the Act to further punish other than the making of a pecuniary penalty order. However, the Act does not require the Court to consider the convenience of the convicted person in determining the conditions of payment, and once an order is made, the Crown is entitled to enforce payment in the normal manner. Section 82(3) of the Act refers to the procedure to be followed when fixing a pecuniary penalty order, not the substance to be taken into account. It does not incorporate s 8 of the Sentencing Act 2002.

Child manslaughter – Appropriate starting point for sentence

In *R v Waterhouse* (2004) 20 CRNZ 897, the Court allowed an appeal against a sentence of 10 years imprisonment, with a non-parole period of 6 years, imposed on the appellant for child manslaughter.

The appellant was charged with the murder of a young child who lived with him under a foster-care arrangement. There were two trials, both proceeding on the basis that the appellant accepted his guilt of manslaughter but denied murderous intent. At the second trial, he was acquitted of murder and found guilty of manslaughter. At sentencing, the Judge adopted a starting point of 12 years imprisonment and deducted 2 years to reflect the mitigating factors, thereby arriving at a sentence of 10 years. The Judge was also satisfied that the statutory threshold for a minimum non-parole period was met and accordingly imposed one of 6 years.

Mr Waterhouse appealed against his sentence. This Court held that his culpability was about equal to that of the offender in *R v Leuta* [2002] 1 NZLR 215 in which a 10 year starting point was imposed. The facts of this case and those in *Leuta* were virtually indistinguishable. While the Court was not prepared to say that a starting point above 10 years was beyond the available range, there was no justification for a 2 year discrepancy in starting point between *Leuta* and the current case. Given the facts, the Court considered a starting point of 11 years imprisonment to be as much as could be justified in this case.

The Court further considered a 2 year deduction for the appellant's early guilty plea in relation to manslaughter and his previously good record to be inadequate. The Court held that a deduction of three years was necessary to adequately mark the mitigating factors. It substituted a sentence of 8 years imprisonment with a non-parole period of 5 years.

Sexual violation by rape – Appropriate discount for guilty plea at earliest opportunity

In *R v P* CA 38/04 7 September 2004, the Court allowed an appeal against a sentence of 9 years imprisonment imposed for sexual violation by rape. The appellant entered the victim's home in the early hours of the morning and removed the bedroom light bulb. He then woke the sleeping victim and had full sexual intercourse with her including ejaculation. ESR found a Databank match with the appellant on DNA

analysis. The match was inadmissible but provided the basis for a suspect compulsion order. The fingerprint evidence found on the light bulb and the DNA identification collected from the suspect compulsion order sample effectively left the appellant defenceless and he pleaded guilty on his first court appearance.

The Court considered the 10-year starting point adopted by the District Court to be within the appropriate range given the aggravating features identified. However, a 10% discount for his very early guilty plea was considered insufficient. It was noted that it is usual for discounts of 25 to 33.3% to be allowed for such pleas, and only in unusual cases would a smaller discount be imposed. The Court was not satisfied that such a small discount could be justified in this case on the basis of the aggravating features, stating that this would amount either to double counting or over-weighting those aggravating features. The aggravating features were already fully considered in lifting the starting point from 8 to 10 years imprisonment.

It followed that the sentence imposed on the appellant by the District Court was manifestly excessive. The Court considered a discount of 20% to be appropriate for the very early guilty plea, and a sentence of 8 years imprisonment was accordingly substituted.

Criminal procedure – Sentencing Act 2002 – Whether there is a right of appeal against refusal to defer the start date of a sentence of imprisonment

In *R v Morgan* [2004] 3 NZLR 738 the Court held that a defendant who has applied under s 100 of the Sentencing Act 2002 for a deferment of the start of their sentence of imprisonment does not have a right of appeal against a refusal to grant such a deferment.

On 21 May 2004, the appellant was sentenced in the District Court to 18 months imprisonment for arson. She was granted leave to apply for home detention. Her counsel immediately applied for a deferment of the start date of her sentence under s 100. The Judge refused to defer it. She appealed against his refusal but not against the sentence of imprisonment.

The Court held that it is clear that Parliament did not intend there to be a right of appeal from a decision under s 100. Where a right of appeal is intended, Parliament has made that intention clear with express words. The Court cited ss 98, 73, 105 and 116 of the Sentencing Act as examples. A right of appeal would be inconsistent with s 100(4)(b), as well as ss 76 and 78 of the Parole Act 2002. Further, the absence of an appeal right is unsurprising in light of the highly discretionary nature of a s 100 decision, and its limited effect on the offender. A right of appeal would also provide the result of a deferment by means of bail pending the hearing of the appeal. The Court referred to the Parole (Extended Supervision) and Sentencing Amendment Bill, which proposes to clarify (as oppose to amend) s 100 by putting it beyond doubt that there is no right of appeal against a refusal to defer.

The Court rejected the argument that a refusal to defer is an “order of the Court made on conviction” and hence “a sentence” for the purposes of s 379 of the Crimes Act.

The Court dismissed the purported appeal on the ground of lack of jurisdiction.

Criminal appeal procedure – Sentencing – People Smuggling

In *R v Chechelnitski* CA 160/04 1 September 2004, the Court upheld a sentence of 3½ years on 3 charges of migrant smuggling of 3 Ukrainians who had paid for false Israeli passports and the guidance of Mr Chechelnitski to steer them through the New Zealand immigration processes and assist them in finding accommodation and work.

The Court considered the starting point of 5 years taken by the sentencing judge was entirely appropriate and could even be seen as generous. Migrant smuggling was to be seen as a serious offence, concerning conduct that the international community had declared as requiring effective action to prevent and combat, and for which New Zealand was obliged, under the United Nations Convention Against Transnational Organised Crime and associated protocols, the Trafficking Protocol and the Migrant Protocol, to provide sanctions that take into account its gravity. Whilst it was true the Ukrainians involved appeared to be willing participants, and there was no evidence to conclude that the appellant was a member of an organised criminal group, it was clear, from the 20 year maximum for the offence and the legislative history, that migrant smuggling was to be seen as a serious offence whether the aggravating factors in s 98E of the Crimes Act 1961 were present or not. The Court considered that accordingly the Judge was quite correct to treat the primary sentencing consideration as being the need for deterrence.

With regard to mitigating factors the Court considered that the Judge quite rightly refused to contemplate imposing a fine in lieu of imprisonment. The discount of 18 months was entirely appropriate for mitigating factors of the guilty plea (in the face of a strong Crown case), the Appellant's previous good character, remorse (such as it was) and the assistance provided to the authorities. A disparity argument was also rejected given that the Ukrainians were sentenced for a different offence (which carried a lower, 7 year, maximum term of imprisonment) and on the rather generous basis that they had been duped into the offending by Mr Chechelnitski.

Sentencing levels for the corrupt use of official information

In *R v Palmer* CA332/03 31 March 2004, the Solicitor-General sought leave to appeal against a sentence of 18 months imprisonment imposed on the respondent in respect of two convictions under s 105A of the Crimes Act 1961 for the corrupt use of official information. The respondent, together with a co-offender, used information obtained in the course of his employment as a fixed interest dealer with the Government Superannuation Fund to make a profit of nearly \$270,000. The Solicitor-General's position was that the sentence imposed was manifestly inadequate and wrong in principle, relying on the case of *R v Nua* [2003] 3 NZLR 483 where a sentence of 4 years imprisonment was upheld on appeal. *Nua* concerned the corrupt activities of a customs officer over a number of years.

The Court observed that the purpose of s 105A is to ensure that persons employed in the public service are held to a higher level of integrity than persons in the private sector, in order to preserve confidence in the administration of public affairs. Accordingly, a starting point of 3 to 4 years imprisonment would have been appropriate in this case, resulting in a final sentence of at least 2½ years after taking



into account aggravating and mitigating circumstances. The Court made a statement to this effect, but did not increase the respondent's sentence for reasons peculiar to this case.

Murder – Allowance for guilty plea in case where s 104 of the Sentencing Act applies

R v Tumahai CA262/04 26 October 2004 concerned an appeal against a sentence passed in respect of a murder to which s104 of the Sentencing Act 2002 applied. The trial Judge had allowed a discount of 3 years from the 17 year minimum period of imprisonment required by s 104 to account for an earlier guilty plea. The appellant claimed that this discount was insufficient, resulting in a sentence that was manifestly excessive.

The Court noted that the question of whether an early guilty plea is a factor to be taken into account in determining whether to depart from the mandatory 17 year period required by s 104 had yet to be determined (see *R v Williams and Olsen* CA64/04 & 117/04). Assuming, however, that it could be, the Court held that the guilty plea could not be accorded the same weight in cases to which s 104 applies. Reduction from the mandatory 17 years could only occur in exceptional cases. The Judge had been merciful and generous in reducing the mandatory period and could not properly have afforded a greater discount while recognising and respecting the mandatory requirements of s 104. The appeal against sentence was dismissed.

Manslaughter

In *R v Manukau* CA204/04 & 207/04 15 November 2004, the appellant was found guilty by a jury of manslaughter and wounding with intent to cause grievous bodily harm, and was sentenced to a total of 7 years imprisonment with no minimum non-parole period. The Court observed that the verdicts implied that the appellant's self-defence argument was rejected by the jury. The appellant appealed against conviction, and the Solicitor-General sought leave to appeal against sentence in relation to the non-parole period.

The appellant argued that the summing up was unfair, and the Judge ought not to have read to the jury passages from the evidence of 4 of the 22 eye-witnesses who gave evidence. The Court held that summing up in the context of the case was not unfair, and the appeal against conviction was dismissed.

The Court, however, observed that the sentence was lenient given that the offending was on the murder/manslaughter cusp, and comparable cases suggested a non-parole period was appropriate. The application for leave to appeal against sentence was granted and the Court varied the sentence by imposing a 3½ year non-parole period, as sought by the Solicitor-General.
