IN THE SUPREME COURT OF NEW ZEALAND SC 145/2016

BETWEEN **DAVID BROWN**
GLEN SYCAMORE
Appellants

AND **NEW ZEALAND BASING LIMITED**
Respondent

Hearing: 13 June 2017

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: P G Skelton QC and S C I Jeffs and G M Pollak for Appellants
A H Waalkens QC and M G Lawlor for Respondent
A S Butler and M W McMenamin for the Human Rights Commission as Intervener

---

CIVIL APPEAL

MR SKELTON QC:

May it please Your Honours, I appear for the appellants with my learned friends Mr Jeffs and Mr Pollak.

ELIAS CJ:

Thank you, Mr Skelton.

MR WAALKENS QC:

Yes good morning, Your Honours, Waalkens. I appear for the respondent and with me is Mr Lawlor.

ELIAS CJ:

Thank you, Mr Waalkens.

MR BUTLER:

Kia ora. Ko Andrew Butler ahau, mo Human Rights Commission. Ko Matt McMenamin tenei.

ELIAS CJ:

Thank you, Mr Butler, Mr McMenamin. Yes, Mr Skelton?

MR SKELTON QC:

Your Honours, just in relation to timing, I have confirmed with my learned friends and with your leave, the proposal is that I will, when I finish the submissions for the appellants, that the Human Rights Commission will then follow to respond to some of the matters that have been raised by the respondent's submissions. They will also be taking the primary lead on the public policy issue.

ELIAS CJ:

Yes.

MR SKELTON QC:

We anticipate we will be finished our submissions certainly by lunchtime which should give Mr Waalkens two hours after lunch to respond to that.

ELIAS CJ:

Yes, fine. It’s quite a confined point, although I suppose there is quite a lot to be said about it.

MR SKELTON QC:

Yes, Your Honours, I think that's correct.

ELIAS CJ:

That just might be an encouragement not to take all the time available if it is not necessary, Mr Skelton.

MR SKELTON QC:

Point taken, Your Honour. I'll try and be focused. Your Honours, I have provided or handed up a road map of my submissions that I intend to address on my oral argument and I just want to begin by noting that Parliament, by enacting the Employment Relations Act 2000, has enacted minimum employment standards for the purposes of protecting employees who work or are based in New Zealand and by virtue of section 238, parties to an employment relationship are not free to contract out of those minimum standards, so the issue really for determination in this case is whether the appellants were New Zealand citizens resident in New Zealand entitled to the protection of the provisions against age discrimination in the Employment Relations Act.

As Your Honours will be aware, the Court of Appeal said no because the parties had chosen Hong Kong law as the proper law of their agreement and the Court of Appeal held at paragraphs 55 and 58 of the judgment that that choice of law was effectively decisive. Now, the appellants submit that the Court of Appeal misconstrued section 238 as not being a mandatory statutory provision and wrongly held that it would not be contrary to New Zealand public policy to allow NZBL to enforce its contractual retirement provision.

As a result, Your Honours, the appellants submit that very important minimum employment standards that are in the ERA have been undermined by a misplaced desire to uphold party autonomy. Your Honours, party autonomy is a great thing if you are the party that has the superior bargaining position. If you are, on the other hand, a vulnerable party, that's where Parliament has

enacted protections to protect vulnerable people from, in the employment context at least, having minimum standards.

I want to begin, Your Honours, by just briefly dealing with some of the factual background to this matter and I can do that quite easily, Your Honours, by referring to the chart, the timeline of relevant events and that was the last page of the submissions. Do Your Honours have that? It was the last page of the submission, timeline of relevant events.

ELIAS CJ:
Sorry, the appellants' submissions?

MR SKELTON QC:
The appellants' submissions. I have some spare copies if you don't have them.

ELIAS CJ:
No, we have them.

MR SKELTON QC:
It's the final page. And prior, you'll see there, prior to 1999, Messrs Brown and Sycamore, they were employed by Cathay Pacific Airways, so they were employed by the parent company but from 1999, they ceased to be employed by Cathay Pacific Limited and they were employed by a company called Veta Limited which was a subsidiary company of Cathay Pacific, and that employed pilots based outside of Hong Kong.

Now 2002, NZBL was incorporated solely for the purpose of employing New Zealand-based pilots. NZBL didn't employ any pilots in Australia or elsewhere. Its sole purpose was employing New Zealand-based pilots. Now, if we go, Your Honours, to the letter of offer that was made to the appellants, it's in the volume 2 of the case on appeal at 193. This is the letter of offer that was made by NZ Basing Limited –

O'REGAN J:
Sorry, what volume is it?

MR SKELTON QC:
It's volume 2, it's the yellow bundle, and it's page 193.

ELLEN FRANCE J:
Yes.

MR SKELTON QC:
It was the letter of offer that was made. So this company was incorporated in 2002, made the offer to Captain Brown, "Pleased to offer you employment in New Zealand with New Zealand Basing Limited effective 1 July 2002 which is dependent upon your residing and continuing to reside in New Zealand. The offer is subject to New Zealand Basing Limited's Conditions of Service 2002, a copy of which is attached," and then the choice of law clause is the third paragraph there, Your Honours, "The employment contract is governed by and shall be construed in accordance with the laws of Hong Kong and the parties hereto shall submit to the non-exclusive jurisdiction of the Courts of Hong Kong. In the event that you leave New Zealand to take up permanent home base in another country, your employment with New Zealand Basing Limited will terminate and you will join either Veta Limited or US Basing Limited as appropriate," and then they say, "For avoidance of doubt, it is agreed that you will only be employed by New Zealand Basing Limited while you are permanently based in New Zealand. If you leave New Zealand either voluntarily or as a result of company initiative to take up permanent home base in Hong Kong or elsewhere, your employment with New Zealand Basing Limited would cease."

So it's a condition of your employment that you reside in New Zealand and over the page at 194 is the same letter in identical terms of Captain Sycamore. Then, Your Honours, if we then turn to what's referred to as the Permanent Basing Policy Agreement, that's at 206 of that volume, and you'll see there, Your Honours, that it's an agreement between the Hong Kong

Aircrew Officers Association, so Sycamore and Brown, Your Honours, were members of that Association.

GLAZEBROOK J:
Sorry, I've lost the page number.

MR SKELTON QC:
Sorry, 206. The Permanent Basing Policy, so between Hong Kong Aircrew Officers Association on behalf of its members and Cathay Pacific Limited, overseas aircrews, and you'll see there, New Zealand Basing Limited, and it's said to concern the permanent basing. At 1.1, "The parties intend this agreement shall create legal relationship enforceable by the parties and in the case of the Association its present and future members." And at 4.2 it defines the basing areas, "A defined area within which the home base or preferred port is situated," and Your Honours will see that the basing areas include Asia, Australia, Canada, Europe, New Zealand and the USA, and at 4.8, over the page, defines the home base, "The port mutually agreed by the company and the officers from where the officer normally start and end their daily cycle."

Now the intent of this agreement is at 5.1. "The intent of this permanent basing policy is to facilitate and regulate the process for officers to take up base vacancies in a home base of their choice," so it provides for what you have to do if you want to change your base. At 6.2 there's a guarantee there. "Cathay Pacific Airlines will guarantee the basing company's performance of contracts of employment."

Then the administration provisions are at 16.1, that's on page 214 of the document. "The base administrative centres are Sydney for Australia and New Zealand base areas," so the basing operation is said to be Sydney. And at 16.2, "Officers will be required to commence and finish duty cycles at their home base and if available their PP. Travel between officer's residence and home base… are for the officers' own account." So just as you would expect, you get up in the morning, you leave your work, you head to the airport, Auckland International Airport, all of those travel costs are yours.

Taxation, 16.4, "Any personal taxation or personal social security liability resulting from an officer's choice of residence will be for his or her own account." So they have to pay their taxes as New Zealand tax residents.

Now the next thing that happened in the timeline, Your Honours, is the House of Lords delivered their judgment in the *Crofts v Veta Ltd* [2006] UKHL 3, [2006] ICR 250, that was in 2006, and after that judgment was delivered there was an update sent out to aircrew, and that's on page 217 of the case, and you'll see in the first paragraph, you'll be aware the company and the Hong Kong Airline Officers Association negotiation team spent the summer discussing several important issues –

ELIAS CJ:
Sorry, I've lost the page?

MR SKELTON QC:
Sorry 217. It was agreed that with the Hong Kong Airline Officers Association at the outset that these negotiations would include pay, and then you'll see increase in retirement age. Now if you then go down to the fourth paragraph in the update memorandum, it says a lot has happened since the last time there was a major review of the Cathay package, and then the last sentence of that paragraph, "Age discrimintation legislation is changing retirement age in many counties and since 65 is now the norm in most countries, we will have no option but to adopt this standard in our base areas."

Then at the bottom of the page, "Following careful consideration of the current situation, we have decided to implement portions of all four components of the deal. We will be implementing," and then it refers to changing retirement age, "to comply with the law as we go onshore."

Then, Your Honours, there's a section that deals with the retirement age. It starts on page 220 of the case on appeal. There's the heading right at the bottom of the page, "Conditions of Service 2008." It says, "Effective 1st January 2008, we will be recruiting all new joiners on CoS '08. The new CoS

is identical to CoS '99 with the following exceptions: normal retirement age is 65," so the new terms and conditions are at 65, and then under the heading, "Retirement Age": "As has been written before, the current basing structure will have to change to comply with local legislation and all crewing companies will have to go 'on-shore', starting with the UK in April 2008. Europe will follow shortly after that and the plan is to have *every* base area on-shore in the next two years. As each base goes on-shore, the crewing company will have to comply with the relevant local labour laws," and they refer to 65 will be incorporated into each basing area.

O'REGAN J:
What does it mean by "go on-shore"?

MR SKELTON QC:
Following the *Crofts* decision in the House of Lords, they reviewed all of their local subsidiaries and they said we will have to go on-shore to comply with local law. It means enter into terms and conditions of service that expressly also provide for local law to govern their relationship. As Your Honours are aware, these terms and conditions in the Veta *Crofts* case were governed by the laws of Hong Kong, just as the terms and conditions of the appellants' contract is governed by laws of Hong Kong. Well after *Crofts* came out and said for peripatetic employees, people that work all round the world, it's the location of your base that defines the jurisdiction. The decision was made and articulated to the pilots that we will be on-shoring and the retirement age will be going up to 65, and they recognised that 65 was then the normal retirement age.

O'REGAN J:
So it didn't involve actually setting up a company in New Zealand to employ them?

MR SKELTON QC:
No, no, they already had, New Zealand Basing Limited 2002 is established, as I say, solely for the purpose of the New Zealand pilots –

O'REGAN J:

But it's a Hong Kong company, isn't it?

MR SKELTON QC:

It's a 100% subsidiary of Cathay Pacific Limited. It's a Hong Kong registered company, but its sole purpose is just to employ New Zealand pilots.

O'REGAN J:

There wasn't any proposal to set up a company in New Zealand?

MR SKELTON QC:

No but it was proposed to –

O'REGAN J:

On-shoring doesn't mean adopting New Zealand law, did it?

MR SKELTON QC:

It was proposed to change the conditions of service so that the terms would be the same but it would be governed by New Zealand law as opposed to Hong Kong law. That's what I understand, Your Honours, when they talked about what on-shoring meant.

ELIAS CJ:

You say on-shoring means make it amenable to the local law of the base in relation to retirement age?

MR SKELTON QC:

Well all employment laws Your Honour.

ELIAS CJ:

All employment laws?

MR SKELTON QC:

Mmm. And that's correct, and that following the judgment of *Crofts* in the House of Lords where in relation to this aspect of the *Crofts* case, and I will

take you through some of that, it was the peripatetic employees were held to have come within the jurisdiction of the UK employment legislation because it was the base of those employees which was the determining factor in terms of the scope of that particular legislation.

ELLEN FRANCE J:

This document, Mr Skelton, envisaged that the position would stay the same for Hong Kong crew base members until the local retirement law changed, is that the effect of that final paragraph on page 221 before "extendees"?

GLAZEBROOK J:

Weren't there two sets of people in Hong Kong, some who could be depending on what they were flying over 65, and some under 65, is that what that means?

MR SKELTON QC:

I believe that's correct, Your Honour, that they had pilots who were flying the freighter planes and they had passenger pilots and the Hong Kong crew, of course, weren't employed by NZBL. They were employed directly by Cathay Pacific and I think that that means it's separating them out. But the key point for present –

ELIAS CJ:

Does that however support the thrust of your argument about what it means for crew based in other jurisdictions?

MR SKELTON QC:

Yes, Your Honour. I don't think there's any dispute that what Cathay Pacific were going to do after *Crofts* was to on-shore and they did that in the UK, they did that in Canada, they did that in some other areas. They didn't get around to doing it in New Zealand but they were promising that they were going to increase the retirement age. Now, the –

GLAZEBROOK J:

This mightn't be the time to deal with this because it might be dealt with, is there anything that says the exact terms they did on-shore? In the other jurisdictions, did they on-shore just on the basis that you kept on with exactly the same contract that you had before apart from it said 65? Do we know?

MR SKELTON QC:

Well, and the other important change being governed by local law.

GLAZEBROOK J:

Well, that's probably irrelevant for this particular question. It may or may not be but what I'm really asking is that he had exactly the same terms and conditions apart from saying 65?

MR SKELTON QC:

That's my understanding, Your Honour.

GLAZEBROOK J:

And really the question is then that the offer to these two was different because you didn't have exactly the same terms and conditions to 65? The offer the Human Rights Commission says is a *Clayton's* offer.

MR SKELTON QC:

Yes, and I deal with that, that's the next document.

GLAZEBROOK J:

All right, I'll let you carry on. Is there anything that says that explicitly in terms of the on-shoring for other people, ie the other jurisdictions?

MR SKELTON QC:

No, but what happens is we move forward, because this is the update that was given out in 2007 after the *Crofts* judgment came out. It's by the general manager, air crews, Captain Walker, but if we go forward a couple of years to 2009, over the page –

ELIAS CJ:

Sorry, can I just ask because I'm a bit stuck on this, in all other jurisdictions, were there new contracts provided which made the base the proper law of the contract?

MR SKELTON QC:

Yes, that's what happened when they on-shored. They changed their conditions of service, they changed the '99 conditions of service and issued new updated conditions of service with the new retirement age.

ELIAS CJ:

Yes, and that didn't happen for the New Zealand employees?

MR SKELTON QC:

No. Cathay Pacific said they were going to do that.

ELIAS CJ:

Yes, I see.

MR SKELTON QC:

And they said they were going to change it to on-shore. They obviously considered they had to do that, following *Crofts*, but what happened, you'll see the next document at page 224, this is another update by the general manager, air crew. You'll see the first paragraph, "The director of flight operations described the economic realities facing the company," so this is after the GFC –

GLAZEBROOK J:

Do we know the date of this?

MR SKELTON QC:

Yes, 20 April 2009. You'll see in the update of the heading, Your Honour.

GLAZEBROOK J:

Yes, I see.

MR SKELTON QC:

So this is after the GFC and explained the necessity for a corporate salary sacrifice scheme. But then the second paragraph in addition to what they called the special leave scheme, "Flight operations is offering a one-off opportunity to transfer to conditions of service '08," and that's the conditions of service with the 65 retirement age, Your Honours, "provided the option of working beyond 55 and up to what in Hong Kong and most jurisdictions is now considered the normal licensing age of 65." So they made that offer but the problem was, and this is the *Clayton's* choice reference that my learned friend Dr Butler mentions in his submissions, is you go onto the conditions of service '08 and that involved a pay cut so Messrs Brown and Sycamore chose not to take that particular option at that time in 2009.

O'REGAN J:

So was it a pay cut that was linked to the fact that there was now 10 more years of service and pension entitlement or was it a pay cut that was completely independent of that?

MR SKELTON QC:

It's to do, I believe, Your Honour, with the austerity issues that they were dealing with. They were asking people to take special leave schemes, to take four weeks' leave without pay, and these new conditions which, of course, they were employing new pilots that were coming on, they were employing them on the new '08 conditions, they were cutting costs and –

WILLIAM YOUNG J:

So they were trying to incentivise people to join the new scheme by giving them a later retirement age?

MR SKELTON QC:

Well, that's correct. They were offering them an incentive. "We need to cut costs. It's a voluntary corporate salary sacrifice scheme. Please agree to take four weeks' leave without pay to help out the airline, but we'll give you an

incentive to go across to the '08 terms of employment but of course to do that, you're on the lower salary." They chose not to do that. Now –

ELIAS CJ:
And the incentive, the higher age of retirement?

MR SKELTON QC:
Under the new '08 terms had the 65 age of retirement, correct.

O'REGAN J:
Did everybody want the later retirement? I mean, I would have thought for some people, they'd prefer to retire at 55 and have the presumably generous pension from then on.

MR SKELTON QC:
No –

WILLIAM YOUNG J:
There might be a reference in one of the earlier documents where it says, "This isn't popular with everyone."

MR SKELTON QC:
That's correct, Your Honour. There was a difference of views held between people in that earlier document.

O'REGAN J:
So would some people want to stay on a 55 retirement age?

MR SKELTON QC:
Yes, well, I read that, Your Honour, as you noted in that earlier document that it wasn't universally accepted or people would all want to go onto the 65.

WILLIAM YOUNG J:
But there's nothing to – sorry, I don't fully understand it. If the retirement age is 65, there's nothing to stop people retiring at 55?

MR SKELTON QC:

No, exactly.

WILLIAM YOUNG J:

Or is there some disincentive associated with superannuation?

O'REGAN J:

Well, presumably, you wouldn't start getting your pension until you're 65, though, would you?

WILLIAM YOUNG J:

Yes, but unless there's something of that sort involved.

MR SKELTON QC:

Yes, that wasn't touched on in evidence as far as I'm aware, Your Honours, and I can't take that any further.

GLAZEBROOK J:

But is there anything other than what we've seen that says that the on-shoring happened without them having to go onto an '08 contract or something similar?

MR SKELTON QC:

Not that I'm aware, Your Honour, that in the other jurisdictions –

GLAZEBROOK J:

It's sort of implied, I think, in the '07 that it would be the same terms and conditions. So there isn't anything specific in the evidence on that?

MR SKELTON QC:

No, it didn't happen in New Zealand. I mean, I'm not sure what happened in the other jurisdictions. I know they did on-shore in the UK, Canada, Australia, I think, they on-shored, but while they said they were going to in New Zealand, they didn't.

O'REGAN J:

Were there other New Zealand pilots that were caught up in this?

MR SKELTON QC:

Yes. There are some of them in the back of the Court today, Your Honour, but –

O'REGAN J:

And are they – but that did accept this offer?

MR SKELTON QC:

Well of course there were some that accepted the '08 offer, and then there were others that joined as pilots more recent –

O'REGAN J:

On the '08 contract?

MR SKELTON QC:

On the '08 contract.

O'REGAN J:

I see, right.

MR SKELTON QC:

But there's still a group, I think around 15 or so, who are on the '02 contract. so there's roughly 30-odd pilots who are New Zealand-based pilots, NZBL. Now let's just have a look at the terms of conditions of service '02 because these are the conditions of service that govern the employment of the appellants, and that's at page 231, and at the top of that page NZB aircrew conditions of service 2002, and the application, clause 1.1 on page 233, "These conditions of service shall apply to aircrew officers employed by New Zealand Basing Limited." And there's application of law, 2.2, "These conditions of service which form part of the contract of employment between the company and the officer, will in all cases and all respect be interpreted in

accordance with the law as set out in the various applicable ordinances of the Hong Kong Special Administrative Region." But it's accepted that when you read that together with the letter of offer, that Hong Kong law applies to this contract, that's not in dispute and never has been. It's the effect of it.

Now what then at, if we then look at 3.1 duties, "An officer will serve the company by operating any aircraft as defined in the Cathay Pacific Airways air operator's certificate," and there's generous leave entitlements in this document, clauses 25 deal with annual leave, so at 243 you'll see there, Your Honours, that they get eight weeks annual leave, so way more than the minimum statutory entitlements under New Zealand. The provision that deals with retirement is at 35.1. "The normal retirement age is 55 years of age." So that's the '02 conditions of employment.

Now, Your Honour, I've just noted the references in my outline to where the key factual findings in the Employment Court judgements are. I won't take you through those, you'll no doubt have a chance to read them, but it's at 83, and paragraph 86(a) and (b) of the Employment Court judgment. I just note here, Your Honours, that of course there's no right of appeal against factual findings from the Employment Court, it's just appeals on questions of law only, so some of these key factual findings, for example, the employment agreements for the appellants was entered into in New Zealand, they were engaged in New Zealand, it was a factual finding, which my friend appears to be trying to argue wasn't in fact the case, but he's bound by that, that was the finding of the Employment Court Judge, and no appeal isn't allowed against those factual findings.

Now, Your Honours, if I could take you to the Employment Court judgment, sorry the Court of Appeal judgment, which is in the first volume, that's the orange volume of the case on appeal, and I want to take you to paragraph 80 of that judgment because the Court notes that, "We are not suggesting that there was true bargaining parity between the airline and the pilots; at the relevant time, in order to fly for Cathay Pacific, a prospective pilot offered employment would be compelled to accept a standard form governed by the

law of Hong Kong. However, in the context of an inquiry into whether an element of that law offends public policy, it would be artificial to ignore the collateral benefits enjoyed by the pilots," and then important words, "as a result of this choice." So His Honour was saying, well, you can't have your cake and eat it too. You're getting other benefits, generous benefits being on the '02 contract governed by Hong Kong law. Now I submit that the Court fell into error in finding that the pilots obtained collateral benefits, and in particular they talk about tax advantages as a result of the choice of Hong Kong law. That's simply not correct. The appellants would have been entitled to the same tax benefits had they chosen the Conditions of Service '08, or if New Zealand law had been chosen to govern the relationship. It's not the choice of law that gives them the tax benefits. The appellants are New Zealand tax residents, liable to pay tax in New Zealand on their worldwide income. It's actual New Zealand law, the Double Tax Agreements (Hong Kong) Order 2011, which is an order made under the New Zealand Income Tax Act 2007, which exempts pilots who fly on Hong Kong aircraft from having to pay New Zealand income tax on their NZBL employment income. So it wouldn't have mattered one iota to the tax income whether the appellants' employment was governed by New Zealand or Hong Kong law. Tax benefits arise from the fact that the appellants are flying a Hong Kong registered airline.

Now of course there's a more fundamental question here too because the fact that NZBL pilots are entitled to tax benefits under the double tax agreement, and I also say the fact that they're entitled to other contractual benefits under the conditions of service '02, it cannot excuse the respondents from the obligation to the appellants to meet minimum New Zealand employment standards in relation to age discrimination. So I submit that that's one of the key reasons why the Court of Appeal, I submit, erred in this case because they said, well, you're getting all these other benefits under Hong Kong law therefore you don't have to comply with New Zealand's minimum discrimination laws, it just can't be correct I submit.

Now the final factual matter I just want to touch on is that the respondents did not attempt in the Employment Court, or in the Court of Appeal, to justify the decision to require the appellants to retire at 55. They didn't try to justify that in any way, and NZBL does employ New Zealand-based pilots to fly to Hong Kong, engaged on the '08 terms and conditions, which has the 65 age retirement provision in it. So, and they've acknowledged in their documents that the normal retirement age in the airline industry now is 65, so they weren't trying to say that they couldn't fly because they were over a particular age. In fact these appellants are today continuing flying back and forth, Auckland to Hong Kong, and other places in the world, pending the outcome of the decision on appeal. So no attempt to justify the decision to require these people to retire.

Now, Your Honours, I want to just briefly deal with the key statutory provisions here. They're in the appellants' bundle of authorities, volume 5, it's the green volume. If you could turn to the tab 43, which is the Employment Relations Act, we've set out here the key provisions in the Employment Relations Act, and Your Honours if we turn to section 3, which is the objects section in the Act, you'll see there that the object of this Act, and there's two provisions that I believe are of particular importance, it's 3(a)(ii), "Acknowledging and addressing the inherent inequality of power in employment relationships." Now, remember, this is a paradigm shift from the old Employment Contracts Act 1991 which was talking about contracts and employment being contractual. This is the Employment Relationship Act which treated or accepted that in an employment situation, it's more than simply contractual. There is, human relationship issues arise here, and an acknowledgement that there is an inequality of bargaining power and there are measures in the Act to address that.

And then a relatively new provision but it's 3(ab), "to promote effective enforcement of employment standards." So these minimum employment standards, if you turn to the definition provision at section 5, there's a couple of key definitions there. There's employment standards that are defined by reference to various statutory provisions, Equal Pay Act 1972, Holidays

Act 2003, Minimum Wage Act 1983, Wages Protection Act 1983. There's minimum entitlements defined over the page which are part of the minimum standards that this Act has put in place to protect employees.

Now, the key part for us is the personal grievance regime. That's part 9 of the Act and the starting point is 103 which defines what a personal grievance is. 103(1)(c), personal grievance, a claim, and it says, "that the employee has been discriminated against in the employee's employment," that's 103(1)(c), and then if we turn to 104, discrimination, for the purposes of section 103(1)(c), discrimination against is defined to include at 104(1)(c), "requires or causes that employee to retire or resign." So it's discrimination to require an employer to retire, 104(1)(c). Then the exceptions – the grounds of discrimination, 105, and it's 105(1)(i). Age is one of the, I think it's 20-odd unlawful grounds of discrimination, and then 106 are the exceptions. The relevant exceptions which are incorporated from the Human Rights Act 1993, sections 24, 26, 30 and 35.

Now, if you then turn over to tab 44, I just want to look at a couple of those exceptions because they are relevant when it comes to interpreting the scope and applicability of the legislation and if we look at section 24 of the Human Rights Act, it says nothing in section 22. That's got to be read as nothing in section 104 of the ERA. Nothing in that section applies to the employment, it goes on, "of a person on a ship or aircraft," and then importantly, "not being a New Zealand ship or aircraft, if the person employed or seeking employment was engaged outside New Zealand." So clearly, the Act doesn't cover someone working on a foreign ship if they were engaged outside of New Zealand, territorial scope. You can't legislate extraterritorially in that way. On the other hand, of course, the corollary of that is that if you are engaged in New Zealand, as the Employment Court found was the case, on a foreign ship or aircraft, then the Act does apply.

There's the other exception in 26 in relation to work performed outside of New Zealand and it says there, "Nothing in 22 shall prevent different treatment based on," and it includes age, "if the duties," and then under (a), "are to be

performed wholly or mainly outside New Zealand and are such that because of the laws, customs, or practices of the country in which those duties are to be performed, they are ordinarily carried out only by a person who is of a particular," and, "age."

Now the Employment Court found that that exception didn't apply because the evidence was that flying planes over in Hong Kong wasn't only being carried out by people of that particular age. The norm was 65. You might just note there, Your Honours, the reference to that Employment Court judgment is at paragraph 86(b) of the judgment.

So those are the key statutory provisions. The other relevant one, of course, is the New Zealand Bill of Rights Act 1990 which also outlaws unlawful, or discrimination on those particular grounds, which include age. It doesn't directly apply to this particular situation, but it's just another example of New Zealand Parliament's view about age discrimination.

Now moving on then to the issues. As I noted the –

WILLIAM YOUNG J:
Just pause there. Did the Court of Appeal address the question whether the section 24 of the Human Rights Act was engaged?

MR SKELTON QC:
The way the Court of Appeal dealt with it was to say because Hong Kong law applies the Act doesn't engage at all. So it didn't have to then go into the questions of the exception. They said, it's decisive. If you put a foreign law clause in it's decisive, you don't have to go any further because it doesn't apply, which of course is the key issue here. But of course they were, anyway the question on appeal to the Court of Appeal was limited to questions of law. These are, really those exceptions turn on factual matters that are set out in the Employment Court judgment.

GLAZEBROOK J:

Although you say they give quite a good clue as to how you interpret the inclusions effectively and the discrimination clause itself. It's wide with those exceptions therefore it means that if you don't come within the exceptions you come within that clause is the argument I understood you, as I understood it?

MR SKELTON QC:

I think it is, it certainly is a guide to what Parliament intended, and I'll come onto that shortly in terms of how the Act is to be interpreted in terms of its territorial scope because I think everyone agrees that Parliament can't be presumed to have been enacting minimum employment standards up in Fiji or China or somewhere else; it's territorial, but there are those issues around aircraft and shifts.

Now I've tried to hopefully helpfully summarise in three points the appellants' submissions. The first is that the ERA enacts minimum employment standards including a prohibition against age discrimination which applied to all employees who work and/or based in New Zealand. Now that's the territorial scope issue. That's the jurisdictional issue. The second point, the ERA is a mandatory overriding statute which by virtue of 238 must be given effect to notwithstanding the parties' choice of law, that's what a mandatory statute means. Notwithstanding whatever you choose it must be given effect to and the alternative, the Court should prevent NZBL from enforcing the contractual retirement age provision because to do so would be contrary to New Zealand public policy.

Now I want to then turn to the first point which is the territorial scope of the Act. I think there's been some confusion with respect in the lower Courts to distinguish between three key concepts. There's the concept of jurisdiction. There's the concept of what is the proper law of the contract, and then not dealt with in this case, but the appropriate forum. So jurisdiction, proper law, appropriate forum. Now the Court of Appeal accepted that proper law may inform the last decision, what is the appropriate forum, so if it's proper law is New Zealand law that might inform whether New Zealand is the proper forum.

I submit that where the Court of Appeal went into error was to say proper law informs the issue of jurisdiction. That's a different issue. Jurisdiction is about, or traditionally it's been about, presence of a person in New Zealand that can be subject to proceedings being served on them, you know, an American that gets off the plane at Auckland Airport, might only be here for a short period of time, gets served with papers, then the Court would have jurisdiction. Now what about a person overseas? Well then you go back to the High Court Rules 2016 with jurisdiction and you look at those factors to see can we serve someone outside of the jurisdiction. Now of course if the contract is made in New Zealand, tick the box, you've got jurisdiction. So the proper law, I don't think goes to that question of jurisdiction.

WILLIAM YOUNG J:

How would this case be dealt with by a court in Hong Kong. Would it deal with it in exactly, in theory should it deal with it in exactly the same way as we will?

MR SKELTON QC:

No, it wouldn't dealt with it the same way up in Hong Kong as we would because they don't have age discrimination prohibition up in Hong Kong.

WILLIAM YOUNG J:

But if they took the view that the age discrimination provision applied, at least in New Zealand, might it not apply in Hong Kong as well?

MR SKELTON QC:

No.

ELIAS CJ:

Well you say it doesn't because you are conceding that it's not the proper law of the contract.

WILLIAM YOUNG J:

Can you have two laws of a contract?

MR SKELTON QC:

Yes you can, yes Your Honour, you can actually have two laws of the contract. You can have one law of the contract that deals with one particular topic, and another law of the contract dealing with another issue.

WILLIAM YOUNG J:

Couldn't you have, couldn't the law of the contract, couldn't the age discrimination provisions affect or be part of a composite law of the contract?

MR SKELTON QC:

To answer your question I think if the matter was dealt with up in Hong Kong then they would feel they're not obliged to apply New Zealand employment ERA or human rights legislation.

GLAZEBROOK J:

Well they may think they are because they may say that those are explicitly implied into the contract, which is for a New Zealand-based employee and therefore – I mean they may not, but I don't think there would be anything wrong with them saying that while it's Hong Kong law, those are minimum standards that despite a choice of law scheme become incorporated into a contract for anybody who's working, or deemed to be working, in the country and they have a specific basing policy, as you've shown us.

MR SKELTON QC:

Mmm.

GLAZEBROOK J:

It might be different if they didn't have that specific basing policy.

WILLIAM YOUNG J:

Can I just, picking up on that, say Cathay or New Zealand Basing had sought a declaration from the courts in Hong Kong that they're entitled to require the appellants to resign, and had obtained such a declaration, would that be a res judicata?

MR SKELTON QC:

Well it would be a situation where the appellants would say that the New Zealand court should not enforce that declaration as a matter of public policy, because it would be contrary to New Zealand's public policy that protects age discrimination. Your Honour if I can just go back to that point about jurisdiction. The difference between jurisdiction, proper law and appropriate forum, of course on jurisdiction, if you've got jurisdiction, and it's quite often the case you might apply a foreign law in New Zealand, so it's quite common that a New Zealand court has jurisdiction, but they decide the proper law might be the law of Australia, and then you have to, as a matter of evidence, lead evidence as to what that law is. So jurisdiction is something different from what is the proper law is my point.

Now, Your Honours, if I can take you to my written submissions at paragraph 36, because the starting point as the learned commentators Mr Goddard and Professor McLaughlin note, "New Zealand courts are required to give effect to New Zealand legislation. If on its proper construction a New Zealand statutory provision requires application to a cross-border issue before a New Zealand court, the statute must be applied even if the normal choice of law rules in relation to that issue would lead to the application of the law of some other country." Now, I submit that that statement must be correct but where an Act such as the ERA has no express territorial limitation, the court has to determine the intended scope of the Act as a matter of statutory interpretation and I submit it must be presumed that Parliament, when enacting the Employment Relations Act, did not intend to impose minimum employment standards universally.

There is a rebuttable presumption that general words in a statute are to be read as confined to what according to the rules of international law, it is within the provenance of our Parliament to affect or control, and this statute does have general laws. It applies to employees, employers. It doesn't say in the Act, "New Zealand employees," so on the face of it, unless the Court interprets it down, could apply to employees or employers all around the world. That can't have been intended.

WILLIAM YOUNG J:

What would happen if your clients issued proceedings seeking, claiming unjustifiable dismissal? How relevant would the Hong Kong law be to that? They could issue proceedings, presumably, if your theory is the case.

MR SKELTON QC:

Well, they've issued proceedings in the Employment Court, absolutely, seeking declarations that it would be unlawful to require them to retire.

WILLIAM YOUNG J:

But that's not an unjustifiable dismissal claim. Say they were dismissed and issued proceedings for unjustifiable dismissal?

MR SKELTON QC:

Yes, so say Cathay Pacific disregarded that and just fired them anyway and yes, they issue proceedings in New Zealand under part 9 of the personal grievance claim, unjustified dismissal. Why? Because it was on the grounds of age and it would be contrary to New Zealand law.

WILLIAM YOUNG J:

Say it was just a disciplinary dispute, nothing to do with age. Presumably, there would be jurisdiction to deal with it but it would be dealt with, what would be justification in Hong Kong law would probably be a justification under the Employment Relations Act?

MR SKELTON QC:

Yes, you see that's where I perhaps differ in the way the Courts' dealt with it, in the lower Courts, where I'm not saying that Hong Kong law doesn't have effect for all purposes. I'm saying the way the statute works, section 238, it subjects Hong Kong law choice which was a valid choice, we're not disputing that, the parties agreed to it, it's a valid choice, but it subjects it to limitations and so it's not to say that for other purposes, Hong Kong law isn't valid or operable. I deal with that in my submissions shortly. I'll get to that.

GLAZEBROOK J:

So it wouldn't apply in that situation if Hong Kong law said, "Any decision we make is too far and it is absolutely final and it doesn't matter why we fired you" it's fine, it's subject to the minimum standards of unjustification or an inability to bring a personal grievance," but that in working out whether it's gross misconduct or whatever it might be, you can look to the Hong Kong contract, is that the way you analyse it?

WILLIAM YOUNG J:

You see, the Hong Kong employment law gives power to simply dismiss on notice, doesn't it?

MR SKELTON QC:

No, I think, Your Honour, that it's not quite as blunt as that. It's not quite like in America where you have employment at will and you can just –

WILLIAM YOUNG J:

I see. Okay, well, that's really what I was envisaging. Say there was a power under the Hong Kong ordinance to dismiss on reasonable notice which would affect the position prior to the late 1980s, would it be an answer to unjustifiable dismissal to say, "No, there is a justification. This law is governed by the law of Hong Kong and under the law of Hong Kong, dismissal on notice without reason isn't a good justification"?

MR SKELTON QC:

It's a good point, Your Honour, because you see, in America, dismissal on will, but what they do in America, it doesn't mean these grievances don't get aired. They bring them as discrimination claims so if the reason for the dismissal was, "We are 55" –

WILLIAM YOUNG J:

No, I'm postulating it's got nothing to do with age, that it's just a straight question of how do these contracts fit into the Employment Relations Act? Is it open slather in the Employment Court and the Employment Relations

Authority because the party, the pilots live in Auckland and are based there, or is it, "Yes, you can resort to the New Zealand institutions but the way they deal with it is controlled by the law of Hong Kong"?

MR SKELTON QC:

Well, yes, the example that my learned friends refer to in one of their cases, *Musashi Pty Ltd v Moore* [2002] 1 ERNZ 203 (EmpC) I think it's called, it was a decision where Chief Judge Colgan said, "I disagree with the authority. Victoria law applies, not New Zealand law," but the Court still has jurisdiction to hear the grievance but they've got to hear the grievance under Victorian law so you have to produce evidence as to what that is. So yes, the fact that they are residents based in New Zealand gives the Employment Relations Authority jurisdiction, I submit, to hear the case.

Next issue, what's the proper law of the contract? Well, that's Hong Kong law. Next issue, does the human rights legislation against age discrimination apply notwithstanding Hong Kong law? Answer, yes, because it's a mandatory overriding statute and so that applies notwithstanding what the parties' choice of law is. If I'm wrong on that –

GLAZEBROOK J:

But doesn't that apply, though, I'm not – I'd understood that you said that that, those overriding provisions provide for minimum employment standards, whatever they are, to override law, not just the age discrimination, because what Justice Young's asking you is whether if there was something in Hong Kong law that said you could dismiss for no – the position I postulated – dismissed for no reason on notice without any grievance provision, I thought your position was no, because the minimum standards of procedure would override that?

MR SKELTON QC:

Well, no in the sense that you would be able to file a claim under the ERA because it would have jurisdiction. Hong Kong law would apply but His Honour was saying that well, to then justify –

GLAZEBROOK J:
Well, what is –

MR SKELTON QC:
– the dismissal, you may be able to go to Hong Kong law and say, "Under Hong Kong law, I can justify the dismissal on various grounds," and I think that's correct.

GLAZEBROOK J:
But what's the point in having minimum standards of employment if you can just get around them in the way you say?

MR SKELTON QC:
But the minimum employment standard gives you the protection of being able to bring a personal grievance claim. That's – and require justification for that dismissal. So that's the minimum standard. How you justify it, as long as you don't breach the age discrimination provisions, I can see there is merit in saying, "Well, if there is a way under Hong Kong law to justify it, then because it's governed by Hong Kong law, you may be able to do that." But it gives you the access to the personal grievance process.

The first point, Your Honour, on the scope, I submit that it must be within the power of the New Zealand Parliament to enact minimum employment standards to cover work undertaken by employees in New Zealand or employees who are based in New Zealand. Application of the Act, there's a spectrum here in the cases that the *Croft* case is the one that I want to take Your Honours to but before doing that, you've got the standard case which I think Lord Hoffmann referred to as the paradigm case, work performed in New Zealand. Obviously, the Employment Relations Act would apply to work done in New Zealand by a New Zealand employer, New Zealand employee. That's the standard case. A peripatetic employee is a person who's worked in many different places. I think it was the *Crofts* example of the Cathay Pacific pilots working in different places around the world, that's the example we're facing. At the outer limit we have the expatriate employee, and that's the hard

part, we're not faced with that, but that's someone whose work is being performed exclusively overseas. That's the difficult one because normally you'd say well the New Zealand Employment Relations Act would not apply to regulate work overseas.

Now if we could go to *Crofts*, it's in volume 2 of the bundle of authorities for the appellant, do Your Honours have that before you? It's tab 14, volume 2. Now Your Honours, you'll see that the case involved three separate appeals that were heard together, and at page 252 of the decision you'll see they're referred to as *Lawson v Serco Ltd, Botham v Ministry of Defence*, and then *Crofts v Veta*. So these three cases are heard together. In terms of that spectrum I referred to, the first two, *Lawson, Botham*, they're all expatriate employees. They're people working exclusively offshore. *Crofts* was the Cathay Pacific pilot in the UK based in the UK, a peripatetic employee. Now it's a judgment of Lord Hoffmann and if we go to 253 the issue, the first sentence there, "My Lords, the question common to these three appeals is the territorial scope of section 94(1) of the Employment Rights Act 1996, which gives employees the rights not to be unfairly dismissed." And if you go to sort of line D on that paragraph –

ELIAS CJ:
Does the Employment Rights Act have a similar provision to section 238?

MR SKELTON QC:
Yes, it's more explicit than 238, and I think I can show you that.

ELIAS CJ:
That's all right, as you go through, thank you.

MR SKELTON QC:
But if we go down to the first paragraph, half way down in D, "Nevertheless all parties to these appeals are agreed that some territorial limitations must be implied. It is inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with

Great Britain. The argument has been over what those limitations should be." Now they then deal with the facts of the three appeals. The *Lawson* one the employer, a substantial UK company, engages Mr Lawson as a security supervisor on Ascension Island where the company had a contract to service a RAF base. It is a dependency of the British Overseas Territory. So he was working in an overseas, he wasn't working within the UK.

Botham, we have the Ministry of Defence employs Mr Botham. He worked establishing a youth worker at various Ministry of Defence establishments in Germany, so he was working over in Germany. He was treated as a resident in the UK rather than Germany for various purposes including taxation. So again an expat situation of someone working offshore.

Crofts, the employer is a wholly owned subsidiary of Cathay Pacific Limited, that's Veta Ltd, the one I referred you to earlier Your Honours. Mr Crofts was based at Heathrow which enabled him to live in the UK. Now in terms of – so *Lawson*, sorry at 5, *Lawson* and *Botham* employer and employee both had close connections with the UK but all the services were performed abroad. So that's the key point for those two, they were all performed abroad. *Crofts*, the employer was foreign, it's the Hong Kong-based Veta Ltd, but the employee was resident in Great Britain and although his services were peripatetic they were based in Great Britain.

Now at paragraph 6, "Territoriality: The general principle of construction is, of course, that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world. Some international crimes," they talk about torture, "are an exception… That is why all the parties are agreed that the scope of section 94(1) must have implied territorial limits. More difficult is to say exactly what they are."

Now this is also important, a bit further down in 6 you've got, "Employment is a complex and sui generis relationship, contractual in origin but, once created, having elements of status and capable of having consecutive or simultaneous points of contact with different jurisdictions, so the question of territorial scope

is not straightforward. In principle, however, the question is always one of the construction of section 94(1)." So that notes that it's not just a pure contractual relationship, it's not like two businessmen entering into a contract and putting a choice of law clause in, there's a human element to it.

The next part of that paragraph they refer to a passage from Lord Wilberforce's judgment in *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130 (HL). "In principle, however," and then it goes on, "it requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?" Well quite clearly here it's the employee. So this legislation is employee-focused. So with respect to the Court of Appeal they approached it from the employer perspective, but the legislation is very much employee-focused.

Now then over the page at 255, "The repeal of section 196: The Act has not always been silent on the question of territorial scope. When the right not to be unfairly dismissed first made its appearance as section 22 of the Industrial Relations Act 1971, it was accompanied by a provision … which said that section 22 did not apply 'to any employment where under his contract of employment the employee ordinarily works outside Great Britain.' (There was also a special exception for people who worked outside Great Britain on ships registered to the United Kingdom.)" So originally it had doesn't apply to work outside of Great Britain. And then if you go down to F, paragraph F three-quarters of the way down, "By section 32(3) of the Employment Relations Act 1999 it repealed the whole of section 196 and put nothing in its place. The only part to survive was the special provision for mariners, which was re-enacted in slightly different form … Otherwise, the courts were left to imply whatever geographical limitations seemed appropriate to the substantive right." So that's the situation that Your Honours are facing. There's no express geographical limitation. There is some issues with mariners and an aircraft in the Human Rights Act that gives some guidance

but – so *Crofts* they had the same situation after the repeal of the Act, section 196, the Act was silent.

Now His Honour then talks about what inferences, if any, should be drawn from the fact that Parliament repealed 196 and didn't replace it and then he, at page 258, set out the rival formulations as to what should be the test for the scope of the Act. Then he dealt, paragraph 21 on page 258, with the *Crofts* case, and he says at 21, "The issues in the *Crofts* case … were rather different. While Mr Lawson and Mr Botham might be called expatriate employees, working abroad in circumstances in which their work nevertheless had strong connections with Great Britain, Mr Crofts was perhaps an extreme example of a peripatetic employee whose work constantly took him to many different places," and he talks about Mr Griffith-Jones for Mr Crofts and Mr Gouldy for Veta were agreed that the question of whether section 94(1) applies depends upon taking into account a number of different factors but they disagree over what the factors should be.

Mr Griffith-Jones attached the most importance to the fact that the terms of his contract in the way it was actually being operated at the time of his dismissal. Mr Crofts was based in Heathrow. Mr Gouldy on the other hand said the decisive factor was the place from which he was managed, where he was paid, where the aircraft flew or belonged or where they were licensed, all of which in this case was Hong Kong.

So he set out those submissions and then he deals with under a heading, "Principles not rules," at 23. "In my opinion, the question in each case is whether," so each case is referring to all of the three appeals, "is whether 94(1) applies to the particular case notwithstanding its foreign elements. This is a question of construction of 94(1)," and then at G down at 23, "Of course this question should be decided according to established principles of construction, giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme. But this involves the application of principles, not the invention of supplementary rules."

And then at 25, he starts with the standard case, working in Great Britain. "Having said that, I am sure that Lord Justice Pill was right in saying that what Parliament must have intended as the standard normal paradigm case of the application of section 94(1) was the employee who worked in Great Britain." So that was the paradigm case, and then down at 27, "Since 1971, there have been radical changes in the attitude of Parliament and the courts to the employment relationship and I think that the application of section 94(1) should now depend upon whether the employee was working in Great Britain at the time of dismissal rather than upon what was contemplated at the time, perhaps many years earlier." So just as there's been quite a radical change in New Zealand to deal with employment relationships rather than contracts, he's saying you don't look back at the date the contract was entered into. You look at what was the situation at the time of the dismissal.

Peripatetic employees dealt with at 28. "As *Crofts v Veta Ltd* shows, the concept of employment in Great Britain may not be easy to apply to peripatetic employees." At the bottom at 29, "As I said earlier, I think that we are today more concerned with how the contract was in fact being operated at the time of the dismissal than with the terms of the original contract. But the common sense of treating the base of a peripatetic employee as for the purpose of the statute has place of employment remains valid," and he refers and cites a passage from the *Todd v British Midland Airways Ltd* [1978] ICR 959 (CA) decision of Lord Denning, "A man's base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas. I would only make this suggestion. I do not think that the terms of the contract help much in this case. As a rule, there is no term in the contract about exactly where he is to work. You have to go to the conduct of the parties," et cetera.

And he says, "Lord Denning's opinion was rejected as misguided obiter by the Court of Appeal in the case cited there, and then at the bottom of 30, "I think that Lord Denning provides the most helpful guidance," and it's important to note in that context that this Lord Denning judgment was 1978 so it was a

common law situation. So he then at 31, "Like the majority of the Court of Appeal, I think that Lord Denning's approach in *Todd* points the way to the answer in *Crofts v Veta Ld*. It is of course true that British Midland was a British airline." He's talking about the *Todd* case there. "The only foreign factor was Mr Todd spent more time outside Great Britain than in, but employees of a foreign airline can also be based in airline and in my opinion, this was the situation with Mr Crofts. Unless like Lord Phillips one regards airline pilots as the flying Dutchmen of labour law, condemned to fly without any jurisdiction in which they can seek redress, I think there is no sensible alternative to ask where they are based, and the same is true of other peripatetic employees."

So in terms of the result for the *Crofts* case, that's at 34, just the last sentence of 34 down by G, "In the present case, I think not only that the tribunal was entitled to reach the conclusion that it did but also that it was right. I would therefore dismiss Veta's appeal." So he determined that the scope of the Act covered the *Crofts* situation because he was based there.

I want to just briefly touch on the expatriate –

ELIAS CJ:
Here, of course, you have the parties' agreement that he's based here in the contractual document so it's easier if that line is followed that that's what governs.

MR SKELTON QC:
Correct, we have the agreement and their contractual documents and we have the finding of the Employment Court Judge that they were based here so I don't think there is any real dispute about basing. It's whether or not this Court should adopt the basing test followed by Lord Hoffmann as defining the scope of an application of the Act and I say that there's very good reasons for doing that, including all of the reasons that Lord Hoffmann touched upon.

Expatriate employees, he says, “The problem of what I might call the expatriate employees is rather more difficult. The concept of a base which is useful to locate the work place of a peripatetic employee provides no help in the case of an expatriate employee. The Ministry of Defence accepts that Mr Botham fell within the scope of section 94 but his base was the base and the base was in Germany. The circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of the British labour legislation but I think that there are some who do.” So this is the exception. So normally, you work overseas, the Act doesn’t cover you but there are a couple of exceptions where you might and at paragraph 37, the first exception that Lord Hoffmann referred to, “I think that it would be very unlikely that someone working abroad would be,” well, this is the general rule, very unlikely if you’re working abroad, “you would be within the scope of section 94 unless he was working for an employer based in Great Britain but that would not be enough.” So just because you’re working abroad on behalf of a local company, that’s not enough.

So what else is required? At 38 is the first exception. “Something more may be provided by the fact that the employee is posted abroad by a British employer for the purpose of a business carried on in Great Britain. He is not working for a business conducted in a foreign country which belongs to British owners or is a branch of a British business but a representative of a business conducted at home. I have in mind, for example, a foreign correspondent on the staff of a British newspaper.” So you’re a foreign correspondent, you’re employed by a British newspaper, you’re sent off to Afghanistan to do a report. Well, the UK Act still applies because it’s a UK employer. You’re working abroad but not for the purpose of the business conducted over there but for the local business.

Now the second exception is at 39. “Another example is an expatriate employee of a British employer who is operating within what amounts for practical purposes to an extraterritorial British enclave in a foreign country.” This is what’s now been known as the enclave exception. And at 40, “I have given two examples of cases in which 94 may apply to an expatriate

employee: the employee posted abroad to work for a business conducted in Britain and the employee working in a political or social British enclave abroad." And he then concludes that those exceptions apply to both *Lawson* and *Botham*, the Ascension Island base in the middle of nowhere, that was the enclave abroad, and also *Botham*.

Now Your Honours in the Court of Appeal the Courts said, oh, but since *Crofts* things have moved on and suggested that *Crofts* isn't good law and I suggest to Your Honours that that in fact is not the case. We've got the decision of the Supreme Court in *Duncombe v Secretary of State for Children, Schools and Families* [2011] UKSC 36, [2011] ICR 1312, which is in volume 1 of the authorities, tab 10, and the claimant there was employed by the Secretary of State as a teacher in a school in Germany and the issue was could she bring a claim in the UK Courts. The lower Tribunals had said no because applying the general principle the work was occurring outside the UK, and it wasn't a British enclave, it also didn't fall within the two exceptions, so the question in that case was are there other exceptions that might apply. Now there's nothing in this judgment that casts doubt on the principle in *Crofts*. It's just Lord Hoffmann said well I can only think of two exceptions for people working abroad, the expats, there might be others, and in this case the Supreme Court agreed there was another exception at paragraph 8 of the judgment, "It is therefore clear that the right will only exceptionally cover employees who are working or based abroad." So that was again applying Lord Hoffmann. But applied there was a strong connection here with the UK, and at 16, "In our view, these cases do form another example of an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal."

ELLEN FRANCE J:

The Court of Appeal relies I think on the part of paragraph 16 which refers to the fact they were employed under contracts governed by English law. In

other words the choice of law was a relevant factor. What do you say about that?

MR SKELTON QC:

Well when you're in that exceptional situation of expats who are working abroad, and aren't doing any of their work within the jurisdiction, you then have to, to get into the exception you have to show a very strong connection with the local forum and having it governed by UK law is one of a number of factors that you can point to.

ELLEN FRANCE J:

But do you say that's not relevant in the peripatetic employee situation?

MR SKELTON QC:

No, because in the peripatetic employee situation they are being treated as working within the jurisdiction because they're based there. So you're not in the exceptional. You're closest to the paradigm situation.

ELIAS CJ:

But it must be a relevant consideration that the parties have chosen. What you're looking at here is a principle of statutory interpretation as Lord Hoffmann emphasises but in determining, if you have a rule that it does depend on the connection, clearly surely the fact that parties have chosen to make another jurisdiction the law of the contract is relevant.

MR SKELTON QC:

Well, I would submit that it's not relevant to that jurisdictional issue, it may be relevant to the other point.

ELIAS CJ:

No, I understand that. I mean that's pretty trite law really but it's the substantive law that we're concerned with here.

WILLIAM YOUNG J:

You might have a number of factors that engage the Act. One might be people based in New Zealand working from New Zealand. Another might be New Zealand employer, New Zealand employee, employment closely related to New Zealand's interests and governed by New Zealand law. That might be a separate basis which is what I think Baroness Hale was talking about. She's not saying that in a case where someone is based in the UK it's controlling that the overseas law is the law of the contract.

ELIAS CJ:

No, I fully accept that. All I'm just saying is it must be one of the factors you take into account in deciding where, on balance, the connection is, or whether there's sufficient connection for the –

GLAZEBROOK J:

But the argument is that's a different point because if you're based in a country then it applies in any event whatever the contractual relationships are and that's not relevant –

ELIAS CJ:

Yes, but what is "based" you know, really?

MR SKELTON QC:

But if it's a matter of construction the Court says the Act applies to work in New Zealand and people based in New Zealand, then really what the parties themselves agree can't alter that statutory issue.

ELIAS CJ:

I accept that, yes.

MR SKELTON QC:

It may well be relevant though to that second issue, well laws, foreign law and a more appropriate forum might Hong Kong or somewhere else.

ELIAS CJ:

It's not an answer but it must be a relevant consideration and in some cases it might be quite important.

MR SKELTON QC:

And it is a relevant consideration at that extreme where you're working abroad and you're the expat and you don't, you know, so you don't have that presumption that you're within the territory then you have to look at all of the connecting factors to say, nevertheless this forum should take jurisdiction over it because New Zealand law applies, New Zealand employer, it's an enclave of New Zealand or they're only over working in Fiji as a reporter for five days, so all of those connecting factors overwhelm the presumption that work outside the jurisdiction is not covered.

GLAZEBROOK J:

Do you say as a point Lord Hoffmann in *Crofts* says as soon as you decide the person's based in New Zealand that answers the jurisdiction question as well. So it doesn't actually imply that there's a second question later as to what the suitable forum would be. It's if you're based in New Zealand – sorry, if you're based in the UK then the jurisdiction issues and what the applicable law is issue is answered as well. So I'm not sure there are gradations, at least under *Crofts*.

ELIAS CJ:

My question was only directed at what is "based". Here you have a stronger case because the parties have contractually faced up to that and identified it, but in a case where it depends on all the facts it maybe that if you've chosen –

GLAZEBROOK J:

Oh I see, yes.

ELIAS CJ:

Sorry I shouldn't have said anything.

GLAZEBROOK J:

Yes, no, in a factual sense whether someone is –

ELIAS CJ:

Yes, yes.

GLAZEBROOK J:

Okay, I understand.

MR SKELTON QC:

Your Honours, just before the break, the last page on the little chart that I've done on the outline, I've looked at *Crofts*, the House of Lords decision, you'll see there I just wanted to identify for Your Honours what was and wasn't in issue in *Crofts* because: what is the proper law? Well that wasn't an issue in *Crofts* because there was an express choice of Hong Kong law, just as there is in our case, and I've cited there the authorities, which is the Court of Appeal judgment in *Crofts* at paragraph 5, where they expressly say, "Hong Kong law was the choice of law." So just in our case there's no issue, proper law is Hong Kong law in *Crofts*, no issue. Now what is the territorial reach of the statute? Well in *Crofts* they say applies to employees based in the UK. Employment Court said in our case, Employment Relations Act by implication implies to employees based in New Zealand. Court of Appeal the Act doesn't apply to employees with foreign choice of law clause because that choice is decisive. That was the factor that they seemed to focus on as being the decisive issue. Now the overriding statute point, not an issue in *Crofts* because this is your point, Your Honour, about the wording of their 238 exception, 204 of the UK Act was written in explicit terms, it provides that the UK Act applies irrespective of the choice of law, and I've cited there the paragraph. So they've got, so that wasn't an issue about overriding statute because the Act itself says it doesn't matter what your choice of law is.

Now it is an issue in our case, is 238 an overriding statute or not? Employment Court, matter of statutory interpretation, 238 has overriding effect. Court of Appeal, 238 does not explicitly override the parties' choice of

law, so the choice is decisive. So that's the differences as I see it in terms of those particular matters, and Your Honour that might be an appropriate time.

ELIAS CJ:
Yes, thank you. We'll take the adjournment for 15 minutes.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.48 AM

MR SKELTON QC:
Your Honours, just before the adjournment we were considering *Crofts* and *Duncombe*. The latest word on that line of cases from the Supreme Court is the *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, [2012] ICR 389 case, which is at tab 22 of my volume 3. Your Honours that's another extreme case in terms of the expatriate type situation, not a case regarding peripatetic employees. This was a commuter employment situation where the employee worked for 28 days in a row in Libya, didn't do any work in the UK. Contract sensibly provided for UK law rather than Libyan law to apply. Again the issue was could the employer bring a claim in the UK, unfair dismissal claim. Now again this decision, Your Honours, doesn't in any way criticise *Crofts*. On the contrary it's applying *Crofts*, it's just again whether or not there's more than the two exceptions for expat employees identified in the judgment in *Crofts*, does it apply to this unusual circumstance. The answer was yes, UK law does apply. There's a point that Justice Glazebrook referred me to earlier on about the relevance of the UK law. So that's 32 of the *Ravat* judgment where Lord Hope, five lines down, "The better view, I think, is that, while neither of these things can be regarded as determinative, they are nevertheless relevant." So the proper law of the contract mightn't be determinative but it is relevant when it comes to looking at that question of the proper connection.

WILLIAM YOUNG J:
But if they talk about whether British employment law is the system of law to which the contract is associated with, is that the same issue as the proper law

of the contract is UK law, I mean it was in that case, but it must be a slightly different issue, isn't it?

MR SKELTON QC:

Yes, I think they're looking at, the relationship is more closely connected with British law than any other legal system. If one goes back, that might be shorthand, Your Honour, for looking at all of the connecting factors. So again I don't think that takes us too far, it's just another example, at the extreme end, at the outlier end, of the situation. We know that if the work's done within the territory, yes, jurisdiction to deal with it. If you're based in the territory, yes, jurisdiction. If you're not based in the territory, the work is outside the territory, exceptional circumstances may mean that the Act has to be interpreted to include you. I suspect, Your Honours, that reading between the lines the alternative of Mr Ravat having to seek justice in Libya might have not been an appealing prospect for Their Honours.

ELIAS CJ:

I'm just wondering about the use of words like "exceptional", whether it's very helpful in this sort of context. You are just trying to work out what the legislation envisaged. I'm not sure why it would have to be exceptional circumstances really.

MR SKELTON QC:

Well it's if the construe the statute as saying Parliament enacts laws territorially so, you know, it's exceptional – I mean of course Parliament can say what it likes, it can enact laws that, if it expressly says so that are meant to apply in Fiji, that's fine, but it would be exceptional for them to do that and so if you are saying well this law applies to a man working in Libya, there's got to be very strong other connecting factors before you get there.

ELLEN FRANCE J:

Just in terms of the approach you're adopting, Mr Skelton, how would that work in a case like the *Governor of Pitcairn and Associated Islands v Sutton*

[1995] 1 NZLR 426 (CA) one? Would the outcome be any different, on your approach?

MR SKELTON QC:
No, that's a case about sovereign immunity so that doesn't impact on the issue here which is the interpreting the territorial scope of the ERA and the Human Rights legislation. I don't say, I don't have to say the *Governor of Pitcairn and Associated Islands v Sutton* decision was wrong, I think it was correct, it just recognised as part of international, private international law, the exception for sovereign immunity.

Your Honours, I wanted to just take you back to the Court of Appeal judgment and if I could take you, that's in volume 1, if I could take you to paragraph 45, because the Court of Appeal said that *Crofts* was distinguishable, 45, they said it was a distinct statutory background and Your Honour, Chief Justice, there's the wording in the 204 that is different from our 238 in terms of that wording. But Lord Hoffmann in *Crofts* was not considering whether or not section 94 had an overriding effect. So the issues in *Crofts* was not about did it have overriding effect or not, but whether the matter fell within the scope of the Act. So while the Court of Appeal has pointed out there's a different wording in 204 to 238, that, I submit, isn't a ground to distinguish and not apply the basing test.

47, second ground relied on was that 94(1) was enacted in 1999 following the repeal of 196(2). As Your Honours will recall, by repealing 196(2), it just left the Act silent as to there's no territorial scope so it was exactly in the same situation as Your Honours are faced with having to imply some territorial scope. Again, not a basis for distinguishing *Crofts* in my submission.

GLAZEBROOK J:
And as you probably say, without the same history that Lord Hoffmann said was relevant in terms of what the previous legislation had said?

MR SKELTON QC:

Yes, and of course, he referred to the Lord Denning *Todd* judgment which was prior to that 196 wording anyway, that it's a common law-type approach to, "Where does someone work?" Well, where they're based. At 50, again, it's, "Lord Hoffmann found that the only 'sensible alternative' to an international airline pilot's condemnation to a life of flying without a jurisdiction of redress was to ask where he was based." Well, with respect to the Court of Appeal's reasoning, *Crofts* wasn't a case of someone, a flying Dutchman with no redress because the contract in *Crofts* had the same governed by Hong Kong law clause as appears in the conditions of service '02 in this case so it wasn't a justifiable basis, I submit, for distinguishing *Crofts.*

51, two later decisions, "have signalled a move away from *Crofts*, confirming that the parties' agreed choice of law is a highly material factor," that applied the connection test. Well, again, with respect, there's no movement away from *Crofts* in the subsequent decisions. It's just the extent of the exceptions for employees who all of their work is abroad. The subsequent Supreme Court cases have applied Crofts and endorsed their approach.

Your Honours, I want to then move onto the next section of my submissions which is around the proper interpretation of 238 and whether the ERA has overriding effect and I deal with that at 61 to 90 of my written submissions and I want to begin by taking you to the leading Australian textbook on conflicts of law, this is the *Nygh's Conflict on Laws* which is in volume 4, tab 39. So if Your Honours have that, it's volume 4, tab 39 and page 402 is the chapter from the book that deals with the issue of mandatory laws of the forum.

Your Honours, you'll see at 19.39, "A contractual choice of law clause, like any other clause in a contract, may not be enforced on grounds of public policy where the public policy is considered sufficiently powerful to override the parties' generally respected freedom of contract." At 19.40, "In some cases, the language of a statute will make it plain that it is intended to apply and to operate irrespective of the parties' contractual choice of law or where, for example, but for that choice, the contract would be governed by the law of

the forum objectively ascertained." That's the example in 204 in the UK legislation where it's made it expressly plain. And then, the authors set out some examples of statutes where there's express provisions made that expressly deal with conflict of law issues.

Then if we go to page 404, 19.44, "Considerable difficulty may arise in circumstances where the Parliamentary draftsman has not adverted to the intended impact of the legislation in question on contracts governed by foreign law with the consequence that the legislation is silent and the court has precious little to guide it in seeking to discern whether or not the principal statutory interpretation articulated in the *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 case applies, or is rebutted with the consequences that the statute attracts a mandatory law epithet. There are some types of legislation which notwithstanding the absence of manifest legislative intention have been customarily held to be mandatory in character and to apply irrespective of the choice of governing law other than that of the forum and labour or employment legislation frequently falls into that category."

Your Honours, the state, I submit, has a right in the public interest to regulate political social economic matters and that right must prevail over the autonomy of parties to choose the proper law of their contract and such social regulation frequently occurs in contexts involving unequal contractual relationships such as employment and Your Honours, I want to take you to tab 42.

GLAZEBROOK J:
Is that 5?

MR SKELTON QC:
I think it's volume 5. It says again in an article by Nygh, *Autonomy in International Contracts*, and just to refer you very briefly to chapter 7 of his book, that's at page 139. Chapter 7 is about the protection of the weaker

party, “Contractual freedom and the need for protection.” Do Your Honours have that?

ELIAS CJ:
Yes.

MR SKELTON QC:
It’s chapter 9, page 139. “Hand in hand with the growing recognition of the principle of autonomy, it is internationally acknowledged that economically weaker parties need protection. This is evidenced by the special fora provided for consumers in the Brussels and the Lugano Conventions and the special provisions for choice of law in respect of certain consumer and employment contracts in the Rome Convention. This chapter will explore who can legitimately be regarded as the weaker party and the degree of protection which should be afforded to shield such parties from the unfettered exercise of autonomy in the choice of law.”

And then at page 143, the author goes through the different categories that need protection and consumer transactions at bottom of 143 is one well-known category which of course becomes more relevant today when you buy everything over the Internet and someone puts in a choice of law clause in the fine print but then at 148, employment contracts are the other category and he sets out, I won’t take you through it, he sets out the history of employment protection laws that internationally have occurred in more recent times to the consumer ones. But I want to then move on to chapter 9 which is on the mandatory rules, and that’s at page 199. “The nature and object of mandatory rules. An exception to the general scheme.” So the opening sentence, “An important limitation on the autonomy of the parties is the principle that mandatory rules have priority over the choice made by the parties.” And then half way down the rationale for that limitation is explored. “According to Savigny, the category of ‘exceptional laws’ must reflect a public, rather than a private interest. That interest might be declared by the legislature, but this was rare. It was implicit in laws which sought to protect moral values, such as a marriage law which excludes polygamy; or they may

'rest on reasons of public interest, whether these relate to politics, police or political economy'. This was the genesis of the concept now known as 'mandatory rules', namely an ill-defined category national laws which override the normal conflictual rules, including the choice made by parties to an international contract. The notion of 'public interest' has expanded since Savigny's time: often the mandatory rules serve to protect the interests of private citizens, such as consumers and employees. Nor are such rules of necessity territorially-based: they may not only affect transactions by foreigners within the jurisdiction, but extend to transactions entered into abroad by nationals of the enacting state."

Of course we have here a company which is incorporated in Hong Kong, but for the sole purpose of employing New Zealand-based pilots. Now the test that is set out in chapter 9 around identifying what is a mandatory rule, it's at 205 of the bundle. "One can therefore say that the application of a law as mandatory will usually involve the following elements: (1) an express, or clearly implied" –

GLAZEBROOK J:
Sorry I've lost the page number?

MR SKELTON QC:
Sorry, page 205.

ELIAS CJ:
Sorry, before you launch into that, I'm just trying to follow why you make this argument. You're not pitching your case on conflict of law principles are you?

MR SKELTON QC:
Well I'm accepting that the parties agreed this contract was governed by Hong Kong law, I'm accepting that was a valid choice.

ELIAS CJ:
I want to ask you about that too.

MR SKELTON QC:

I'm accepting that. But conflict of laws principles allow for two exceptions which override party autonomy. One is mandatory rules and the other is public policy. And my submission is that the Employment Relations Act 238 is a mandatory rule that overrides the choice of Hong Kong law to the limited extent that 238 says it does: where there's inconsistencies between what's in the Act and what's in the contract. So that's the position. I'm not saying that the choice of law is rendered invalid for all purposes whatsoever, which is what the Employment Court got to that point. I think that's putting it too high. I think it's a valid choice of law but it's subject to these mandatory rules.

ELIAS CJ:

How would it apply in this case if you're right?

MR SKELTON QC:

Well how it would apply would be, because it's a mandatory rule, you can't say, well the Employment Relations Act doesn't apply to this case because normally the rule is you choose Hong Kong law so statutes in Hong Kong apply, New Zealand statutes don't apply. But that's only a presumption and it's subject to what the proper construction of the Act says. But the exception is mandatory rules because with mandatory rules, they apply notwithstanding the parties' choice of law. And why is that? Because Parliament has to have the ability to legislate in the public interest, such as imposing minimum employment standards, and you can't contract out of that by just, as a matter of public policy.

So it is important in this case to make a decision as to whether or not 238 is a mandatory overriding statute and that's why I've taken you to 205 because the authors there are looking at, "Well, what's the indicia that – if it's expressed, that's easy, but if it's silent, what do you look at?" One can therefore say the application of the law as mandatory will usually involve the following elements: An express or clearly implied intention on the part of the legislature to protect an interest regardless of the application of ordinary multilateral choice of law

rules. If we just stop there, the interest here that's being protected is employee protection. So that's clearly the interest here.

A second point, "A reasonably close connection between that interest and the enacting state such as territoriality of the transaction or the citizenship or residence of the parties sought to be protected." Of course here, the connection is that the work's done in the territory and the employees are New Zealand residents and citizens. And then the third point, "A need for the party seeking protection to be protected." Well, that's the whole purpose of one of the objects of the ERA, unequal bargaining power between these parties, section 3(1)(a) I took you to that said one of the purposes was to recognise the unequal bargaining power.

ELIAS CJ:
Sorry, just while I'm – I'm not sure that that does answer my query but I leave it for now. But I am also, and the Employment Court took a, as you say, a more extreme stance on this and I'm not yet sure that it was wrong in that. This is quite an interestingly worded choice of law provision but you don't make anything of that. You accept that it brings in the whole of the whole common law?

MR SKELTON QC:
The wording that was in the conditions of service '02 is actually quite limited because it just says, "Hong Kong law for the purposes of interpreting the statute."

ELIAS CJ:
Yes.

MR SKELTON QC:
So that's quite limited.

ELIAS CJ:
Yes.

MR SKELTON QC:

But the wording in the letter of offer that I took Your Honours to at the beginning I think is more express and I think you have to read them together.

ELIAS CJ:

All right, yes, you have said that.

MR SKELTON QC:

Because if it was just simply interpretation then you could say, "Well, apart from interpreting contracts which Hong Kong law applies, the rest of New Zealand law applied," but that's not the way it was argued in the Courts below and I'm not suggesting that. I'm prepared to say the parties did choose Hong Kong law but I am saying that – and I'm not saying that wasn't a bona fide choice. They didn't choose Zimbabwe law or Fiji law but it's subject to mandatory overriding statutes but before you get to, "Is it a mandatory overriding statute?" you have first, the primary question is, does the Act apply at all? So you have to define the scope in application of the Act. If it's extraterritorial, it doesn't apply at all, we don't even get to base two but I've gone through that aspect. I say it applies to peripatetic employees who are based here. Next question, is it overriding or not? And I've taken you through Nygh. I want to just take you to a decision in *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379 which is at tab 7. It was a case about a fatal accident that occurred in Germany. So that's tab 7, it's volume 1. So fatal accident in Germany, claim issued in UK seeking damages under the UK Fatal Accident Act 1976. The issue was set out in paragraph 12 of Lord Sumption's judgment. "English rules of private international law distinguished between questions of procedure, governed by the law of the forum, and questions of substance, governed by the lex causae." The issue in the case is whether Mrs Cox is entitled to rely on the various provisions in the Act. They provide for different measures of damages to be calculated. And he goes on, "This issue depends on whether the damages rules in sections 1A and 3 of the Fatal Accidents Act 1976 fall to be applied (i) on ordinary principles of private international law as procedural rules of the

forum, or (ii) as rules applicable irrespective of the ordinary principles of private international law," ie are they mandatory rules?

If we go to 26 to 29, 27 talks about extraterritorial application, "Whether an English statute applies extraterritorially depends on its construction. There is, however, a presumption against extraterritorial application which is more or less strong depending on the subject matter." Now I've taken you to the fact that with employment matters often they are mandatory.

Now 28, "It is, however, important to understand what is meant when we talk of the extraterritorial application of an English statute. There are two distinct questions … The first question is what is the proper law," and then further down, "The second question is one of extraterritorial application properly so-called." Now at 29 Lord Sumption talks about, "Implied extraterritorial effect is certainly possible, and there are a number of examples of it. But, in most if not all cases, it will arise only if (i) the terms of the legislation cannot effectually be applied or its purpose can effectually be achieved unless it has extraterritorial effect; or (ii) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that polity to apply to any one resorting to an English court regardless of the law that would otherwise apply." And that's the situation, we submit, we're in here. Minimum employment standards been enacted by New Zealand, cannot simply be sidestepped by putting in a choice of law clause.

GLAZEBROOK J:
Did Lord Hoffmann even get to that second question though? Did he – in *Crofts* wasn't it if the statute applies it applies and that's the end of it. Did he have to then go on and say it overrides?

MR SKELTON QC:
No, in this case –

GLAZEBROOK J:

So I'm just wondering whether you do need a two-stage. It's probably the same question the Chief Justice was asking. If the ERA applies doesn't it just apply? Because Parliament said it applies.

MR SKELTON QC:

Well, yes, although the starting presumption is that if you've got a valid choice of overseas law then New Zealand statutes don't apply.

GLAZEBROOK J:

Is that the starting presumption or is the issue just whether the ERA applies and if it applies to employees based in New Zealand then it applies and who cares about anything further? That was my presumption.

MR SKELTON QC:

Well, that was the starting point of my submission that this Court has to apply New Zealand statutes. That's your starting point, isn't it, so you have to interpret it –

GLAZEBROOK J:

So this is a sort of backup argument, then, that if that isn't the really simple answer then this is a mandatory statute that does override?

MR SKELTON QC:

Well, that's correct. I say it is a mandatory statute that does override.

GLAZEBROOK J:

But that's a backup argument? This first argument is, well, the ERA applies as *Crofts* said to peripatetic employees who are based in the UK, here, New Zealand –

MR SKELTON QC:

Correct, yes.

GLAZEBROOK J:

– and that wouldn't have mattered two bits what the rest of the statute said and it wasn't something that Lord Hoffmann relied on, ie it overrode choice of law provisions.

MR SKELTON QC:

Well, that's correct, because if I can't persuade you that the Act applies to peripatetic employees, well, then I don't get over base 1 but for the reasons in Lord Hoffmann's *Crofts* decision, there are good reasons for it to apply to peripatetic employees. I've set those out in the judgment.

ELIAS CJ:

Of course, Lord Hoffmann also makes the point which is echoed, I think, in some of the cases that he draws on that we call them employment contracts but you are talking about a matter of status which could equally be regulated by the law of the contract and I am not certain in my own mind that when you're dealing with something like that, a party choice of law attaches. I would have thought effectively it was a, "What is the proper law of the contract?" question in which the parties' choice might be a relevant consideration but I don't see why it should be determinative in this special case.

MR SKELTON QC:

Yes. I think the better approach to say, well, it's a contractual relationship, normal rules of choice of law can apply, but because it's a special relationship involving human issues it's within the scope of our Parliament to enact minimum standards which you can't contract out of, and the way that the text books look at that is to say, well, they have mandatory effect because they apply notwithstanding your choice of law, which is the –

ELIAS CJ:

But they might not always apply. I mean, they might if there was an overwhelming public interest in it, but if New Zealand was a convenient forum for determination of the dispute in some cases one can conceive of a situation where you would actually be applying foreign employment law, you know if –

MR SKELTON QC:

Yes, and that's *Musashi*, that's that case I mentioned where Chief Judge Colgan said it was Victorian law because it had a connection with Victoria, but the New Zealand courts have jurisdiction to deal with it but you must apply –

WILLIAM YOUNG J:

Have we got that case in the material?

MR SKELTON QC:

Yes, that's at tab 17. And the point in *Musashi* that is of note here is because the – I'll take you to that, Your Honours, tab 17, it's in volume 2, and this mandatory point is dealt with at 55 where –

GLAZEBROOK J:

Volume 2 what? Sorry.

MR SKELTON QC:

Volume 2, sorry, it's volume 2, tab 17, and at para 55.

ELIAS CJ:

The reference to *Dicey and Morris on the Conflict of Laws*?

MR SKELTON QC:

Well, yes. There's the reference to *Dicey and Morris,* but then at the bottom, "In this regard, and although not referred to by Mr Rooney in argument, the Authority nevertheless found support for this proposition in s 238." So they relied on 238 to say New Zealand law applied, "and its materially identical predecessor s 147 Employment Contracts Act 1991 in force when the contract was entered into. These sections provide that the legislative regime may not be contracted out of. Although they do not go so far as to govern the position in this case absolutely, they are indications of the Legislature's intent that employment contracts entered into in New Zealand and performed in New Zealand should comply with … minimum legislative standards." And

then at 56 he rejects the, you know, forum non-conveniens argument that it should be dealt with in Australia because this poor employer was never going to have any money to go off to Australia to fight the battle over there, and said New Zealand was the appropriate forum that you applied Victoria law.

Clifford v Rentokil Limited [1995] 1 ERNZ 407 (EmpC), Your Honour, is the case where it was accepted that 238 may be used to invalidate what isn't a bona fide or valid choice of law. So if the parties had gone and chosen the law of Zimbabwe to cover their relationship and put it in their contract, in *Clifford* Employment Court said you couldn't rely on that, 238 would stop you. Now I agree, but I also say that 238's not limited to cases where the choice of law is clearly not bona fide or valid, it's wider than that, 238 is there to protect minimum employment standards and needs to be applied accordingly.

Your Honours, I'm running over my time limit and I do want to give Dr Butler a fair go –

ELIAS CJ:
Yes, I'm sorry.

MR SKELTON QC:
And I did say that I will leave him with the heavy running on the public policy exception. Just a couple of points on public policy. They're set out in my submissions, but the key point here, this isn't a difficult case on public policy exception. Public policy exception is problematic when a New Zealand court is being asked to not apply a foreign country's law, you know, or where a judgment overseas has been entered into, like the *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA), and the Court's being asked, "Don't recognise the foreign judgment." That's hard; there's comity issues. This case is not about impugning a foreign law but preventing NZBL from enforcing a contractual right when to do so would be contrary to New Zealand law and public policy. So it's a much easier case, because you're not being asked to say Hong Kong law was invalid or wrong. There's no law in Hong Kong that says you have to retire someone at 55, it's a contractual right,

and it's quite common for New Zealand courts to say, "On public policy grounds we won't allow you to enforce a contractual right." This contractual right is you can be required to retire at 55, it's not a big ask, I submit, to apply a public policy exception here. And I endorse the proposed test that Dr Butler has suggested, manifestly incompatible with New Zealand public policy, I think that is a much better test than a test about shocking the conscience and all the variants of that test which are unclear and unhelpful.

And the final point, Your Honours, on that, you know, the cases talk about the paradigm case of a law passed in the Third Reich that strips a Jewish person of their German citizenship and takes away their property. Well, in this case we have a situation where the appellants, they mightn't be losing their citizenship but they're losing their status as an employee and, in terms of their property, their most valuable asset is their income-earning ability. So, you know, it has huge consequences, and that's being done purely because they're reached an age of 55 without any justification being offered as to why they can't perform their duties at 55.

So, Your Honours, I will leave my submissions at that point unless you have any further questions.

ELIAS CJ:
No, thank you, Mr Skelton. Yes, thank you, Mr Butler.

MR BUTLER:
So, Your Honours, you've had the benefit of the written submissions that have been prepared in advance by the Human Rights Commission, so I'm not proposing to delve into those submissions in great detail –

ELIAS CJ:
We don't need you to go into those.

MR BUTLER:

Thank you, that's great. There are one or two points however of contention, I think it would be fair to say, between myself and my learned friend, Mr Waalkens, for the respondent, which I may just want to touch on, so at least give you my perspective on those points.

So how I propose to deal with matters was I've focused on about six particular points that I just would like to make on behalf of the Commission and then focus on the points of contention that I identify with my learned friend, Mr Waalkens, and I'm obviously very conscious of the time, so I'll just rip into it if I may, Your Honours.

So the first point I want to make, which I think comes through strongly in the Human Rights Commission's submissions, I hope it does, is that what we say here is this isn't really a case about extraterritoriality at all. It is a case, we say, where, looking at various events and actions that have been taking in place in New Zealand, the circumstances indicate that the ERA would apply in terms, and the only reason there's a dispute about whether the ERA can apply is because of the existence of the choice of law clause in the contracts. I think that means we're not really talking about a case of extraterritoriality, we're rather talking about the intersection between a New Zealand statute which would otherwise apply and a contractual clause, or a clause in an agreement reached between the appellants and the respondents, and I simply make that point because it seems to me that renders cases like *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 and *Ludgater Holdings Limited v Gerling Australia Insurance Co Pty Limited* [2010] NZSC 49, [2010] 3 NZLR 713 inappropriate, and I'll also say, and I'll deal with it in a little bit more detail later, that it means that the very broad principle expressed by Justice Dixon in the *Wanganui-Rangitikei Electric Power Board* case really doesn't apply in terms. That case, as Your Honours will know, was a case about whether or not an interest reduction statute in New South Wales should be able to be relied upon to the benefit of the Electric Power Board in circumstances where, as Justice Dixon pointed out, the contract there had

almost complete connection with New Zealand. We're not in that territory, I submit, here.

I say a second factor that needs to be taken into account, it's touched on previously by my learned friend, Mr Skelton, but I need to emphasise it for the Commission, really is about the nature of employment as a relationship. You'll have seen in my submissions we emphasise quite strongly that employment is, adopting the language of Lord Hoffmann in *Crofts,* a sui generis relationship. It's not simply or merely contractual, it is one which involves, as I think Your Honour the Chief Justice just mentioned in discussion with my learned friend, has elements of status attaching to it, and Your Honours have been taken to *Crofts* at page 254 and 255 where that comes through strongly.

I did want to point out in addition that the unique nature of the employment relationship is something that Parliament was aware of when the ERA was going through the House. So if Your Honours wish to look at the Employment Relations Bill, which is in my bundle, tab 2, page 1, you'll see reference there to the special nature of the employment relationship. So you'll see, Your Honours, in the very first paragraph, a reference in the second sentence to the framework being, "Based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual economic exchange." And then further on in the second paragraph it talks about the employment environment encompassing the entire range, "The entire complex and dynamic system of relationships." And of course Your Honours will be aware, and that's why I included it, that the complex different nature of employment relationships is not a new thing. It was interesting that when the Treaty of Versailles was signed in 1919 following what was then called The Great War, the war to end all wars, a very important feature of the peace treaties was the establishment of the ILO. I'll just simply refer you to the preamble again set out in my bundle of authorities at tab 9, which emphasises the importance of dealing with labour relations and employment issues as part of a total global peace focused on achieving social justice.

And lastly on that point, I thought it was useful, I know my learned friend when he was taking you to the book by Professor Nygh, which is in his volume 5, tab 42, took you to page 139. He read a particular passage, but I'd just like to just look a little bit further down that page, because I think there are some comments of some interest again.

ELIAS CJ:
What volume?

MR BUTLER:
So volume 5, the appellants' volume 5. I don't have the colour co-ordination, I'm afraid, so I can't tell you –

ELIAS CJ:
No, it's not colour coordinated.

MR BUTLER:
It's apparently the green one, appropriately. And he'd taken you to chapter 7, page 139. He talked about the Brussels and Lugano Conventions and such like, you might remember that paragraph 1 of page 139. The part I wanted to take you to was the second paragraph on that same page where the author, the learned author, notes, "It cannot be denied that there is a tension between the principle of autonomy and the choice of the law applicable to the contract and the desire to protect the weaker party." And here's the important point, "According to the classical approach, no concession should be made. Although the principle of freedom of contract of necessity implies the existence of an actual freedom to determine the terms and conditions of the contract, the classical model, generally speaking, ignored the social and economic pressures that might induce a party to agree to disadvantageous terms in the course of bargaining." And so the point I'm trying to make there, Your Honours, I'm sure you get it, is that to the extent that there is reliance on a so-called classical model in respect of choice of law, I say that the premise of the classical model is inconsistent with the premises that underlie

employment legislation, and particularly employment legislation in this jurisdiction.

And the next point I wanted to make is an obvious one from the Commission's perspective, which is just simply this: that in the Commission's submission the ERA and the HRA anti-discrimination provisions need to be construed together. I address this in some detail in my written submissions beginning at paragraphs 2.8 and ongoing.

I just wanted to make two related points in that regard. The first one is just to remind Your Honours of something I'm sure you're already aware of, which of course is there is a choice of procedure ability. So somebody who's an employee who's unhappy that there's been non-compliance with non-discrimination provisions has a choice to proceed either under ERA or under the HRA. So from the Commission's perspective it's important, we say, for this Court to see the protections, particularly in the area of anti-discrimination law, as a whole, as a package. Now immediately that's relevant for this reason, Your Honours, which is that while my learned friend, Mr Skelton, has been able to take you to section 238 and talk to you about section 238 as being a mandatory rule which might well be able to override any choice of law clause in an individual employment agreement, there is no equivalent to 238 in the Human Rights Act, and that's why I say that when one is looking at the application in particular of the anti-discrimination provisions whatever about some other aspects of the ERA, when looking at the application of the anti-discrimination provisions it's important to adopt a statutory purpose approach. What is the mischief or the harm at which both the ERA and the HRA in terms are aimed at dealing with?

And the second point I'd wanted to make, which is one really of interpretation, so that was the big picture point about why the provisions should be interpreted together. But the second point I'd wanted to make was simply one of interpretation. I just simply note that the heading to sections 24 and 26 of the Human Rights Act which, as Your Honours know, are incorporated into the ERA expressly, are headed "exception". They're explicitly stated to be

exceptions to the prohibitions otherwise present in section 22 of the Human Rights Act. So I do think that having the status of exception those two provisions, 24 and 26, tell you what would otherwise appear to be the intended reach of the prohibition in section 22, they are carve-outs, and I address those exceptions in a bit more detail in my written submissions at paragraph 2.24 and onwards.

The next point I wanted to address Your Honours on – again please tell me if I'm going too fast – is this element of the public policy threshold and where it is set. You'll have seen that the Commission says that that public policy threshold has been set at far too high a level, and I say that in addition, that when one looks actually at the cases where public policy is an issue they certainly don't suggest you've got to get to the standard of *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 (HL) and Third Reich possibilities.

One of the cases that's in the bundle is *English v Donnelly* 1958 SC 494. Now this is a million miles away from being in Third Reich territory. What you've simply got here is a hire purchase agreement. You've got two jurisdictions in the same country, although I'm not sure whether I'm using the word "country" in the right way, the right phrase, within the same state, let's say, being the United Kingdom. So you've got hire purchaser in Scotland and you've got the hire company in England. Under the contract the governing law is said to be English law, and the company seeks to enforce the contract against the hire purchasers. Under Scots law – and by "Scots law" I mean an Act of the Westminster Parliament passed in respect of Scotland – a hire purchase agreement is invalid unless certain things had been done. The same law, it would appear, did not apply south of the border. The view taken by the Court of Session in that case was –

ELIAS CJ:

What case are we talking about?

MR BUTLER:

So we're talking about *English v Donnelly.* Did I not give Your Honours a tab reference?

ELIAS CJ:

Ah, yes, *English v Donnelly*, okay. No, that's all right. Your bundle, yes.

MR BUTLER:

Yes, it's tab 5 Your Honours, I'm sorry. I thought I'd made reference to it, I beg your pardon.

GLAZEBROOK J:

You were going to give us the punchline.

MR BUTLER:

Yes, I was going to give you the punchline. The punchline, Your Honour, is when you look at what the subject matter is in respect of which the public policy exception to choice of law is applied, we are nowhere near *Oppenheimer* territory. What we are in is a relatively anodyne question of the enforceability or otherwise of a hire purchase agreement.

ELIAS CJ:

And it's mandatory.

MR BUTLER:

Precisely. And the view that's taken by the Court in that particular case is yes, it should be applied, you'll see, and the reference at page 499. Unfortunately there's no line numbers or letters of the alphabet to assist us. You'll in that very top paragraph the Lord President has said, "In the second place therefore I must consider whether the Scottish Act applies or not. It is quite true that in general under private international law it can be said that the validity of a contract is governed by the proper law of the contract," here that would be English law, "namely by the law which parties intend or may fairly be presumed to have intended to invoke," reference to *Dicey*. And the view that's

adopted, you'll see in the next paragraph is, "In the present case however the statutory provision contained in the Scottish Act is mandatory. The object of section 2 of the Scottish Act is to lay down certain conditions precedent for valid hire purchase contracts designed to ensure that persons who hire goods under them are properly," there's something Scottish, "certiorated of the conditions contained in the agreements into which they are entering," and here's the critical piece, "The Act is a piece of social legislation designed for the protection of certain persons, ie members of the public, who hire articles through companies such as Twentieth Century Banking Corp. It is not intended to benefit nor to protect these companies," and so on.

GLAZEBROOK J:

But is this really more an issue of saying whether you can contract out of the contract rather than private international law? I mean, all it's saying is that these provisions can't be contracted out of isn't it? Whether by having a choice of law somewhere else or just saying they don't fly.

MR BUTLER:

Well, I don't quite see them quite that way.

WILLIAM YOUNG J:

Well, upstream of that, to get section 106 applying you have to accept that New Zealand Basing is an employer, the pilots are employees, it's an employment agreement, and thus it fits within the general definitions of the Act.

MR BUTLER:

Correct.

WILLIAM YOUNG J:

Does that mean that everything else in the Act applies, freedom of association, right to meal breaks, recognition of unions, access to workplaces, a role for the registrar of unions, a union for the inspectors, formerly

Labour Department inspectors, can that really be the case, can they all get sort dragged in?

MR BUTLER:
I think what one is looking at there, which is why I've been focused in my submissions very much on the anti-discrimination provisions –

WILLIAM YOUNG J:
I know, but you only get to the anti-discrimination provision if this is an employment agreement.

MR BUTLER:
Yes, I accept that's the case.

WILLIAM YOUNG J:
And if it's an employment agreement doesn't it drag everything else in, which is –

GLAZEBROOK J:
Unless there are certain things you can't contract out of, which is what –

WILLIAM YOUNG J:
Yes, but you've still got to accept it's an employment agreement.

GLAZEBROOK J:
Yes.

MR BUTLER:
Yes, and I do, yes.

WILLIAM YOUNG J:
But if it's an employment agreement then on the face of it everything else in the Employment Relations Act applies, including things that you might think are rather silly.

MR BUTLER:

Yes, that may be the case –

WILLIAM YOUNG J:

So what is the answer to that?

MR BUTLER:

Well, I think the answer to that, in my own mind the answer to that would simply be the intended scope of the no contracting out provision in the, in section 238.

WILLIAM YOUNG J:

But it can't mean that – say the pilots actually lived in Hong Kong but had signed the agreements in New Zealand, the Hong Kong choice of law wouldn't be a non-contracting out agreement, wouldn't be a contracting out agreement. So, I mean, you've got to make a decision whether the Act applies at all and, if so, to what extent.

MR BUTLER:

Yes. And the submissions to the Commission, as you'll know, at the outset. That's why I was saying if it wasn't from the Commission's perspective it's not a case about territorial, extraterritoriality, because the Commission's submission was that on the face of it, in terms of the factual findings that had been made by His Honour Judge Corkill below, it is the Commission's position that the Act would otherwise apply –

WILLIAM YOUNG J:

But you have an agreement made in New Zealand that is – say I enter into an agreement with Cathay Pacific to become a pilot and I do so in Wellington but I'm going to fly out of Hong Kong, would the Act apply to that? Because the agreement's made in New Zealand.

MR BUTLER:

Not necessarily, that's –

WILLIAM YOUNG J:

Well, what's the point at which it starts to apply?

MR BUTLER:

That brings us right back then to whether or not somebody has the status of being an employee or an employer –

WILLIAM YOUNG J:

Yes, I understand that. But why would I not have, on your argument why would I not have the status of an employee if I sign the agreement in New Zealand, even though I'm going to work in Hong Kong?

MR BUTLER:

Because the premise that the Commission is proceeding upon isn't so much where it has been signed as such, but whether or not –

WILLIAM YOUNG J:

I thought that was what you were, because you were relying yourself on Judge Corkill's finding of the agreement that they were engaged in New Zealand?

MR BUTLER:

No. So I think what's important there is to recall, as His Honour Judge Corkill did in his written decision, that in fact it was my learned friends for the respondent, for Cathay Pacific, who were seeking to rely on sections 24 and 26 as an exception from their perspective, and that's recorded by Judge Corkill I think at paragraph 86, if I remember rightly, of his written decision. So it really was a case of them relying on the exception that existed in the HRA, that's why I made the point in my written submissions, it was one of the points of contention I think between myself and my learned friend, Mr Waalkens, I say that they have accepted that but for the choice of law clause the ERA would apply, and I say they are right.

WILLIAM YOUNG J:

I don't know that they have accepted that. I think it's a separate argument, isn't it?

MR BUTLER:

So what they say, as I understand their submissions, the proper reading of their submissions as I read it is because choice of law was Hong Kong law the ERA cannot apply, but I think they would recognise that if we were just looking at to determine at whether the Act applies or not if some other law was chosen, let's say the law of Zimbabwe, let's use that ridiculous example, if the law of Zimbabwe had been chosen and the question then was, well, would the ERA apply, my learned friend must in my submission accept though in these facts applying a case like *Crofts* for example, that the ERA is indeed applicable.

WILLIAM YOUNG J:

Okay, so that follows –

MR BUTLER:

So he's not conceding – yes.

WILLIAM YOUNG J:

So that would follow, on your argument, that New Zealand Basing has to comply with everything else in the ERA?

MR BUTLER:

And then the question will become, for example, let's take the labour inspectorate, so the question will, and really that's why I say it's –

WILLIAM YOUNG J:

But that's triggered as to whether it's an employment relation issue, it's not triggered by whether, where people are living.

MR BUTLER:

That's correct.

WILLIAM YOUNG J:

I mean, I'm really sympathetic to the appellants' case, but I just wonder whether the premise of it carries with it too much baggage?

MR BUTLER:

Sir, well –

WILLIAM YOUNG J:

Sort of crazy stuff.

MR BUTLER:

Yep.

WILLIAM YOUNG J:

Because it can't be that Cathay Pacific are required to submit to Department of Labour inspections in Hong Kong.

MR BUTLER:

No, and that would go to my point, is that's where you, then once you say that the ERA in principle is triggered then the question becomes which of the obligations, for example, would you apply in a scenario around penalties or the like, or powers of inspectors, so then in respect of those sorts of matters you might be drawn back to other aspects of private international law or jurisdiction and the like.

ELLEN FRANCE J:

It does suggest it's not solely a matter then of the interpretation of the Act doesn't it, the starting point?

MR BUTLER:

So I think, well, I say that the starting point is the interpretation of the Act, but in interpreting the Act what one is trying to figure out in particular instances is

which of those obligations in the Act is applicable to the employment relationship between the parties. So, for example, using an example a little bit closer to this situation, so I'm just taking Your Honours to *English v Donnelly*, but if you look for example at the *Old UGC Inc v Industrial Relations Commission of New South Wales* [2006] HCA 24, (2006) 225 CLR 274 case, to which there's some reference there, in that particular case, and this I think goes to the point made by my learned friend, Mr Skelton, in his submissions, there the applicable, the law of the contract, was the law of Colorado. I know there's been some suggestion that, well, Colorado had no connection with the relationship, that's not my understanding of it, my understanding is that the corporation in fact was domiciled in the, you know, head office was back in the States, I haven't been able to find out whether it's exactly in Colorado or not but I think it's a fair supposition, but there would have been some connection with it. But the point I say that you take from, say, the decision of the New South Wales Court of Appeal or from the High Court of Australia in that particular case is we're not trying to dis-apply the choice of law of Colorado, what we are trying to do however is apply in relevant terms and to the relevant extent the applicable New South Wales legislation, in that particular case the jurisdiction given to the Industrial Relations Commission to interfere in – I think that's the statutory phrase, to interfere in or intervene in – the contractual arrangements between the parties if, in its judgement, the arrangements were unfair. And it was an example where both the High Court and indeed the New South Wales Court of Appeal had some regard to the *Wanganui-Rangitikei* principle but said, "Here the policy is such that there is a connection, there is work which is undertaken in Australia, and that's enough to ground the application of the relevant legislation, notwithstanding the fact that the parties had chosen Colorado law as the proper law of the contract."

ELLEN FRANCE J:

One of the commentators, Louise Merrett – I'm not sure where in the bundle it is – but she draws a distinction between what she calls private law arrangements between the employee and things that she says are of the more regulatory nature. Is that an approach that you see as having any attraction?

MR BUTLER:

I can see aspects of that, and I suppose that's why in my submissions I've been trying to focus very much on the particular prohibition that's in play in this case, being the anti-discrimination provision, and how that will play out here. And again if you go, if Your Honour pulls back and asks the question – so the point I was in the middle of making was a point related to the nature of the public policy threshold and where that sits, and so the point I'm simply trying to make is that to pitch it as I feel that the Court of Appeal has done below just pitches it far higher than the cases say it needs to be, than it needs to be pitched. So that's why I make reference to *English v Donnelly,* it's why I make reference to the *Old UGC* case. I'd also make reference to, say, *Dicey*, so there's a number of extracts from *Dicey* shared across my bundle and the appellants' bundle. But it's interesting to me, for example, if you look at some of the examples that are to be found in *Dicey* in terms of public policy, and I just want to make sure I've got the right page references – they're between two bundles. But one of the examples given is, for example, a restraint of trade clause, so that typically a restraint of trade clause will not be given effect to, notwithstanding that under the jurisdiction of the law of the contract a restraint of trade clause might be upheld. So I've got references to those in my submissions at paragraph 3.8, and the relevant references will be the Human Rights Commission's bundle of authorities at tab 13, I'll just quickly take you there.

So the examples are set out at page 1877, if you see, Your Honours, if you've got that tab 13, page 1877, you'll see there's illustrations, and we are dealing with contracts contrary to public policy in general, so there's a range of examples given. One example, for example, would be example 2, share of a damages case, so some of those case are, relatively speaking, old, but that same principle for example was relatively recently upheld by the Irish Supreme Court in relation to a contract in respect of heir locators, that's heir as in H-E-I-R, where there was an agreement to share the spoils, and it was held that the agreement was one that was contrary to public policy in both Ireland and in the UK and would not be enforced, again, nowhere near the *Oppenheimer* as founded I submit. And then if you look down at example 6

example, you've got the example of a restraint of trade clause. So I say that the Court of Appeal has just pitched it too highly.

I would echo the point that's been made by my friend, Mr Skelton, that in terms of the reliance in the public policy that we say is articulated in both the Human Rights Act and in the ERA, you're not being asked to impugn Hong Kong law as such but rather a contractual choice that's being made by parties, a contractual choice which, if the ERA and, indeed, HRA, applies, is not open to the parties.

And there was reference – I'm just turning now very briefly, I'm just conscious of time, I've got two minutes, so I'm just trying to see which of the points of contention between myself and my friend, Mr Waalkens, are worth particularly focusing on just to give him notice of those particular points. I note that he says that, for example at paragraph 76, that *Old UGC* is inconsistent with Justice Dixon's general principle that silent statutes are subject to the rules of the conflict of laws. It's not quite an accurate description of the principle that is articulated by Justice Dixon, he talked about in the absence of countervailing considerations, and I say the public policy is very much a countervailing consideration and do recall that in the *Wanganui-Rangitikei* case where the observations of Justice Dixon were made there was merely a scintilla of connection to New South Wales, and when one stood back and asked the question why should the Wanganui-Rangitikei Electric Power Board have the benefit of an interest reduction statute aimed at boosting or preserving businesses in New South Wales, the question almost answered itself. So you've got to read those comments, I say, in context.

At 77 I'm criticised for focusing on statutory purpose. I disagree. I say bearing in mind that what we're engaged in here is primarily an exercise in statutory construction, it's very important to focus on purpose. I say that when you look at those, the purposes of both the ERA and the HRA, that you will, Your Honours will agree with the proposition that I advance, which is that both the ERA and HRA are classically within the field of social legislation, to which

one can look, divine public policy, and then decline to apply choice of law to the extent that it's inconsistent with the public policy.

I've talked to already about the language of sections 24 and 26, so I won't talk about those.

There's some criticism at paragraph 97 of his submissions where he says that the Court of Appeal was right to say that protection against enforced retirement because of age doesn't reflect the absolute value that must trump trans-national contracting, and I've set out in my submissions reasons why I say that what we are in is in the territory of fundamental importance, it's a norm that is observed in many jurisdictions and, importantly, it's a norm established within New Zealand. I have referred in my submissions to the possibility of what I call choice of law arbitrage, or jurisdictional arbitrage, and I say that's another important consideration to bear in mind in determining whether or not proper force is going to be given to the terms of the ERA and the HRA insofar as non-discrimination principles are observed.

WILLIAM YOUNG J:
So if this was a straight personal grievance claim that had nothing to do with age discrimination but was simply to do with a dispute about conduct or something of that sort, would you say that the Employment Relations Authority and the Employment Court would have jurisdiction to deal with it in accordance with New Zealand law, ie by New Zealand principles of unjustifiable dismissal, or would they apply Hong Kong principles?

MR BUTLER:
I don't luckily, I'm not in that space, I don't have to provide an answer.

ELIAS CJ:
You're not in that argument. But Mr Skelton might have to say yes.

MR BUTLER:
Indeed, exactly, that's what I was going to say.

ELIAS CJ:

Yes.

MR BUTLER:

Fortunately for myself I'm not quite in that argument –

WILLIAM YOUNG J:

But the trouble is that they don't have to – if the answer to my question isn't yes then it's not quite so obvious, at least to me, why you would bring in what's really a subset of a personal grievance jurisdiction, which is age discrimination.

MR BUTLER:

Yes. And basically from my perspective if put on the spot to say, well, what is the right answer, my answer would be yes, the PG provisions must apply because they are the mechanism through which the substantive protections, not only in relation to anti-discrimination but other of the minimum employment rights, the employment standards, are given effect to there, the mechanism through which effect is given to them.

WILLIAM YOUNG J:

But they can be given effect to in other ways, and it may be the Hong Kong employment ordinance does, but just does so differently.

MR BUTLER:

That may be the case, we don't know that on the facts here, and I suppose the point then becomes is that possibility sufficient to deny jurisdiction in the Employment Court, (a), to receive and process the personal grievance that is being advanced here first and then, second, is it a further hindrance to the Employment Court actually applying the applicable rules in the ERA?

WILLIAM YOUNG J:

Was there any discussion in *Crofts* as to why the pilot in the *Crofts* component of the case shouldn't have litigated the case Hong Kong, litigated the dismissal in Hong Kong?

MR BUTLER:

I can't remember that there was. I do remember looking at this some time ago when I referring –

GLAZEBROOK J:

I think he just said it followed, if 94 applied it followed that it was UK jurisdiction, I think I read that.

MR BUTLER:

That's my recollection.

GLAZEBROOK J:

So it was night follows day.

MR BUTLER:

Correct, and it could be –

GLAZEBROOK J:

Now maybe it doesn't but –

ELIAS CJ:

And that meant the whole of the employment law too –

MR BUTLER:

Yes, that's right.

ELIAS CJ:

– to answer the other question.

MR BUTLER:

Now remember in that –

ELIAS CJ:

Because it was the personal grievance regime.

MR BUTLER:

Yes, it's the personal, and that's just what I was going to say, Your Honour. Now my understanding of the way that UK employment law operates is it's quite a diffuse system, it's not like a single package like what we have got. So my understanding has always been that in the way that because of that strange relationship that UK law has with EU, used to have, well, does for the next wee while, have with EU law, that often when one gives to directives or regulations one does it in a piecemeal way, so that when looking at this other particular case in *Crofts*, if I remember rightly, involved the Employment Rights Act –

WILLIAM YOUNG J:

But it's just a straight wrongful dismissal claim or unjustifiable dismissal claim.

MR BUTLER:

And that's the point, that's the point. So whether it involved everything, for example like inspectorates and all of that, I can't say, but it certainly did involve unjustified dismissal, that was the context within which the claim was framed. So to that extent it was the equivalent of what we might call a part 9 – I think that's the right part isn't it? – part 9 of the ERA.

ELLEN FRANCE J:

There were breach of contract claims as well, unfair dismissal and breach of contract.

GLAZEBROOK J:

Yes, paragraph 1 he says if 94(1) applies the answer to this question will also determine the question of jurisdiction because it will have jurisdiction if, but only if, section 94 is the appropriate choice of law.

WILLIAM YOUNG J:

But it doesn't say why, it doesn't –

GLAZEBROOK J:

No, no, it doesn't, it just says that is…

MR BUTLER:

No, exactly, and I don't know why.

GLAZEBROOK J:

It just says that's what the answer is because it applies.

MR BUTLER:

And it may have been convenience to the applicants, to the claimants, or something of that sort, if they were based in, but I don't –

GLAZEBROOK J:

It didn't sound like it, it actually sounded like just night follows day.

MR BUTLER:

Yes.

GLAZEBROOK J:

If that legislation applies then, well, that's what he says.

MR BUTLER:

Correct. So just very briefly, two particular points. There was a question from Your Honours about the number of pilots who were affected by the claim and by this particular issue. If it's helpful to Your Honours, volume 2 of the case on appeal, page 306, lists the employees –

WILLIAM YOUNG J:
Was it two captains, the present appellants, and 11 first officers?

MR BUTLER:
Yes, and that list helpfully sets out which contract they are governed by and what their age was as at some date in 2014, just if it's helpful to you to give you just a bit of a feel for what's in play here.

And the last point that I just wanted to touch on – I'm just looking at my junior to make sure I've not forgotten anything – was I just think it's important to point out that it's recorded by His Honour Judge Corkill in the Employment Court in the case on appeal, volume 1, at paragraph 52, that there was evidence given by both pilots in this case around their unwillingness to bargain away the retirement age, in other words take a drop in salary for the retirement age, and one of the pilots, from memory I think it was a Mr Sycamore, explicitly made reference to his awareness of what the protections were under the HRA and his expectation that the company would act in accordance with its obligations under the HRA, so I just thought that was probably again as a matter of factual record useful just to have that in the mix.

Your Honour those were the points that particularly the Commissionr wanted to make in the time that's available. Thank you very much for hearing from the Commission.

ELIAS CJ:
Thank you, Mr Butler, thank you for your written submissions too.

COURT ADJOURNS: 1.07 PM
COURT RESUMES: 2.08 PM

MR BUTLER:
Your Honours, I made reference to a case during my submissions and I said it wasn't in the bundle. I've just provided copies for Your Honours to

Madam Registrar but I don't want to take away any more time from my friend's presentation, thank you.

ELIAS CJ:

Thank you. Yes, Mr Waalkens.

MR WAALKENS QC:

Yes, thank you, Your Honours. Can I just start with a few facts, if I may, just to emphasise some points that may have just been a bit glossed over, and that is firstly in terms of the employment of the two appellants, they were initially employed in 1990 and 1992 and then, as my learned friend Mr Skelton referred, they were employed then by Veta some years later in another contract then ultimately by the respondent company. But you have before you two employees who have had 22 and 24 years or thereabouts in respect of employment terms, which from day one have always had the age 55 retirement age. So there's nothing that's changed in that regard in terms of where CoS '02 is at.

ELIAS CJ:

Although I imagine that an awful lot of employment contracts 24 years ago contained mandatory retirement dates.

MR WAALKENS QC:

Well, yes, but I was about to make the point that the Employment Court noted – this is paragraph 22 of Judge Corkill's decision, I've set it out in my submissions also – that CoS'02 was the product of quite extensive negotiations. My learned friend for the Human Rights Commission made the point that these are not – well, he said that they're sophisticated and well-resourced employees. In my submissions I picked up on the inference or the suggestion that there's some vulnerability here in the way these contracts were negotiated, and a couple of points on that, it's just simply not accepted and certainly there was no evidence at all before the Employment Court about that and nor did the Employment Court make any findings along those lines.

ELIAS CJ:

Sorry, of what?

MR WAALKENS QC:

That they were disadvantaged or they were vulnerable employees in the negotiating process.

ELIAS CJ:

Oh, I see.

WILLIAM YOUNG J:

But it can't turn on that, can it, it can't turn on whether the appellants were vulnerable, and why did it not turn on the question whether as a general rule the legislation assumes that employees are vulnerable, for instance say flight attendants, Cathay Pacific flight attendants, employed out of Auckland were involved?

MR WAALKENS QC:

Yes, there may be – look, Your Honour's right, there may be categories of employees where that impression may be –

WILLIAM YOUNG J:

But the law can't be different depending on whether you're dealing with a pilot or a flight attendant, can it?

MR WAALKENS QC:

No, except, well, my point is that these contracts were the subject of extensive negotiation on people who were, you know – I'm picking up on the words from my learned friend – sophisticated, well resourced, they had union support, lawyers and, as I say, this age 55 provision has been there all throughout. The only time the issue was taken was when in 2014 the retirement age of 55 was looming.

It hasn't been emphasised yet, but the Employment Court Judge, although he couldn't put an express figure on it, noted that it's about 8.3% or thereabouts of the pilots' work is spent in New Zealand, the rest of it is outside of the territory, and in my submissions at paragraph 30, and I won't take you right through those, but if you run your eye down those you'll see the terms of the CoS'02 document has very extensive perquisites or benefits, many of which have a distinctly Hong Kong flavour to them. And in that regard there's some analogy with the *Musashi* case that was referred to, that's the judgment of Justice Colgan or Judge Colgan in the Employment Court, Mr Skelton referred to that this morning. And that was the case where the Court, the Employment Court, has to determine whether it was Victorian law that applied or New Zealand law in a case involving an unjustified dismissal, in fact a constructive dismissal claim, and Your Honours will see that in volume 2 of the appellants' green bundle of authorities beneath tab 17, and if I could just briefly take you to that please, the head note at paragraph 3 adequately identifies the ways in which the proper law governing an employment contract could be determined. I should have said that this was a case that falls within the tenure of this current Act, that's the Employment Relations Act, and His Honour referred to the general common law in that regard at paragraph 38.

WILLIAM YOUNG J:

I actually wonder whether the Judge was right there, because under section 103(a)(ii) what constitutes an unjustifiable dismissal is defined. So I actually have reservations whether the Employment Relations Authority or the Employment Court, if dealing with a personal grievance alleging unjustifiable dismissal, could look at justification in terms of Hong Kong law. It seems to me that their choices may simply be to either apply New Zealand law or to decline jurisdiction on the basis the case can be litigated somewhere else.

MR WAALKENS QC:

Well the Judge, as you know in this case, determined that New Zealand could look at it but would apply in that case the *Musashi* case, apply Victorian law.

GLAZEBROOK J:

But why would they when the, I mean in terms of *Crofts* the person was working in New Zealand, that's all they were doing, they just happened to be working for an Australian company. Why in terms of *Crofts* would Victorian law apply?

WILLIAM YOUNG J:

Probably by mistake, they just used their standard form.

MR WAALKENS QC:

Well –

GLAZEBROOK J:

If you're working in New Zealand surely New Zealand law applies in terms of *Crofts* there wouldn't be any question of extraterritoriality. You're applying New Zealand law to a New Zealand person working in New Zealand, happens to be for a company – well actually a company that has registered in New Zealand as an overseas company what's more –

MR WAALKENS QC:

It's not though, it's not registered in New Zealand.

GLAZEBROOK J:

No, no, sorry, this is *Musashi*.

MR WAALKENS QC:

Oh *Musashi*.

GLAZEBROOK J:

It's just if you're relying on this it actually seems to me to be wrong. In terms of *Crofts* I can't see any justifications for saying it's nothing to do with extraterritoriality, it's slap-bang a New Zealand person working in New Zealand for a company registered as an overseas company in New Zealand.

MR WAALKENS QC:

What His Honour did though –

GLAZEBROOK J:

Is that wrong?

MR WAALKENS QC:

Yes, well His Honour was right though, isn't he, in paragraph 38 where he ultimately in the end of that paragraph paid regard to the law in which the transaction has the closest and most real connection and you'll see that that epithet is echoed in the English jurisprudence now on this. I'm going to take you –

GLAZEBROOK J:

Well I doubt that the English jurisprudence would say someone who is employed in New Zealand, working in – employed in England, working in England, under a contract in England, is employed by anybody other than, covered by anything other than English employment law.

MR WAALKENS QC:

Well what the English cases say now is that the, one has to look at the closest and most real connection. My learned friend, I'll take you to the passages in the judgments in a moment but –

GLAZEBROOK J:

That's when you're looking at somebody who's employed overseas whether there's a closer and more real connection to somewhere else. It's very hard to say that this person in *Musashi* has a close connection with anything other than New Zealand, isn't it?

MR WAALKENS QC:

Yes, yes, well *Musashi*, if I can, I hear what Your Honour is saying. If I can finish *Musashi*. If you go to paragraph 46 Judge Colgan there cited the various provisions in that agreement, which in that case had a strong flavour

towards Victorian provisions, which is very similar to the type of bundle of benefits that exist in this agreement CoS '02, and I've set those out in paragraph 30, you'll see the numerous references to ordinances to Hong Kong and the like. So I say that the concept of, essentially on the appellants' part, essentially cherry picking out the benefits and in particular attacking the age 55 retirement on the basis that they do, results in a wholesale replacement as the Court of Appeal said, of the carefully drafted transnational bargain that these parties came to, and it also creates a very difficult outcome or precedent for foreign corporates or bodies that may want to employ a New Zealander, or have employment that involves some New Zealand connection, albeit the most significant connection is with an overseas jurisdiction that an outcome that would favour the appellants in this case would seriously jeopardise New Zealand's international relations in that regard and the problem with the outcome that the appellants commend is that once, there's no one size fits all, so once the ERA is found to apply it's all the benefits under that Act that will have equal application, not just this issue around age discrimination. So what I commend is that, as the Court of Appeal have followed, that this is a classic conflict of law case and the Court ought firstly identify what the proper law of the contract is, and that has been properly and conventionally undertaken by the Court of Appeal. There's no dispute that the adoption of Hong Kong law was proper and bona fide –

ELIAS CJ:

They just say that there's been a, that the parties have opted for it, that's the only reasoning in terms of identification of the proper law.

MR WAALKENS QC:

Well, no, because beyond that there's also the issue of where is the closest and most real connection? There is some connection with New Zealand, I grant you that, but by far and above the –

ELIAS CJ:

But did the Court of Appeal elaborate on that? I thought that they did. I thought they simply said it was a choice of law.

MR WAALKENS QC:

Well, they've followed the traditional conflict of law approach, Your Honour, but if one was to adopt a statutist interpretation or approach, which I'm going to come to in a moment, which my colleagues adopt, that's not going to determine the territorial reach of the statute. So if the ERA is found or determined to have overriding effect, it's an overriding or mandatory statute, which I don't accept, but if that is the determination of the Court, then quite separately you've got to determine what the statute or what the territorial reach of that statute is, and in order to do that the Court ought look at where the closest and most real connection with the employment criteria are, and that's not New Zealand, that has to be Hong Kong. So I've summarised my argument in my written submissions –

GLAZEBROOK J:

So you say *Crofts* is wrong when you look at where someone is based?

MR WAALKENS QC:

Oh, very much so, yes. And maybe if I could deal with that now, Your Honour, just on *Crofts*?

ELIAS CJ:

But the Court of Appeal didn't say *Crofts* was wrong, the Court of Appeal said it was distinguishable.

MR WAALKENS QC:

It's distinguishable, they said, but it's also wrong though. The Court of Appeal didn't say it was but –

ELIAS CJ:

No.

MR WAALKENS QC:

Yes.

ELIAS CJ:

No, no, I understand your argument that it's wrong. But the Court of Appeal distinguished it. I must say I have difficulty distinguishing it, and I wanted to know if you wanted to add here to that line that it was distinguishable or whether you're only advancing the argument that it's wrong?

MR WAALKENS QC:

Look, it's both, Your Honour, it's distinguishable, and can I just take you to my paragraph 41 – 41 and 42 set it out. There is no question that the, there can be no dispute that the statutory provision in *Crofts* that Lord Hoffman was looking at is a mandatory rule, and *Halsbury's Laws of England* makes that abundantly clear in that section.

GLAZEBROOK J:

But that wasn't the basis of the decision though, was it, or do you say it was?

MR WAALKENS QC:

Well, it was, because His Honour went – he didn't even consider choice of law at all, he went straight to –

GLAZEBROOK J:

Well, he did, because he said if the Employment Act '94 applies then the jurisdiction follows.

MR WAALKENS QC:

Well, can I just walk you through it. So in paragraph 41 and 42 I've set out the statutory provisions there. I've given Your Honours the Grušic article, I don't know if you've had a chance to look at that, it's an excellent analysis of *Crofts* and that's at the very end of my bundle in the last tab, tab 15. So you'll see in the head note, the author, Grušic, commends that last sentence that, "The European choice of law rules must have greater importance for determining territorial scope of employment legislation and consequently the approach pursued in," and that's the three cases under the name *Lawson*, "is

no longer correct if ever it was and should not be followed." And if you go to page 738 of that article –

GLAZEBROOK J:

That's not distinguishing it though, is it, that says it's wrong, so is that –

MR WAALKENS QC:

That's true. It's a different statute, it's a very different statutory backdrop though because you have a statute that's very clearly of an overriding effect, that's a distinguishing feature that's predominant in *Crofts* that's not present in ours. We don't have an express provision that adopts it as an overriding statute, but if you go to page 738, and again this is identifying why Lord Hoffmann's analysis in *Crofts* is wrong. The author in that first main paragraph on that page notes how His Lordship commenced his speech by stating that the, read literally the section applies to any individual who works under a contract of employment anywhere in the world, and that some territorial limitations must be implied. And then a few lines down, "However, this assumption was erroneous. It disregarded the basic principle of private international law that 'a statute does not normally apply to a contract unless it forms part of the governing law of the contract'" and therefore the Employment Rights Act "could have never claimed worldwide application, but rather applied, in principle." And the author follows through on that analysis with further examples, and if you go over to page 747, under the heading "Should the *Lawson v Serco* approach be abandoned?": "Had Lord Hoffmann not started off with a wrong assumption", namely that the Act –

GLAZEBROOK J:

I don't quite understand why the author says it's the wrong assumption because if the Act says this applies to everything, any employment contract, a statute would override what anybody said in a contract. Why would a contract override what was said in a statute? I don't think it matters but I'm not sure that it's a wrong assumption. Because if a statute says this applies to all contracts anywhere, the fact that in private international law there might be a different rule can't override the statute.

MR WAALKENS QC:

His Lordship didn't refer at all to the section that is said to give it to the overriding effect.

GLAZEBROOK J:

Well not because he said that read literally it could apply to any contract anywhere but you have to look at a territorial limitation.

MR WAALKENS QC:

Mmm.

GLAZEBROOK J:

But you couldn't override the, If the statute did say it applies to every contract everywhere, that can't be overridden by a contract saying no it doesn't.

MR WAALKENS QC:

That's so, yes, that is so.

GLAZEBROOK J:

Well that's what they said. I don't think it matters particularly but it's very difficult to see that it's a wrong assumption because a contract will override the statute whatever private international law says, and that's a principle of private international law in itself.

MR WAALKENS QC:

Well –

GLAZEBROOK J:

Especially in a country where there is Parliamentary sovereignty. And even where there isn't the thought that somebody can override the law by writing something in a contract, unless you're able to contract out of that statute, can't be right either.

MR WAALKENS QC:

Well the assumption that Lord Hoffmann does start with on page 1, or page 253 of the judgment, in terms of extending it literally to any individual who works in a contract anywhere in the world just can't be right.

GLAZEBROOK J:

No, but he says that can't be right but he says read literally it could and then you've got to work out what the territorial limitations are. It seems perfectly standard to me. I mean he does accept that it doesn't apply but he then has to work out the territorial limitations.

MR WAALKENS QC:

Yes, and Lord Hoffmann also of course adopted that passage which the Court of Appeal do rightly criticised him for, of saying, or identifying with a base test because otherwise these pilots in *Crofts* would be left without redress, and as the Court of Appeal said that can't be right, where you've got a provision which Lord Hoffmann didn't refer to adopting Hong Kong law as the appropriate law.

ELIAS CJ:

It was an illustration. He wasn't really saying that was the effect in what he said.

WILLIAM YOUNG J:

Well wasn't he really disagreeing with Lord Phillips?

ELIAS CJ:

He was disagreeing with Lord Phillips.

ELLEN FRANCE J:

Just in terms of this article, I was not sure how it helped you because it seemed to me that what the author was saying was that in *Crofts* Lord Hoffmann had in fact followed the conventional view, which was to treat statutory claims as in a different category and in that context you didn't get

into the choice of law you went straight to what the statute says, and I thought this author was saying, “Well, that's changed now, but it’s changed because of the provisions of the Rome Regulation,” that's what I thought the main thrust of this was, but I might be wrong about that.

MR WAALKENS QC:
Well, I didn’t read it that way, Your Honour.

ELLEN FRANCE J:
And if you look at 751 where things are brought together – I mean, I accept the author is saying that the approach in *Lawson* was never correct but –

MR WAALKENS QC:
Yes. And that is what I rely on, I agree with the author on that.

If I can take you back to our Court of Appeal decision, I say that, or I commend their approach of looking at the conventional way in which a choice of law clause is to operate, and the Court identified, and I’ve set it out in my submissions at paragraph 49 and 50, the Court identified the areas in which or the limitations on the effectiveness of a choice of law clause, which is right, one either entered into in bad faith, which this isn’t, or contrary to public policy – and I’ll come to that in a moment – or that it’s an overriding statue, and we’ve got very clear jurisprudence already in New Zealand to the effect that the Act or its predecessor is certainly not an overriding statute. And if I could just take the Court very briefly please to the three cases that I refer to in that regard? The first one is the *Pitcairn* case, you’ll find that in my bundle of authorities beneath tab 5, and that's the Court of Appeal decision Your Honours will recall that was looking at the issue of sovereignty that arose in that case, although within the context of the Employment Contracts Act as it was then what’s significant in this case and also in the next one I’ll refer to you that they’re both 1995 cases and notwithstanding that the Courts made it clear that these statutes were not of an overriding effect Parliament hasn’t addressed this in any way, shape or form to make it expressly clear that that isn’t the right approach. So in *Pitcairn* the Act was clearly noted to be one that

didn't have an overriding effect, and you'll see that in the Court of Appeal's judgment at page 438, and it's between lines 25 and 40, I won't read it all out, but the concluding remarks, "While the Employment Contracts Act is broadly phrased, it's not expressed to apply extraterritorially or to override sovereign immunity. The absence in its general language of any specific restriction on its application to a foreign sovereign cannot be elevated to an expression of intent to override that important presumption ground in public law" –

GLAZEBROOK J:
So you're extending this to apply to anything rather than merely sovereign immunity?

MR WAALKENS QC:
Well, no, just the literal words used, that the Employment Contracts Act is a general statute, it doesn't have an overriding effect in this case with regard to sovereignty.

GLAZEBROOK J:
Well, no, but sovereign immunity is a sacred cow if you like, so you would need usually something very much more to override the than you would in the case of a private contract wouldn't you? I mean, I'm not sure you can extend this reasoning to be anything other than sovereign immunity.

MR WAALKENS QC:
Well, all the same it sets –

GLAZEBROOK J:
But it must have overriding effect on internal contracts.

MR WAALKENS QC:
I hear what Your Honour is saying. You'll see this principle is picked up directly in an employment situation in the *Clifford v Rentokil* case, that's the Employment Court's decision in tab 4, and again Mr Skelton touched on this case this morning. This was the Fijian, the person employed in Fiji who

brought a claim, or dismissal under the Employment Contracts Act, and there was a dispute and an issue as to whether that Act, that's the predecessor Act, was an overriding statute, and the gravamen of the decision is at page 433, and you'll see half way down that page His Honour has referred to the *Pitcairn* case that we've just touched on and then at the very bottom of the page, "Notwithstanding the broadly phrased nature of the Employment Contracts Act, I now re-emphasise it is not an overriding statute but will apply according to standard doctrine in an arguable conflict of laws setting where the particular contract of employment in contention is held by the Employment Tribunal or this Court, as the case may be – but subject to the fundamental caveat," that the Court referred to in a moment, "The 'fundamental caveat' to which I refer is simply that if, in a particular case, the parties to a particular employment contract which clearly, upon analysis had in its material incidents the closest and most real connection with the employment law of New Zealand, had purported to expressly select as the proper law governing their contract of employment a foreign system of law which had little or no connection with that contract of employment, and thus comprising in substance a contracting out by the parties of the governing application of the Employment Contracts Act contrary to s 147 of the Act, such a purported contracting out would, I hold, be void and of no effect." And that 147, as Mr Skelton made clear this morning, is largely in identical terms to the provision we have in our current statute 238.

ELIAS CJ:

What does that say? Sorry, I'm getting lost in the dashes.

MR WAALKENS QC:

Yes, the 147 Your Honour? His Honour is saying there that, he's approached an assessment of where the material incidents of the statutes have the closest and most real connection with the employment law of New Zealand.

ELIAS CJ:

He says it's governed by New Zealand law because New Zealand law is the proper law of the contract.

MR WAALKENS QC:

In that it has the closest and most real connection with New Zealand.

ELIAS CJ:

Yes.

MR WAALKENS QC:

Yes, and so His Honour has adopted that, noting that wouldn't be applicable if the foreign system of law had little or no connection with that contract of employment. So in this case, again if one looks at the various connections with Hong Kong and Hong Kong law, the fact remains that New Zealand has little or no connection. It has some connection, it has little connection with the material incidents of the employment. They're employed by an overseas company. They are paid in Hong Kong. They pay tax there. All the facts that I referred to earlier in my, alluded to in my written submissions. Unquestionably places the closest and most real connection with Hong Kong not with New Zealand. And that case is, as I said, that case didn't result in, or that determination hasn't resulted in Parliament or anyone making, there was a need to –

ELIAS CJ:

That isn't the effect, is it, in the jurisdictions where these contracts have been brought on-shore, or whatever the expression is?

MR WAALKENS QC:

Can you just repeat that Your Honour?

ELIAS CJ:

Well, as I understand it the same sort of arrangements have applied in relation to Australia and the UK and, I don't know where else, those two anyway, but the contracts, well the choice of law clause has been dropped.

MR WAALKENS QC:

Yes.

ELIAS CJ:

On your argument those contracts too should be governed by the law of Hong Kong because it has the closest connection, the sort of arguments you're putting forward.

MR WAALKENS QC:

Well, no, because – you mean with, you're talking about the Cathay pilots who work in these other?

ELIAS CJ:

Yes.

MR WAALKENS QC:

Well, no, because they've now been home based, they've got a permanent base in these other jurisdictions.

ELIAS CJ:

Well, these are based in New Zealand.

MR WAALKENS QC:

Only with very little connection with New Zealand, just –

GLAZEBROOK J:

I didn't understand some of the other jurisdictions had necessarily home bases there or that that was the basis of the "homing" if you like.

MR WAALKENS QC:

It's a very different –

GLAZEBROOK J:

The idea was that they were going to bring home all of the contracts wasn't it?

MR WAALKENS QC:

The Employment Court and nor do we have any detail of what the terms of the contract for those other Cathay pilots who work in other jurisdictions, we just

don't have those. So I can't tell you, and I'm not being evasive, we just don't know what the terms are. I have –

ELIAS CJ:

Well, on your argument though they would all be subject to Hong Kong law because it is the proper law of the contract because it has closer connection, if they're simply based in those other jurisdictions.

MR WAALKENS QC:

Not so, Your Honour, because the difference with our case is that we have an express adoption of Hong Kong law, and that's –

ELIAS CJ:

But it all comes back to that really doesn't it?

MR WAALKENS QC:

Yes.

ELIAS CJ:

On your argument.

MR WAALKENS QC:

That's a big factor in it, not all of it, but it's a big factor, because that coupled with the closest and most real connection with the incidence of employment we say, additional to the express adoption of Hong Kong law, is Hong Kong, so that's all in harmony with that. And can I just –

WILLIAM YOUNG J:

But, I mean, there was some evidence about it wasn't there? I mean, it's referred to by Judge Corkill that in other, that leaving aside the States, where I understand there is a legislated retirement age, that in all other jurisdictions out of which pilots operate the Cathay Pacific has allowed them to go on till 65.

MR WAALKENS QC:

Yes, that's right.

GLAZEBROOK J:

Including Hong Kong, to a degree.

MR WAALKENS QC:

Well, but not all of them, not all the –

GLAZEBROOK J:

No, no, to a degree I said.

MR WAALKENS QC:

Yes, to a degree, yes.

WILLIAM YOUNG J:

But they can go on if they want to.

MR WAALKENS QC:

Well, no, they can't, they can't elect, they can't change as of right, there are –

WILLIAM YOUNG J:

Sorry, but I understood that Cathay Pacific simply gave them exemptions.

MR WAALKENS QC:

But they had done this before. I'm giving evidence in the Bar here but I spoke to a Cathay person earlier today who said no, they can't just – those who are on the 55 retirement age can't as of right say, "Well, I'm now going to elect to go to the 65 year retirement age." Can I just also pick up on that? My learned friend, Mr Skelton, this morning emphasised this issue around the promise that Cathay pilots or in this case NZ Basing Limited pilots would have the opportunity to go to 65 and that hasn't happened. Two things: I wasn't at the hearing but that issue was, apart from not being pled or raised at all, formerly didn't arise until during cross-examination of one of the pilots and that issue was raised, that there was this matter that's now been elevated up to become

a promise, and you'll see the Court of Appeal quite rightly in my submission in paragraph 81 said, "Well, look, no action's brought by way of misrepresentation or breach of promise or the like on that," and so that's something that's rather irrelevant, so I thought I said address that point expressly.

ELIAS CJ:

When you say "the connections" of the ones in your submissions, are you referring to those at para 64?

MR WAALKENS QC:

64 of my submission?

ELIAS CJ:

Yes.

MR WAALKENS QC:

Those are some of them. They're to be read also in conjunction with number 30, which has got an identification of all the various perquisites that have, many of them have a strong reference to Hong Kong and Hong Kong law. So 64 is a summary of the points.

ELIAS CJ:

Yes, 64 refers back to those entitlements doesn't it?

MR WAALKENS QC:

Yes.

GLAZEBROOK J:

But you could have those in a contract, say you've got a Hong Kong company who sends somebody to New Zealand to work for two years, or permanently if you like, and they could be given, because they say, well, this is a hardship post, we'll actually give you your public holidays in Hong Kong, we'll give you the same thing because then you can come back and see your family on the

various things that are important to your family in Hong Kong, rather than being stuck with the New Zealand, and yet it may be perfectly, quite clearly absolutely totally a contract of employment that relates to New Zealand and only New Zealand. I mean there's nothing wrong about giving – I mean New Zealand companies could give a Chinese employee who wants to go home to a particular area the right to go home for family festivals et cetera.

MR WAALKENS QC:
That's so. The difficulty in practice though is what I alluded to earlier, that if the ERA is found to have this mandatory overriding effect in this case –

GLAZEBROOK J:
Well it only does if somebody is based in New Zealand, which is the *Crofts* test. If they're not based in New Zealand it doesn't have that aspect, does it.

MR WAALKENS QC:
Well they don't have to be based here. They could –

GLAZEBROOK J:
Well they do actually in accordance to their contract because they have to ask to be based elsewhere.

O'REGAN J:
That's the whole basis of *Crofts*, isn't it, that they're based –

MR WAALKENS QC:
Yes, that is so, yes, that is so.

O'REGAN J:
I mean what's the problem with it anyway. If the contracts with people all around the world have been changed in the jurisdiction they live in, what's the problem with having New Zealand jurisdiction apply, New Zealand's law apply?

MR WAALKENS QC:

Well again there was no evidence given about this but I, the sense I understand of it is that the cohort of pilots here, particularly those on, are much older than in other jurisdictions, and so the age 65 retirement would result in an inability of the airline to have younger pilots and they sort of numbers that they would want coming – there's something of a commercial analysis behind this that supports why what has happened has happened. But my point is that if this appeal was to be successful it will serve a very ugly precedent for other corporates and other businesses to come and do business in New Zealand on a, anything comparable basis, being foisted with having to comply with all of the –

GLAZEBROOK J:

Well if the employees are, this is slightly different because you have these peripatetic employees.

MR WAALKENS QC:

Yes.

GLAZEBROOK J:

But I can't see anything odd, or even remotely odd in saying, whatever you are as an employee, whether you're foreign or otherwise, if you have people working in New Zealand, based in New Zealand, living in New Zealand, they should comply with New Zealand law.

MR WAALKENS QC:

Permanently, absolutely so. What the English –

GLAZEBROOK J:

Well if they're seconded for a short period then the rules in *Crofts* would have a different base wouldn't they, if you like?

MR WAALKENS QC:

Well what the UK –

GLAZEBROOK J:

But these are the peripatetic which are the, the based, which is a different category of employee under *Crofts*.

MR WAALKENS QC:

What the UK statutes decision are now seemingly commending is this analysis, the reach of the, so that if you were to find that the ERA is an overriding statute, you've then got to separately make a determination of what is its reach. Which employees does it cover? And the answer to that is an instruction or an enquiry around what is the closest and most real connection with the incidents of the work. But if I can move onto that.

GLAZEBROOK J:

Well if you're flying out of, if you're required to live in New Zealand, which they are, well at least they're required to have their base as New Zealand, they're required to fly out of New Zealand and come back to New Zealand, in terms of the closest connection of the work, it's a bit on the, it looks quite like they're working in New Zealand to me, apart from the time they're in international airspace –

MR WAALKENS QC:

Well they –

GLAZEBROOK J:

But they're returning back and forth, aren't they, and isn't that what *Crofts* said?

MR WAALKENS QC:

They only spent – well no they're flying predominantly into and around and out of Hong Kong. They'll travel from New Zealand and come back to New Zealand, but they've only got, there's only 8.7 or thereabouts per cent of their time is spent in New Zealand. We don't have the actual percentage, but the Judge –

GLAZEBROOK J:

Well, how much is spent in Hong Kong, did they – I doubt very much more is it? Because they fly in and out.

MR WAALKENS QC:

Oh, it won't, no, of course it's not, no, it's not all of it. A great deal more of it is spent in Hong Kong than here.

O'REGAN J:

Well, there's no evidence of that.

MR WAALKENS QC:

That will be so. They have to go there for training, and there was evidence about, and it's referred to in the judgment, about big rafts of training time that they have to go to Hong Kong. But again, if you look down the criteria of what is the closest and most real connection, unquestionably I say it's Hong Kong and those are, that's my paragraph 30 and also paragraph 64 that Justice Elias referred me to a minute ago.

ELIAS CJ:

You said, you know, it might be different if they were permanently resident in New Zealand, but the terms of the letters of offer make the whole employment dependent on your residing and continuing to reside in New Zealand.

MR WAALKENS QC:

What I was alluding to was permanently working in New Zealand so that they –

ELIAS CJ:

Oh, I see, working, yes, I see.

MR WAALKENS QC:

And just on that, Justice Elias, you may have seen in my submissions that there is that provision in the contract that says – and my learned friend

Mr Skelton referred to it this morning – that if you leave New Zealand you have to terminate your employment, you have to be based here.

ELIAS CJ:
Yes.

MR WAALKENS QC:
But as I've alluded to in the submissions, there is evidence of, you know, that's not a condition that's in force, for what that is worth.

ELIAS CJ:
No, but it looks as though the letters envisage that you'll then be employed by Veta Limited or USA Basing Limited.

MR WAALKENS QC:
USA, yes, that's true, that's what the letters say.

ELIAS CJ:
Yes. So there's a sort of swap over. But it seems to be envisaged that there are different contracts then.

MR WAALKENS QC:
Yes, that is so, that's what the letters envisage.

The Hook article, if I can just move on to the –

ELIAS CJ:
I've forgotten, is NZ Basing Limited, that is a New Zealand company?

MR WAALKENS QC:
No.

ELIAS CJ:
A Hong Kong company?

MR WAALKENS QC:

No, it's a Hong Kong company, it doesn't even have an office here.

ELIAS CJ:

Right, that's right, yes, it said that.

MR WAALKENS QC:

So as I said earlier –

GLAZEBROOK J:

Was the previous company, was that domiciled – I thought that, the previous one, was an Australian company wasn't it?

MR WAALKENS QC:

Veta. It was an Australian company, yes.

GLAZEBROOK J:

So that'll be, they'll have got into trouble with the double tax agreement there because they have to have –

MR WAALKENS QC:

It's a tax issue, that's right.

GLAZEBROOK J:

– a contract party that is Hong Kong based in order to take advantage of the double tax agreement.

MR WAALKENS QC:

Yes, that would unquestionably have been so, yes.

GLAZEBROOK J:

Because they did say they did it for tax reasons.

MR WAALKENS QC:

Yes.

GLAZEBROOK J:
They were legitimately for tax reasons – I'm not suggesting there's –

MR WAALKENS QC:
That's right, legitimately so, yes.

So if I can just take you back to those two articles that I've put into my bundle of authorities, going back to Grušic, which is the tab 15, Grušic at page 743, it's tab 15 of my bundle, at page 743. And I won't read the whole section out but at the top of the full complete paragraph there, as previously mentioned, section 104, the ERA prescribes that for the purpose of this Act it's immaterial whether the proper law of a contract is or is not the law of the UK or part of it, and then there's a discussion about how some authors have interpreted that. And then just towards the end of that paragraph, the last couple of sentences, "But this argument blurs the difference between a provision's overriding effect and its territorial scope. It is possible that the provision is overridingly mandatory but an employee falls outside its territorial scope and, conversely," and the author refers to the other situation or the flip side where an employee falls within this territorial scope, "it cannot rely on it since it doesn't override British law." So I agree that it's one thing to determine whether a provision has an overriding effect, so if you were to determine the ERA, and our case does, you then still have to determine what the territorial scope of that is. And in that regard I refer to the two UK Supreme Court cases that Mr Skelton referred to this morning. The first is the *Duncombe* case, Lady Hale's speech, which is in tab 10 of his bundle, that's volume 1 of the green bundle, and this is the English teacher who was employed to work in Germany and brought an unfair dismissal claim at the end of the nine year term that she was engaged to work for. If you go please to paragraph 16 which my learned friend –

GLAZEBROOK J:
Sorry, I missed your tab?

MR WAALKENS QC:

It's tab 10 of the first volume, if you go to paragraph 16, "In our view these cases," and this I having reviewed, you'll see in the previous line the reference to *Crofts*, "In our view, these cases do form another example of an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal." And then gives the examples of a number of factors, first and second, and then down to just before line F, "Although this factor," that's the contracts being governed by English law," is not mentioned in *Lawson v Serco Ltd*, it must be relevant to the expectation of each party as to the protection which the employees would enjoy." And again there is the example of Lady Hale saying not just looking at a closest, an approach of an overwhelming closer connection with Britain and British employment law, but also as to the construction that adopting a particular foreign law in this case, for us Hong Kong law, must be a significant factor and Justice Elias you raised that very question with my learned friend this morning and I see that as a confirmation of the very point that it's –

ELIAS CJ:

I don't know that I said "significant" but must be a relevant factor.

MR WAALKENS QC:

Yes, it's a relevant factor. And the other case is the *Ravat* case, which is in my learned friend's appellant casebook, tab 22, and that is volume 3, and the relevant passages, this is the employee from, the UK employee who travelled from his company base in Aberdeen to work in Libya and he brought an unfair dismissal claim when the Libyans terminated his employment, he commenced that in the UK, and the question arose as to what was the reach of the statute, and at paragraph 27, a reference to counsel in 27 drew attention to Lord Hoffmann's comment in *Crofts*, "that the fact that the relationship was rooted and forged in Great Britain because the employee happened to be British and he was recruited in Great Britain by a British company ought not to be sufficient in itself to take the case out of the general rule. Those factors will

never be unimportant, but I agree that the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works." So these two cases, the UK Supreme Court indeed, note the closest, my words, closest and most real connection with, in this case Hong Kong, as an indicator as to the reach in which a statute that otherwise has an overriding effect may have.

My learned friend for the Human Rights Commission in his written submissions, this is at paragraph 2.32, I won't take you to it but I'll remind you of it, made reference to a concern that otherwise, a company like Air New Zealand, he gave as an example, might adopt a foreign law provision and the appellants likewise adopt a similar I say scaremongering-type submission saying that a simple nomination of another foreign law has a great potential for abuse and would frustrate the ERA aims. I say of that that either of those examples would not be permitted. The Employment Court in the *Rentokil* case makes it very clear that you can't evade the consequences by selecting a foreign law which has little connection with the statute or with the incidence of employment and likewise, so too do the two UK cases that I just referred to.

Indeed, the *Rentokil* case makes clear that again, the caveat that if the employment contract has its material incidence as its material incidence the closest and most real connection with New Zealand then that's got to be the driving factor behind it. The *Old UGC* case, the Colorado case is another example of this where the New South Wales employee could hardly be taken to have to comply with Colorado law which had so little contact with the employment arrangements there.

So in terms of how the issues are characterised, I commend to the Court that it is appropriate to characterise these issues as contractual or of a contractual type and that's consistent with the Employment Relations Act. Section 5 of the Act, and that's in my learned friend for the Human Rights Commission's bundle, section 5 of the Act makes it clear.

ELIAS CJ:

That's the interpretation section.

MR WAALKENS QC:

I'm sorry, I've got the wrong reference. Yes, it's volume 5 of the appellants' bundle and it's beneath tab 43. Section 5 of the ERA defines "employment agreement" and you'll see it at the bottom of page 24, part (a), meaning a contract of service.

ELIAS CJ:

Well, it includes – "it means of contract of service," yes, sorry.

MR WAALKENS QC:

Well, in (a), "means a contract of service," and (b) "includes a contract for services," between, so it refers to the term "contract" and it's got a contractual flavour to it. The employment rights conveyed by the Act against including claims of unjustified dismissal are contractual in nature and the author Grušic again has quite a bit to say about that in his discussion on the contractual nature of employment claims of this type. That's from page 732 onwards. I won't take you to those but the author doesn't analyse that.

GLAZEBROOK J:

Well, not in terms of the Employment Relations Act though.

MR WAALKENS QC:

Well, he –

GLAZEBROOK J:

Well, the Employment Contracts Act maybe, but it's difficult to say that requirements in a statute for grievance is contractual.

MR WAALKENS QC:

Well, they've traditionally been treated that way because the statutes adopt a quasi-contractual entitlement to bring a grievance claim.

WILLIAM YOUNG J:

And you can hear a straight breach of contract claim too in the ERA or the Employment Court.

MR WAALKENS QC:

Yes, you can, yes.

WILLIAM YOUNG J:

I must admit, I don't think the New Zealand Court, New Zealand Employment Relations Authority or Employment Court, could decide a case in accordance with the statutory entitlements under the Hong Kong employment ordinance, I just don't think it's got power to do that. On the other hand, it could hear a claim for breach of contract, applying if necessary the Hong Kong –

MR WAALKENS QC:

Well, it could apply the former though.

WILLIAM YOUNG J:

But you see, I mean they're – well, could it? Section 103(2) defines the test for what's an unjustifiable dismissal.

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

I can't see how a New Zealand court could apply any other test to unjustifiable dismissal.

MR WAALKENS QC:

Well, if it was to adopt a foreign statute that had its particular in the Hong Kong ordinance example, and I don't know what the position there is in terms of the equivalent of unjustified dismissal, but if there was a regulatory test that could be –

WILLIAM YOUNG J:

Well, it's a difficult, well, as I understand it it does fall – although there's a tribunal the case can, an employment case can also be dealt with by the ordinary courts.

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

So you can say, "Okay, these are the legal principles applied to this contract, we'll apply them here." I'm not quite sure that's quite so easy if the claim here is simply, "I was unjustifiably dismissed," because the statute tells you what the test for unjustifiable dismissal is and it's got nothing to do with Hong Kong.

MR WAALKENS QC:

Yes, and I don't have any –

GLAZEBROOK J:

And nothing necessarily to do with the contract either.

MR WAALKENS QC:

I don't know the answer to that, but the ordinance or the equivalent registration in Hong Kong may well provide the definition of and mechanism of determining an unjustified dismissal or whatever grievance claim.

WILLIAM YOUNG J:

And it's going to provide it in terms which are broadly generally similar to those in New Zealand because presumably they all reflect the ILO Convention, but it won't be exactly the same.

MR WAALKENS QC:

No, well, maybe not. But there can't be much objection to these appellants complying with the contractual provision that it's the law of Hong Kong that applies and that Hong Kong is the appropriate place to bring claims, and have

it determined in Hong Kong in accordance with whatever the procedures there are.

WILLIAM YOUNG J:
Unless it's a claim that can't be heard in Hong Kong.

MR WAALKENS QC:
And that's never been suggested.

WILLIAM YOUNG J:
Well, I think it. Isn't it suggested that you can't bring a claim for age discrimination in Hong Kong?

MR WAALKENS QC:
Oh, age discrimination you can't – no, no, that's so.

O'REGAN J:
We've also got the overlay here of the human rights legislation with the employment legislation haven't we?

MR WAALKENS QC:
Yes.

O'REGAN J:
So it's not, I mean, to say it's all contractual is gilding the lily a little bit, isn't it, particularly in light of the social objectives talked about at the very beginning of the Employment Relations Act?

MR WAALKENS QC:
Well, I say that there's a contractual flavour to these rights, and paragraph 61 of my –

O'REGAN J:
But you could equally say there's a social flavour.

MR WAALKENS QC:

Well, it has some –

O'REGAN J:

It's employee rights. I mean, it talks about employee relationships all the way through this legislation.

MR WAALKENS QC:

Yes.

O'REGAN J:

And it does import provisions for the protection of people perceived to be vulnerable in the employment relationship.

MR WAALKENS QC:

Yes, it does.

O'REGAN J:

So it's the fact that the contract is the legal structure that's used doesn't mean that there's just the law of contract, otherwise we wouldn't have an Employment Contracts Act.

MR WAALKENS QC:

Yes. Well, just to finish this topic off, the Act under – and this is in my paragraph 61 – adopts the, at section 162, the provisions of the Contracts (Privity) Act 1982, the Contractual Remedies Act 1979, Contractual Mistakes Act 1977 and so forth.

GLAZEBROOK J:

I do just have a bit of trouble with this personal grievance thing, contractual. You have a statutory right to bring a personal grievance, it won't matter what the contract says. So the contract mightn't say, "I, employer, am allowed to sexually harass you and I can do it when it like," it mightn't say anything

whatsoever about that. But if you've been dismissed because you've been sexually harassed, then you can bring a personal grievance.

WILLIAM YOUNG J:
But you'd be asked that if you can bring it in Hong Kong too.

GLAZEBROOK J:
No, no, I'm not talking about whether it's Hong Kong or anything, it's just the assumption that it's contractual doesn't wash with a personal grievance, because most of these things won't be anywhere near – I mean, they might be, there could well be something that says no one's allowed to sexually harass you in the marketplace now, but a contract doesn't have to say that.

MR WAALKENS QC:
Well, you wouldn't. The contract doesn't have to go and identify the various types of grievance you can bring. The fact that you've got the –

GLAZEBROOK J:
No, no, but to say that it's contractual when actually the statute tells you when you can bring grievances that might have nothing whatsoever to do with the statute is just an odd way of putting it.

MR WAALKENS QC:
Well –

GLAZEBROOK J:
I understood your, what you were saying is the whole basis of the ERA is contractual, but that just isn't right in terms of personal grievances.

MR WAALKENS QC:
Well, except that the ability to bring the grievance, however it's framed, be it a sexual one or whatever –

GLAZEBROOK J:
Comes from the statute, it doesn't come from the contract.

MR WAALKENS QC:

Well, it adopts a right that has a contractual flavour to it, that they can as of right bring a claim.

GLAZEBROOK J:

Okay.

ELLEN FRANCE J:

The contract does have, although it's very general, provisions dealing with the ability to bring a grievance, it just doesn't specify, it says, "Either individually or collectively which directly affect the conditions of employment," it's how it seems to be framed, if I'm in the right contract, page 266, that's the 2002.

MR WAALKENS QC:

Yes. Well, yes, that's right. I mean, there is the ability to bring a grievance on a very wide range, it doesn't identify or break it down into any particular type of grievance.

ELIAS CJ:

This is a sort of an in-company procedure, it's an administrative procedure is it?

MR WAALKENS QC:

Well, all grievances are, as this is defined, relate to some action taken by the company in violation of, and then it's a whole lot of provisions there: contracts, terms of employment, work rules, et cetera. So it's not limited in how it applies, or the circumstances are certainly not confined there.

ELIAS CJ:

Well, this is not a court process or anything like that, is what I mean.

MR WAALKENS QC:

It doesn't set out a court process, no.

ELIAS CJ:

No. It's not an independent tribunal process either.

MR WAALKENS QC:

No, it doesn't identify that, no.

ELIAS CJ:

No.

MR WAALKENS QC:

Just in terms of the approach that my learned friends have commended, that one should adopt a statutist approach in identifying what the metes and bounds of the ERA are, I don't know if Your Honours have had a chance to read it at all, the article of Maria Hook, which is in tab 13 of my bundle of authorities, and the author at page 81, the second of the pages, had this to say in terms of commending the way the Court of Appeal had approach it – it's halfway down the page under the heading, "Does the ERA apply to contracts governed by foreign proper law?" about two-thirds of the way down there, "At a time when many a court is falling into the 'statutist trap' of reducing the enquiry into an exercise of mere statutory interpretation, … reassuring the Court of Appeal analysed the question at hand – whether the ERA applied to the claim of unfair dismissal – as a traditional conflict of laws problem. Nevertheless, overriding mandatory rules form an important part of modern private international law and it is a shame the Court didn't explore the potential overriding nature … more fully," but all the same the author there and elsewhere commends the approach that the Court of Appeal followed. If you go over the next page, page 82 at the top, in the top section of the article, "What is the applicable law?" not, "Does the Act apply?" and about halfway down that passage, "Yet once it is determined that a statute has overriding effect it is necessary to work out its territorial scope proper. In *Crofts* the House of Lords used the base test to determine … The Court of Appeal was thus right to distinguish *Crofts.* The base test could only become relevant once the Act had been determined to have overriding effect. It was not a tool, or a substitute, for determining the overriding nature of the Act."

And then in terms of section 238 and how it's to be interpreted, if you run your eye immediately across from that passage I've just read to the right column, "The Court concluded – correctly in our view – that the Act did not contain any provision to this effect. Section 238 is a 'simple' mandatory rule that is not concerned with cross-border dimension of the Act (it ensures that parties are unable to contract out of the provisions of the ERA when the applicable law is New Zealand law". The section must be presumed to operate subject to ordinary choice of law rules," and there's a further discussion as the author indicates on that very aspect later in the article. I'll leave it for Your Honours to read this article more fully when you come to consider the case, but in terms of the closeness of the connection of the case to the forum at page 84 at the very last paragraph on that left-hand column, "The more closely connected the case is to the forum, the more the forum wishes to have the particular policy enforced. This means that overriding mandatory rules will have the greatest practical impact when the parties have chosen the applicable law, because the parties may have chosen a foreign law for a contract that is most closely connected to the forum," and that's what I commend, as Your Honours have heard from me. And in the right-hand column halfway down, in terms of the question of the party's choice as a reason for overriding effect or public policy, "Could the ERA have been such a safeguard? We consider the Court of Appeal was right to resist this line of reasoning. Overriding mandatory rules are blunt tools that may prevent the worst excess of party autonomy, but they are not ideally suited to the task of regulating party autonomy per se."

And then just picking up again on the author's comment earlier about how you interpret section 238 of the ERA. At the very bottom of that right-hand column, "Section 238 is of no relevance to the existence and validity of choice of law contracts; it is not apparently concerned with cross-border dimension at all. The effect of a choice of law contract is not to contract out of the particular rules of the objective applicable law …; its effect is to contract out of the objective choice of law rule. Even if it were applicable …, there would be no justification for restricting its effect to chosen laws that are not closely

connected to the relationship." I see the time. Is that a good time, Your Honours? I won't be very much longer.

ELIAS CJ:
I think we'll keep on going, if that's –

MR WAALKENS QC:
I beg your pardon?

ELIAS CJ:
We'll keep on going.

MR WAALKENS QC:
So the last is the public policy issue that my friends have referred to. In my submissions, I've set out a fairly comprehensive response to that. I do adopt the *Reeves* test as the Court of Appeal articulated as the appropriate and it's the recognised test and when one looks at all of the criteria that do show a closest and most real connection with Hong Kong, it couldn't possibly be said that the conscience of a reasonable New Zealander would be shocked in some way, or that it would offend basic morality. As I've said, and my learned friends have referred to, and the Court of Appeal have picked up on this, the anti-age discrimination laws are not absolute and it's just not –

GLAZEBROOK J:
But why wouldn't they – they may not be absolute but to the extent that they do apply, why wouldn't even using the conscience test that be shocked except by people who think it's perfectly okay to discriminate on the basis of age and we don't take them into account, I wouldn't have thought.

MR WAALKENS QC:
You'd need, as I've said in my submissions, the suite of perquisites or benefits in this contract that were negotiated extensively on the bases that I said earlier have always included an age 55 retirement and that in the context of the Hong Kong connection in this case, for a –

GLAZEBROOK J:

But there's nothing to say that they were linked to an age 55 retirement, was there, which is the question I was asking at the beginning that they got a bigger pension because they were retiring at 55 or anything of that nature.

MR WAALKENS QC:

All I can say on that, Your Honour, is that they –

GLAZEBROOK J:

I mean, why – they were just getting benefits because they were flying, weren't they? It wasn't linked to the fact that they got rid of them at 55?

MR WAALKENS QC:

I have to say, there is no evidence that they were paid extra amounts because of an age 55 retirement but that was –

WILLIAM YOUNG J:

But age 55 retirement was very standard in the airline industry until about 20 years ago and partly because of for reasons related to dangers associated with aging which have now faded, and then for political reasons in a sense, internal political reasons because first officers didn't want to see their promotion prospects deferred while a whole lot of old guys in their 50s and 60s kept on flying so, but over that 20 year period, it has gone to 65 without, as a general rule, hasn't it?

MR WAALKENS QC:

It has done and IKO have adopted 65. I think there's a reference to that in the Court of Appeal judgment, indeed. But it is a rare and sparingly-used exercise of using public policy to spring to the –

GLAZEBROOK J:

Well, what about the cases we referred to in respect of hire purchase?

MR WAALKENS QC:

I'm sorry?

GLAZEBROOK J:

Hire purchase, but it doesn't particularly offend my conscience, anything to do with hire purchase, really.

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

It's a funny sort of rule though, anyway. Isn't it better to look at what the statute is? The purpose of the statute? I mean, my conscience is not easily offended at all. I'm fairly laissez-faire but I'm more interested in what the statute means.

MR WAALKENS QC:

Yes, well, that all said, it's still a part of our law that – and the cases recognise, as does *Laws of New Zealand*, that one of the bases upon which you can, or one of the answers to the situation is whether the law is one that's not in good faith or where it's contrary to public policy and that is still the law and I say, as I've set out in my submissions, that it's something that should be exercise sparingly in this case doesn't reach that threshold.

O'REGAN J:

Reeves was a case about recognising a foreign judgment.

MR WAALKENS QC:

Yes, it was.

O'REGAN J:

Is there any authority that says it also applies to this situation?

MR WAALKENS QC:

Well, I know Your Honour was on *Reeves* and behind it was the assertions of Mr Reeves that this was all, these trade secrets were all sourced elsewhere and OneWorld didn't have the rights to them in the first place and so Your Honour's right. It technically was just a judgement, foreign judgment issue but *Laws of New Zealand* adopt *Reeves* as the test right across the board and I don't have other cases to refer to answer the point, Your Honour, Justice O'Regan's just asked.

WILLIAM YOUNG J:

If you look at section 105 of the Employment Relations Act, it's a single provision. You might say discrimination on grounds of age is one of the more sort of anodyne offences under it. But there are other components of that which might get a bit more traction in terms of moral outrage. But for instance, if Cathay Pacific said, "We're going to sack all female pilots" –

MR WAALKENS QC:

Or all coloured people.

WILLIAM YOUNG J:

– or alternatively, "We're going to sack all male pilots – "

MR WAALKENS QC:

Correct, yes. And that's –

WILLIAM YOUNG J:

Or, "We're going to sack anyone who's not a Buddhist," so that would have some, you'd probably be inclined to say that section 105 was engaged in that situation, wouldn't you?

MR WAALKENS QC:

Well, there will be – plainly, there would be conduct of that type.

WILLIAM YOUNG J:

But see, what I prefer to deal with in terms of a statute is a whole rather than look at the individual situation, say, that the list in section 105 indicates a legislative purpose that these are provisions that are going to apply in relation to contracts which one way or another are within the jurisdiction of the New Zealand institutions, no matter what the choice of law is. I mean, say under Hong Kong law there was no sex discrimination.

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

And Cathay Pacific said, "Right, we're going to sack all male pilots." What would you say to section 105? Would you say, "Well, section 105(1)(a) applies because it's a horrible thing to do," or would you say, "Well, it's clear that if you look at the list in section 105 that it's intended to trump a foreign choice of law clause"?

MR WAALKENS QC:

If it had this list, there are some that are more offensive than others and sex –

ELIAS CJ:

I really query whether you can enter into that because the legislation identifies these by reference to the Human Rights Act and the Human Rights Act recognises all of these as human rights so withholding them doesn't seem to be something that courts can say, "Well, that's okay, really, it's not a very bad thing. It's not as bad as discriminating on the grounds of colour." I mean, you have to take it the way it is, really, don't you?

WILLIAM YOUNG J:

The great thing about looking at the list is you just treat the list as a whole, that you don't make have to make odious comparisons. You just treat it as a matter of statutory interpretation rather than, "How shocked is my conscience"?

MR WAALKENS QC:

Well, except that aside from what the statute may say in terms of listing these matters, the test at the end of the day is what would a reasonable New Zealander make of –

ELIAS CJ:

I don't think so, I think the legislature has said that these are prohibited grounds of discrimination.

GLAZEBROOK J:

And discrimination is basically seen is one of the worst things, one of the worst things that one can do in respect of human rights, because the whole basis of human rights is equality and dignity to everybody, so discriminating on the basis of any of those matters is actually seen as particularly serious.

MR WAALKENS QC:

Well, as I've said, and I'm repeating –

GLAZEBROOK J:

And then it's a question of what discrimination is, and there might be exceptions to that. But if you don't come within the exceptions then it is –

MR WAALKENS QC:

No. Well, can I just say, because that's what I was about to say is that on age, for example, one of the exceptions, the saving provisions, is that sections 24 and 26 that my learned friend, Mr Butler, referred to, and the Employment Court determined that Basings, NZ Basing Limited, didn't come within the criteria of that, because the employment contract wasn't signed overseas, it was entered into here. But they came very close to establishing that. We say that's wrong and I accept that I'm not in a position to take that any further because there is no appeal, you can only appeal on a question of law and there's no appeal on that basis, but it came very close to meeting the exception. So coming back to the statutory –

WILLIAM YOUNG J:

Well, maybe a miss is as good as mile though isn't it?

GLAZEBROOK J:

Yes.

MR WAALKENS QC:

Well, that's what I was getting to say. Because it's close and it didn't quite get there, that would be something that the conscience of a reasonable New Zealander, which is the test –

WILLIAM YOUNG J:

Well, I suppose part of your probable is you're dealing with, in this debate you're dealing with a point that's a bit downstream of, I think, the point at which I've become stuck and I think the Chief Justice may have become stuck.

MR WAALKENS QC:

I accept that it's downstream, yes. But the point I make is that it's not absolute and there are very – well, I hear Justice Elias saying that's just not right because it's in the statute and it's got to be treated equally, but with the saving provisions in the Human Rights Act under section 24 and 26 it's –

WILLIAM YOUNG J:

Well, you don't get anywhere near section 26 do you?

MR WAALKENS QC:

No.

WILLIAM YOUNG J:

It's really section 24 was the closest.

MR WAALKENS QC:

Yes, section 24 was the close but no cigar one.

ELIAS CJ:

Unless you qualified under section 30 I suppose. But that burden hasn't been taken on.

MR WAALKENS QC:

No. Are there any other matters I can –

GLAZEBROOK J:

Well, no one's suggesting that that was the case in any event I don't think.

ELIAS CJ:

No. Where's the exception for us?

MR WAALKENS QC:

On age, Your Honour?

ELIAS CJ:

Yes.

GLAZEBROOK J:

It'll be a statute, statue overrider.

ELIAS CJ:

It's not in the Human Rights Act.

WILLIAM YOUNG J:

Yes, you're arguing to a group of people who are probably –

ELIAS CJ:

A discriminated bunch.

MR WAALKENS QC:

I sympathise with the Court, yes, we should have great sympathy.

WILLIAM YOUNG J:

Not well-disposed to the thrust of your submissions.

GLAZEBROOK J:

A statutory override.

MR WAALKENS QC:

So those are my submissions, Your Honour.

ELIAS CJ:

Yes, thank you, Mr Waalkens.

MR SKELTON QC:

Your Honours, I'll be brief, but I'll work backwards if I may, just starting with that last point. As the Court's identified, there's no ranking of the grounds of discrimination in the Act and, with respect, I believe this is where the Court of Appeal erred because it tried to say that age discrimination was less important than, for example, race, where they said the classic example of the Third Reich of Jewish men loses –

WILLIAM YOUNG J:

I think the exaggerations probably don't matter much because, I mean, the issue, your best point really is that section 105 speaks for itself.

MR SKELTON QC:

Speaks for itself, there's no ranking, and all of those prohibited grounds need to be given effect to.

The next point, there was a question around whether there was any linking between the extra benefits in the contract CoS '02 and agreeing to the retirement age at 55. There wasn't any evidence of a linkage between the two, but perhaps more fundamentally, even if somebody did get a benefit in a contract for agreeing to a early retirement age, that does not of course excuse a party from complying with the minimum standards in the Human Rights Act,

you can't buy your way out of that minimum standard in the Human Rights Act.

The public policy issue, my learned friend referred you to the *Reeves* case, Justice O'Regan made the point that it's quite a different case, it's enforcement of a US –

WILLIAM YOUNG J:
I thought you were going to refer to the very strong dissent.

MR SKELTON QC:
But there's a warning here to say when you're looking at public policy there's probably not one test that fits all, you know. If you're looking at striking down an overseas judgment and there's comity issues that apply, or saying an overseas statute shouldn't be recognised in New Zealand's public policy grounds, that would be a very high threshold. Here this is a different story. The issue is simply whether it's against New Zealand public policy to allow NZBL to enforce a contractual retirement age at age 55, and those cases are like the restraint of trade case that my learned friend provided.

WILLIAM YOUNG J:
Say there was a provision in the law of Hong Kong that exactly matched our provisions, say there was a prohibition on age discrimination so that it's just really a question of desirable forum, how would that case be dealt with? Would section 105 still display a mandatory override or would the New Zealand –

MR SKELTON QC:
Yes, because 105 gives you a right to the procedure here in New Zealand, and of course matters of procedure are always dealt with by the law of the forum, that's matters of substance that are dealt with by the proper law of the contract. So, yes, you would be able to pursue a personal grievance under the New Zealand legislation.

My learned friend referred to the Maria Hook article, it's no surprise that I certainly disagree around the assumption that 238 isn't a mandatory overriding statute. You have to go to the purpose in the text of 238 and I won't repeat the submissions why, they're all in writing in my main submissions.

My friend took you – I think it was Justice France referred to the grievance procedure in the contract, and it is an internal grievance process where you go to the person higher up the ranking and ask them to review the decision, it doesn't provide any independent assessment as to whether or not there was justification for what was happening.

On the issue of whether the personal grievance procedure is contractual in nature, and I submit it's clearly a statutory process, a statutory procedure. What it does, it subjects an employer to a test of justification to make them justify the exercise of their contractual rights. So a contract might say you can terminate on one month's notice, but you must under the statutory process be able to justify the exercise of that contractual right, it's not a contractual process it's statutory.

Now there was, my friends mentioned the possibility of abuse through the nomination of a foreign law clause, and that matter was dealt with by Justice Kirby in the *Old UGC* case. It's at tab 19 of the appellants' bundle of authorities, and the relevant paragraph 55 through to 56. "The Court of Appeal rejected the submission that the nomination of a proper law of the impugned contract as that of Colorado placed their contract outside the jurisdiction of the Commission to grant relief under section 106. It would be astonishing if the opposite were the case, given the remedial purpose of section 106 of the Act. A contrary rule would leave the statutory provisions open in many cases to easy evasion by the simple nomination of a governing law other than that of New South Wales. In many cases in the new economy such a device could not be easily impugned." Now Your Honours will recall that the exit contract in that case expressly provided for Colorado law to apply,

and yet the High Court of Australia held that the statutory provision had to be given effect, notwithstanding the express choice of law.

Now, Your Honours, there was a small point about where was Veta incorporated. The answer is to be found in the *Crofts and others v Cathay Pacific Airways Ltd and others* [2005] EWCA Civ 599, [2005] ICR 1436 Court of Appeal judgment which is at tab 8 of the appellants' bundle of authorities. It's paragraph 4, "Veta and USAB are subsidiaries of CPA, all three companies are registered in Hong Kong," so they were Hong Kong-registered companies, and at paragraph 5, "The contracts of employment of all the pilots were governed by Hong Kong law, their salaries were paid for in Hong Kong bank accounts, they held Hong Kong professional licences, their personnel files were kept in Hong Kong, all training was devised and carried out in Hong Kong, all disciplinary grievance procedures in Hong Kong," which is similar to our situation despite that the House of Lords had no difficulty in saying the UK statute applied.

There was mention made of the fact that only 8.7% of time spent in New Zealand, I think the evidence referred to an 8.3%, which was a calculation simply for tax purposes, obviously depends on whether you, if you count flying over the territorial waters of New Zealand or not. But there was no evidence that they spent any more time in Hong Kong than they did in New Zealand, and of course the reality is 90% of their time was flying over Australian air space and in international waters. Whatever the numbers are, the principle is that they were based in New Zealand, they got up in the morning, they left home then went to the airport, they started their tour of duty and they ended their tour of duty.

Now the on-shoring issue was raised. It's mentioned in the judgment in the Employment Court, Your Honours, to clarify that point. It's at paragraphs 44 and 45 of the Employment Court judgment, it's on page 56 of the case on appeal. "As a result of the conclusions reached in the *Crofts* case, a comprehensive review was undertaken by Cathay Pacific to assess all local laws which applied to the jurisdictions in which Cathay Pacific and its Basing

companies operated, this included New Zealand," and then at 45, "Cathay Pacific then determined that it would revise its contractual arrangements with overseas-based pilots, recognising that they would be governed by the employment law of the local jurisdiction, a process referred to as "on-shoring".

The final point that I wish to touch on is the opening submission really made by my learned friend where he submitted that the closest and most real connection was with Hong Kong and not with New Zealand and I submit that there was no factual basis for that submission.

In fact, the factual findings in the Employment Court, if I can summarise those, "The appellants are New Zealand citizens. Permanent place of abodes, New Zealand," that's Employment Court judgment paragraph 1. "NZ Basing was incorporated solely for the purpose of employing New Zealand-based employee pilots," and that was Employment Court judgment paragraph 18. "They were paid in New Zealand dollars," Employment Court judgment 33. "Required to reside in New Zealand as a condition of their employment," was 83C, and, "The employment agreements are actually made in New Zealand," that was 86A. "They started their work in New Zealand, ended their tour of duty in New Zealand," 83D, and, "NZBL was liable to account for accident compensation to the New Zealand IRD," that's at paragraph 34, and, "When they were abroad, all expenses, accommodation were paid for," paragraph 38 and those are some of the key points. The others are already set out in paragraph 83 of the Employment Court judgment.

So I submit that the closest and most real connection of this employment relationship is clearly with New Zealand and not with Hong Kong. The company may have been incorporated in the Hong Kong but all it did was employ New Zealand-based employees.

So Your Honours, unless you have any further questions, those will be my submissions in reply.

ELIAS CJ:

Thank you. Mr Butler, we wouldn't normally call on you to reply but did you have something you wanted to say?

MR BUTLER:

I just have one or two very small point just in terms of things that came up, Your Honours. I'll be very quick with them.

The first point was a reference to the commercial backdrop to the age issues. The same was true in cases like *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456. The same was true in the case *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC). *North Health*, you might recall, was the case where there was a decision not to employ foreign-trained doctors because of a squeeze in terms of the health budget. Not an acceptable reason for the policy to be in place and *Atkinson*, obviously, is the parents as caregivers and you recall that money was at the forefront of the Crown's claim in that particular case.

Second point, *Clifford*, so some reliance by my friend on *Clifford*. Of course, *Clifford* predates *Crofts*. I would have thought that one would have to touch *Clifford* with some genuine care.

Third, in terms of the overall approach to where discrimination law fits in New Zealand, employment law set in – I should have referred to, I do apologise, section 67B, the 90 day probationary period. So even when you're on the hire 'em, fire 'em principle, you can't hire and fire on grounds of discrimination so that's section 67B and *Atkinson* itself, the important point that was made in *Atkinson* was there should be no ranking between the various grounds of discrimination. That was an argument again that was at the forefront of the Crown's submissions in relation to that case but was rejected by the Court of Appeal and I'm afraid I don't have the page and paragraph reference for you but I think if Your Honours are interested in that, that's the place to go.

My very last point is my friend made some reference to the various exceptions that apply in relation to age within the HRA as an indication of the fact that one can say that age isn't as important a ground as others. Well, of course you could do exactly the same exercise with something like, say, sex. So if you look through the relevant provisions of the HRA dealing with employment matters, you'll see exceptions in relation to sex in sections 24, section 26, section 27 and they were previously in section 33 which has now been repealed. That's the women in armed forces. So my point is just looking at one or two exceptions in those provisions really won't assist, I say, in doing the ranking and I finish on this simple point which is in answer to the question, "What would a reasonable New Zealander think in terms of public policy?" I say a reasonable New Zealander would turn to the provisions of the Human Rights Act. That's where a reasonable New Zealander would find assistance in answering that question from a public policy perspective and I say it's there they will see that it is not acceptable from a New Zealand public policy perspective to discriminate in the way in which is suggested as permissible here. Thank you, Your Honours.

ELIAS CJ:

Yes, thank you. Thank you, counsel, for your submissions. We'll reserve our decision in the matter.

COURT ADJOURNS: 4.00 PM