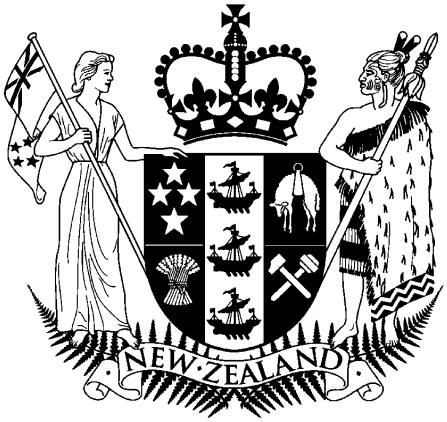

Court of Appeal Report for 2008

HON JUSTICE HAMMOND - MATTHEW WINDSOR

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1 INTRODUCTION

A The Court

The Court of Appeal of New Zealand, located in Wellington, has existed as a separate court since 1862. Until 1957 it was composed of Judges of the then Supreme Court (now the High Court) sitting periodically in panels. In that year the Court of Appeal was reconstituted as a permanent court separate from the Supreme Court. The Court in 2007 consisted of the President and eight other permanent members.

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

Before the "new" Supreme Court of New Zealand was established in 2004 as the final appellate court for New Zealand, civil decisions of the Court on first appeal from the High Court could in general be appealed to the Judicial Committee of the Privy Council, in some cases as of right, in others with the leave either of the Court of Appeal or the Privy Council. Criminal decisions could be appealed with the leave of the Privy Council. After 1 January 2004 appeals lie to the Supreme Court with the leave of that Court. Savings provisions in the Supreme Court Act 2003 leave appellants whose appeals were heard by the Court of Appeal before January 2004 with whatever rights they had to appeal to the Privy Council. Privy Council appeals are now concluded.

B Members of the Court of Appeal

The President of the Court, the Hon Justice William Young graduated from the University of Canterbury and the University of Cambridge. He joined the Christchurch firm of R A Young Hunter and Co in 1978, leaving in 1988 to practise as a barrister. He was appointed a Queen's Counsel in 1991, to the High Court in 1997, and to the Court of Appeal in January 2004. In February 2006 he was appointed President of the Court of Appeal. In June 2007 he was awarded the DCNZM for services as President of the Court of Appeal of New Zealand.

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

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

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

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

The Hon Justice Robertson graduated from the University of Otago and the University of Virginia. He was a partner in the Dunedin law firm Ross Dowling Marquet & Griffin from 1969 to 1987 and was a Harkness Fellow in 1972 – 1973. He was appointed a Judge of the High Court in 1987, and was President of the Law Commission from 2001 to 2005. He was appointed to the Court of Appeal in May 2005.

The Hon Justice Arnold graduated from Victoria University of Wellington and New York University. After teaching criminal law at Victoria University and at several Canadian universities, he joined the law firm Chapman Tripp Sheffield Young where he was a partner between 1985 and 1994. From 1994 he practised as a barrister-sole, being appointed a Queen's Counsel shortly after. He was Solicitor-General between 2000 and 2006 and was appointed to the Court of Appeal in May 2006.

The Hon Justice Ellen France graduated from the University of Auckland and Queen's University. She was a senior legal advisor in the Department of Justice Law Reform Division, a Crown Counsel, and then Deputy Solicitor-General in the Crown Law Office. She was appointed to the High Court in April 2002, and the Court of Appeal in June 2006.

The Hon Justice Baragwanath graduated from the University of Auckland and the University of Oxford. He was a partner in the Auckland law firm Meredith Connell from 1966 to 1977 and became a barrister sole in 1977. He was appointed Queen's Counsel in 1983. In 1995, he was appointed a judge of the High Court and was the President of the New Zealand Law Commission from 1996 to 2001, when he returned full time to the High Court. He was appointed to the Court of Appeal in February 2008. He serves as President of the Court of Appeal of Samoa and is a New Zealand member of the Permanent Court of Arbitration.

2 OPERATIONAL MATTERS

Programme for Court sittings

The permanent Court sat in benches of three and (very occasionally) five Judges in Wellington. A number of High Court Judges contributed to the divisional Courts, which sat as required, in Wellington, Auckland and Christchurch.

3 STATISTICS

A Criminal appeals

	Hearing	Allowed	Dismissed	Allowed On the papers	Dismissed On the papers
Conviction & Sentence	104	40	68		2
Conviction	87	22	59	2	
Sentence	116	38	73		1
Solicitor-General Appeals	13	16	3		
Pre Trial	55	7	46		
Other	27	3	19		1
Sub total	404				
Abandonments/No jurisdiction	89				
Total	**493**	**126**	**268**	**2**	**4**

NOTE: The figures above include one decision reserved from 2007, and there are three reserved case at the end of 2008 with two others waiting for decision on the papers. Also, there were a further 40 judgments delivered during the year in respect of interlocutory matters including bail, costs, suppression and leave.

The following table shows comparisons with earlier years.

Year	Appeals or applications for leave filed	Oral Hearing	OTP	Allowed	Dismissed/abandoned/ no jurisdiction
2004	528	392	21	99	396
2005	521	384	17	143	339
2006	495	438	9	161	351
2007	451	407	6	153	343
2008	498	396	8	126	357

Disposition of the criminal caseload by panels

	2004	2005	2006	2007	2008
Permanent Court – five judges	2	5	2	2	0
Permanent Court – three judges	91	32	86	55	56
Criminal Appeal Division	299	345	350	350	340
On the papers	21	17	9	6	8

B Civil appeals

	2004	2005	2006	2007	2008
Motions filed	273	288	285	208	310
Appeals set down	129	149	147	154	135
Appeals heard	113	125	151	124	136
Appeals allowed	34	53	57	43	51
Appeals dismissed	69	71	81	101	84

NOTE: the number of cases does not equal the number allowed and dismissed. Judgments in 16 cases were reserved at the end of the year, and 14 judgments came from cases heard in the previous year. Plus the matter adjourned sine die from the previous year.

Disposition of the civil caseload by panels

	2004	2005	2006	2007	2008
Permanent Court – five judges	8	2	2	1	1
Permanent Court – three judges	96	105	120	98	90
Civil Appeal Division	8	18	29	25	44
Discontinued	56	46	88	56	59
Abandonments	42	21	29	21	30

Year end workflow

	2004	2005	2006	2007	2008
Criminal appeals awaiting hearing as at 31 December	218	266	240	197	201
Civil appeals awaiting hearing as at 31 December	57	65	77	72	80

C Privy Council appeals and petitions for leave to appeal

Date PC Judgment	Parties	Result	Whether NZ Judge sat
Dec 08	David Cullen Bain v The Queen	Dismissed	No

Total Heard	1
Total Dismissed	1
Total Allowed	0
Appeal from Court of more than 3 Judges	0
Appeals from Courts of 3 Judges	1

D Supreme Court applications for leave to appeal and appeals

Leave applications

Year	Applications for leave to appeal	Leave granted	Leave declined / abandoned	Undetermined at end of period
2005	69	22	38	9
2006	101	25	61	15
2007	107	33	55	19
2008	106	25	66	15

Note: this includes only applications for leave to appeal against decisions of the Court filed with the Supreme Court – it does not include applications for 'leapfrog' appeals from the High Court, or applications for leave to appeal to the Supreme Court where leave to appeal to the Court of Appeal has been declined.

The numbers reflect applications heard in 2008, not the number filed within that period.

Substantive appeals

Year	Appeals allowed	Appeal dismissed / abandoned	Reserved at end of period	Unheard at end of period
2005	1	7	5	9
2006	7	10	10	8
2007	14	13	6	14 plus 1 part heard
2008	18	22	11	18

4 SIGNIFICANT INSTITUTIONAL DEVELOPMENTS

The Golden Jubilee of the Court of Appeal of New Zealand was reached in February 2008. Over a 50 year period, the Court was effectively the final appellate court for New Zealand, given that only a relative handful of cases got leave to proceed to the Judicial Committee of the Privy Council in London. Criminal appeals were particularly rare.

Two events were mounted in recognition of this Jubilee. First, the Governor-General of New Zealand saw fit to mark the occasion by hosting a dinner at Government House, Wellington to which all of the living past members of the Court, the present members of the Court, and their partners were invited. When the actual numbers were calculated, it was noted that over the 50 year period in question there have been only 33 members of the permanent Court.

Secondly, a symposium on the work of the Court over that 50 year period was hosted at Parliament by the Speaker of the House of Representatives. A number of commentaries were offered on the work of the Court during that period. Those papers and addresses have been collected together in a book to be published shortly as R Bigwood (ed) *The Permanent New Zealand Court of Appeal* (Oxford, Hart Publishing, 2009). This will make the work of that symposium widely available to the New Zealand legal profession, and New Zealand and overseas institutions.

As to the present work of the Court, the pattern of appeals in New Zealand over the last three years has settled into a remarkably even one. In broad terms, it can be seen from the statistics in our annual reports that the Court hears close to 600 appeals each year. Approximately two-thirds of those are criminal appeals and about one-third are civil appeals. The civil cases, as can be seen from the index, cover a very wide range of work.

Over the last three years, the Supreme Court of New Zealand has received approximately 100 applications each year for leave to appeal from the Court's decisions. About one in four have been given leave. The amount of work involved in determining leave applications should not be underestimated. The broad statistical result is that of the nearly 600 cases heard by this Court in a given year, it can be seen that around 25 or so are given leave to proceed to the Supreme Court under the criteria prescribed in its statute. In much larger jurisdictions, with substantial populations, final appellate courts still often hear only between 50 to 100 appeals per year.

It is difficult to calculate, on an annual basis, a "success" rate of appeals by appellants from this Court to the Supreme Court. This is because a significant number of cases are either reserved or unheard at the end of a given annual period. However, it will be observed that the success rate for appellants over time appears not to vary much from the one-third figure that has a rather eerie similarity around the common law world.

This at least can fairly be concluded: getting leave to appeal to the Supreme Court is not straightforward, and, if gained, appellants seem to have something like a one in

three chance of success. That however is a relatively crude measure. As every practitioner and judge knows, the value of the work of final appellate courts resides principally in the reasoning and observations which fall from that particular Court, which have an enduring effect on the administration of justice as a whole.

Justice Wilson was appointed to the Supreme Court in 2008. We were heartened by the arrival of Justice Baragwanath, who was elevated from the High Court bench to take his place in this Court.

The Court could not discharge its workload without assistance from High Court judges in the divisional courts, particularly the Criminal Appeal Division. The day-to-day experience which High Court Judges bring to that role is of distinct utility, and very welcome to the permanent Court. We are grateful to Justice Randerson, the Chief High Court Judge, and his colleagues in this respect.

Grant Hammond J

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5 IMPORTANT CASES

A INTRODUCTION

The cases summarised below have been collated by, and the overall exercise supervised by, Hammond J with the great assistance of Matthew Windsor.

The actual summaries have been prepared by the following Judges' Clerks of the Court of Appeal:

> Sarah Cahill, Amelia Evans, Bridget Fenton, Colin Fife, Catherine Fleming, Peter Marshall, Jonathan Orpin, Jane Standage and Matthew Windsor.

The summaries are intended to inform judges in all courts in New Zealand, and interested parties, but are in no sense "authorised" summaries. Reference should be had to the actual judgment for consideration in any legal proceedings, or in giving legal advice, or, in the case of lay litigants, in considering what steps to take in relation to their affairs.

It should be noted that the following summaries do not include all parts of the Court's decisions for 2008. Cases containing suppression orders in relation to the reasons or result of the judgment have been summarised as fully as possible. In some instances, a summary has not been possible. Some of the more important cases in this category are noted at page 146.

B CIVIL CASES

Accident Compensation

Independence allowance – date of payment - transitional provisions – ss 441 and 442 Accident Insurance Act 1998

In *Mahaki v Accident Compensation Corporation* [2008] NZCA 240 and *Accident Compensation Corporation v Fenemor* [2008] NZCA 241, two appeals by way of case stated from a decision of a Full Court of the High Court, the Court considered whether an independence allowance under the Accident Insurance Act 1998 was payable from the date a personal injury claim was lodged or the date of application for an independence allowance. A further issue in the Fenemor appeal was whether the percentage of previous lump sum compensation was to be deducted from the combined whole-person impairment assessment.

Mr Mahaki suffered an injury to his right thumb in 1991, for which he received a lump sum payment under the Accident Compensation Act 1982. In 1993, Mr Mahaki suffered a severe laceration to his right arm. At that time, the Accident Rehabilitation and Compensation Insurance Act 1992 was in force, which had replaced lump sum compensation with an independence allowance entitlement. Mr Mahaki did not seek an independence allowance at that time. The 1992 Act was replaced by the Accident Insurance Act 1998, which provided a separate independence allowance payable for each injury as opposed to one independence allowance paid for all injuries. Mr Mahaki finally applied for an independence allowance in October 2002 when the Injury Prevention, Rehabilitation, and Compensation Act 2001 was in force. That Act had brought back lump sum compensation for impairment to bodily function in place of independence allowances.

Mr Mahaki contended that his independence allowance should be payable from the date he lodged a claim for the relevant personal injury. However, the High Court held that Mr Mahaki's independence allowance was payable from the date of his application for an independence allowance. This meant that Mr Mahaki was not entitled to an independence allowance for the nine years between the claim for cover for his injury and his application for the independence allowance.

The case turned on the interpretation of ss 441 and 442 of the 1998 Act, the part of the transitional regime of the 2001 Act dealing with independence allowances for personal injuries suffered before 1 July 1999, by virtue of s 377 of the 2001 Act. As a result of a 2005 amendment (not relevant to these appeals), s 377 now provides that ss 441 and 442 no longer have effect.

Counsel for Mr Mahaki's central argument was that due to deficiencies in the drafting of ss 441 and 442, the independence allowance remained to be dealt with under the 1992 Act, which would commence payment from 1993. The alternative argument was that the independence allowance fell to be dealt with under Part 4 of Schedule 1 of the 1998 Act, which would similarly commence payment in 1993. He further advanced three arguments to support the proposition that s 442(2) did not apply: first,

s 442 only applied to a further impairment of the same injury that the earlier lump sum was paid for and not a new injury; secondly, s 442 only applied to a further impairment that arose after 1 July 1999; and thirdly, s 442(2) referred to a person being able to apply for an independence allowance under s 441, which did not apply here.

The Court dismissed Mr Mahaki's appeal, holding that a person in Mr Mahaki's position had their independence allowance payable from the date of application for an independence allowance, not the date when a claim for the relevant personal injury was lodged. Section 377 of the 2001 Act made it clear that ss 441 and 442 applied to persons in Mr Mahaki's position. Given that his application had to be made under s 441, there was no escape from the plain meaning of s 442(2)(b), despite the seeming unfairness of the outcome.

Mr Fenemor suffered a back injury in 1990 for which he received a lump sum payment under the 1992 Act. In 1998, while the 1992 Act was in force, Mr Fenemor suffered a severely fractured leg which led to amputation below the knee. He applied for an independence allowance in 2003 when the 2001 Act was in force. Under ss 441 and 442, Mr Fenemor was assessed as having a 28 per cent impairment from his leg injury and a five per cent impairment from his back injury. Under the American Medical Association's "whole-person impairment assessment", that amounted to a combined assessment of 32 per cent. Ten per cent was deducted for his back injury, resulting in a 22 per cent final impairment assessment.

The High Court reversed the District Court decision upholding this assessment, holding that the final impairment assessment should have been 28 per cent because Mr Fenemor's back and leg injuries were unrelated. The questions stated for determination on appeal was whether the High Court was wrong to conclude that s 442 did not apply to Mr Fenemor, and whether the High Court was wrong to conclude that the percentage of previous lump sump compensation was not to be deducted from the combined whole-person impairment assessment.

Like in *Mahaki*, the Court held that s 442 applied to Mr Fenemor. In relation to the deduction of previous compensation, the Court held that s 441(3)(c) applied given that Mr Fenemor was within s 441 by operation of s 442(2). That provision required an assessment to be made on the basis of whole-person impairment for the combined effect of all personal injuries covered by the former Acts, and only one independence allowance was payable for all those injuries. The High Court could not depart from that statutory requirement. Thus, the Court allowed the Accident Compensation Corporation's appeal, holding that Mr Fenemor's final impairment assessment was to be in accordance with the Accident Compensation Corporation's initial 22 per cent assessment.

Personal injury - cover for pregnancy - failed tubal ligation

In *Accident Compensation Corporation v D* [2008] NZCA 576, the Court considered whether there is cover under the Injury Prevention, Rehabilitation, and Compensation Act 2001 ("the Act") for pregnancy resulting from a failed tubal ligation.

D underwent a tubal ligation operation. The operation failed and she became pregnant. Her child suffered medical conditions that required ongoing medical assistance and D sought cover for herself under the Act, describing the "personal injury" as pregnancy. The Accident Compensation Corporation ("the Corporation") declined cover because it considered that there was no personal injury. This decision was upheld on review but overturned in the District Court. In the High Court, the Judge dismissed an appeal by the Corporation.

On appeal, the majority of the Court (Arnold and Ellen France JJ) held that pregnancy is not personal injury for the purposes of the Act. The majority concluded that the ordinary and natural use of the terms "personal injury" and "physical injury" does not encompass pregnancy, even if unwanted. The majority considered that the legislative history supported that conclusion.

William Young P dissented. He held that the expressions "personal injury", "physical injuries" and "gradual process" were sufficiently broad to encompass unwanted pregnancy which results from medical misadventure. Further, he did not see his approach as inconsistent with the legislative history.

In accordance with the views of the majority, the appeal was allowed.

Administrative Law

Judicial review – civil aviation - nature of the decision – imputing knowledge to a Minister - declining relief

In *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139, the Court addressed whether the decision by the Minister of Transport to increase airport landing charges was a private decision, or whether it had a regulatory and public element. Having considered that it did have a public element, the Court then examined whether a public official's knowledge can be imputed to a Minister and grounds on which relief can be declined.

The statutory background to the ministerial power to set prices clearly indicated there was a commercial element to the decisions: s 4(3) of the Airport Authorities Act 1966 directs that every airport be run as a commercial undertaking and s 93(3) of the Civil Aviation Act 1990 directs that actions taken by the Minister in furtherance of the operation of an airport must be done as though it were a commercial undertaking. Despite these provisions, the Court considered the ministerial power had a dual commercial and regulatory focus. This was based on a number of factors, including the fact that regulations affecting price-setting, made under s 100 of the Civil Aviation Act, had a clear public law focus; that if the fixing of prices was purely commercial then it would be unusual for the Minister, rather than the Airport Authority, to make the decision; and that the Minister's duty to consult implied a public law focus.

The Court then addressed whether information obtained by public officials working for the Minister during the consultation process could be imputed to the Minister, or whether the Minister was required to have that knowledge himself. The Court

examined the comments made by Lord Diplock in *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL), concluding that the case had been interpreted in New Zealand as reaffirming the principle that the Minister was not required to consider every matter personally and that responsible officials can exercise the Minister's powers. However, the case also imposed an obligation on a Minister's officials, when acting on the Minister's behalf, to ensure that the Minister is apprised of the key aspects of the officials' findings. This is because the Minister must always form a balanced judgment on the strength of the objections and merits.

In deciding whether to decline relief, the Court observed that public law remedies are discretionary but that there must be extremely strong reasons to overcome the presumption that a claimant is entitled to relief where she has demonstrated that a public decision-maker has erred in the exercise of its power. On the facts, there was not a proper basis to exercise the Court's discretion to refuse relief to Air Nelson. In deciding whether to quash the decisions or simply order that they be reconsidered by the Minister, the Court found that under s 4(5) of the Judicature Amendment Act 1972, reconsideration should only be ordered where the granting a remedy would bring about unacceptable administrative consequences or inequity to third parties.

The appeal was allowed, and the decisions of the Minister were quashed.

Judicial review – duty to consult – consultation process

In *Health Advocates Trust v The Director of Health and Disability Services Consumer Advocacy* [2008] NZCA 67, the Court judicially reviewed the decision of the Director of Health and Disability Services Consumer Advocacy to award a single national contract for the provision of consumer advocacy services for health and disability service consumers. The principal basis of the judicial review claim was that the Director had not undertaken an adequate consultation process on the change from a regional contracting approach to a national one. The claim failed in the High Court.

The Court did not need to resolve whether there was a duty to consult under the Health and Disability Commissioner Act 1994, as it was accepted that the common law obligation to consult arose on the facts of the case. The Court cited the requirements set out in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at 683 - 684 (CA) that if the Director "holds meetings with the parties it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meetings with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision", the duty to consult will have been discharged.

The Court dismissed the appeal, holding that the Director had discharged her duty to consult. The Director had made it plain during dialogue and consultation before the contractual tender that a single national contract was preferable. Although the discussions that occurred before the tender were informal and focussed on future models that were different to that of a single national contract, feedback and input was sought from the parties and the single national contract was nonetheless raised as a possible option. After consultation and feedback, it became apparent that the Director preferred the single national contract model. This was clearly communicated to all

the parties. The case was distinguished from *Leigh Fishermen's Association Incorporated v The Minister of Fisheries* HC WN CP266-95 11 June 1997 (HC), where McGechan J held that the duty to consult was not met if the consultation that occurred did not include discussion of the outcome that was eventually decided upon.

The other grounds of appeal - that the Director failed to take account of relevant considerations, failed to give sufficient weight to relevant considerations, and the invocation of the innominate ground of review - were not made out on the facts of the case. The Court also dismissed the ground of appeal that the decision was unreasonable, noting that the high threshold for intervening in a *Wednesbury* sense was not satisfied in this case.

Judicial review – incorporated societies

Stratford Racing Club Inc v Adlam [2008] NZAR 329 concerned judicial review proceedings which were brought in respect of a racing club. The club owned a racecourse in Stratford which was its primary asset. Members became concerned that the club might be forced by Thoroughbred Racing New Zealand to sell the racecourse, and devised a scheme by which the course would be transferred to a trust for consideration of one peppercorn. There was also considerable disharmony within the club about how trainers were charged for use of the track. One faction undertook a membership drive with a view to overthrowing the committee of the racing club. However, applicants for membership were blackballed by the committee. In the High Court, the Judge held that the transfer of the racecourse was invalid because it was contrary to the club's objects. He also found that the committee had acted unlawfully in blackballing the applicants for membership. The club appealed.

As to the transfer of the racecourse, the Court said that to give away the club's primary asset for no consideration would normally be contrary to the club's objects. The club submitted that the objects of the racecourse trust were identical to that of the club, and the trustees would have to allow the course to be used for racing. The Court rejected this submission on the basis that whether the club could carry out its primary object was now completely dependent on the whim of the trustees. The club had no control over the trustees, who were not beholden in any way to the club's members. The transfer was not validated by a general meeting of the club because the members in general meeting could not ratify an act contrary to the society's objects.

The Court then considered the committee's blackballing of applicants for membership. The club submitted it had a complete discretion as to who to accept as members, reinforced by the New Zealand Bill of Rights Act 1990. It said its decision to blackball the applicants was not reviewable. The Court rejected this submission. The committee's decision to blackball was a "prime candidate for review" because dozens of prospective members were rejected, each of whom appeared, on the evidence available, to be an entirely fit and proper candidate for membership. The disappointed potential members did not have a claim based on contract because there was no contract of membership with the club. Neither did the committee have a complete discretion as to who to accept as members: it was bound to exercise its power to control membership in the best interests of the club. It was indisputably in the club's interest that it grow in numbers and that applicants for membership be

treated fairly. The committee's aim, to prevent the new members gaining control of the club, was improper and possibly in bad faith. Declarations were made accordingly.

Judicial review – Registrar's powers under Electoral Act 1993

In *Edwards v Toime* [2009] NZAR 47, the Court considered the powers of the Registrar under the Electoral Act 1993 ("the Act"). In 2001, an issue had arisen regarding the entitlement of Ms Phillida Bunkle MP (as she then was) to be registered as an elector in the Wellington Central Electorate. The current appeal was brought by Mr Edwards who claimed that his right to be represented in Parliament by Ms Bunkle had been infringed by the judgment in the High Court, which had dismissed his application for review of the Registrar's actions.

A letter had been sent to the Registrar by Mr Sowry MP requesting the Registrar to investigate the circumstances surrounding Ms Bunkle's registration on the Wellington central roll and questioning whether breaches of s 118 (false statements or declarations) and s 119 (wilfully misleading the Registrar) of the Act had occurred. A letter by Mr Prebble MP was to similar effect. The Registrar sent a letter to Ms Bunkle on 21 February 2001 inquiring about the circumstances of her registration. Ms Bunkle had made an application to be registered on the Otaki Electorate roll before the Registrar wrote the letter on 21 February. She had been inserted on that roll and removed from the Wellington Central roll shortly after.

The Court held that the Registrar's powers under ss 95 and 96 of the Act depend on the person being on the roll at the time of the objection. The Act permits a person to consent to the removal of their name (s 95B) and, once that occurs, the Court held that there is no point in continuing the inquiry. The Court commented that the focus of the Registrar's duties is always on the current roll, except where it is alleged that offences under ss 118 and 119 have occurred.

The appeal was allowed and a declaration made that there was no power for the Registrar to undertake the inquiries in and following her letter of 21 February 2001.

Judicial review – suspension and expulsion – natural justice – Education Act 1989

In *Bovaird v J* [2008] NZAR 667, the Court considered issues surrounding the suspension or expulsion of a student from a state school or integrated school.

The Court examined the extent of natural justice requirements that apply under s 13(c) of the Education Act 1989 ("the Act") when a principal or teacher undertakes an investigation of misconduct which may subsequently found a decision to suspend the student.

The Court found that principals and teachers are not required to involve parents when investigating or questioning a student about such misconduct. The Act and the Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999 ("the Rules") provide prescriptive measures for involving parents once a student has been

stood-down or suspended. The implication is that it was not intended that parents be involved when investigating a student. Imposing an inflexible rule to the contrary would pose a number of practical difficulties in schools, which need to be able to provide individualised responses to different incidents. It is preferable to examine each case on its facts to determine whether there was fair treatment of students in the circumstances.

Given that the Act and the Rules do not require parental involvement before a suspension occurs, the Court also concluded that there was no legal requirement for a principal to consult the parents of a student before making a decision to suspend. The Court found that while there is an obligation on a principal to act fairly, what is required to meet that obligation will depend on the facts of the particular case. There is no absolute rule of law that a principal must involve a parent prior to making a decision to suspend in every case.

While the Court departed from the aspects of the High Court decision which had required parental involvement, the Court dismissed the appeal, upholding the High Court view that, on the facts of the case, the Principal and the Board had failed to engage directly with the statutory criteria for suspending and expelling a student under ss 14 and 17 of the Act. The suspension was invalid because neither the Principal nor the Board identified whether the second suspension was the result of gross misconduct or continual disobedience under s 14(1).

Judicial review – tender for contract by District Health Boards – scope of review – conflict of interest – insider information – consultation

In *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, the Court considered a number of issues arising out of a tender process whereby the Auckland District Health Board and other neighbouring District Health Boards ("the Boards") contracted for the provision of community laboratory services in the region. The Boards issued the contract to a new provider, Lab Tests, rather than the incumbent, Diagnostic Medlab Ltd.

In the High Court, the Judge had upheld a judicial review claim by Diagnostic Medlab. He set aside the Lab Tests contract and ordered that the tender process be begun afresh. The Judge held that information acquired by Dr Bierre, a senior executive of Lab Tests and an elected member of the Auckland District Health Board, had greatly advantaged the Lab Tests bid and damaged the integrity of the tendering process. The Judge found that the Boards should never have entertained a proposal involving Dr Bierre, given his conflict of interest. Further, he found that the Boards had breached the consultation obligations owed to primary health organisations, which represent the interests of general practitioners in the area.

The Court unanimously upheld Lab Tests' appeal. It quashed the High Court Judge's decision and held that he was wrong to set aside the contract.

The Court found that the scope of judicial review for government contracting decisions is limited by the context and the statutory framework, and that, on the facts, the Judge was wrong to find that the decision was impeachable. Although the Boards

are public bodies dealing with public funds and have public service obligations, they are still expected to act commercially in some contexts. There was only limited scope for the imposition of public law obligations of procedural fairness in the context of the tendering process. The Boards had to be in a position to negotiate with determined private sector enterprises. Furthermore, Parliament has provided for accountability mechanisms in the relevant legislation and these provisions assume critical importance. Judicial review would only be available where there was fraud, corruption, bad faith, or analogous situations sufficient to undermine the integrity of the contracting process. The Judge had failed to give proper weight to both the commercial context within which the Boards were operating and the relevant statutory provisions.

The Judge had found that Dr Bierre had been in a position of conflict throughout the relevant period; that he had failed to adequately disclose his interest; and that the Auckland District Health Board had failed to deal with the conflict appropriately. The Court rejected those conclusions. It held that Dr Bierre's conflict had to be recognised as two separate conflicts, in relation to an ambition to establish his own boutique laboratory, and to bid on the contract in issue. Any failures in relation to the former were essentially immaterial to the issues before the Court. With respect to the latter, Dr Bierre's conflict had been disclosed and addressed sufficiently promptly so as not to undermine the decision of the Boards.

In terms of confidential information, the Court questioned the correctness of the wide approach taken by the Judge, and the concept of "soft information". It held that Lab Tests enjoyed no unfair advantage over Diagnostic Medlab. The information relied upon was largely public information and the concerns of the Boards had been clearly communicated to Diagnostic Medlab.

Finally, the Court held that the Judge was wrong to find that the Boards were in breach of their obligation to consult, as the obligation to consult was not triggered in the circumstances. Although the Boards did have a statutory obligation to consult where significant changes were to be made to the services being provided, the Boards had been seeking the same service specifications and thus the obligation was not triggered.

The effect of the Court's decision was that the award of the laboratory services contract to Lab Tests was restored.

The Supreme Court has refused leave to appeal.

Agency

Existence of agency or debtor-creditor relationship – whether interest of beneficiary under a trust a "security interest" – s 17(1) Personal Property Securities Act 1999

In *North Shore City Council v Stiassny* [2008] NZCA 522, the Court was asked to determine whether an agency relationship existed between the North Shore City Council ("NSCC") and Chequer Packaging Ltd ("CPL") and, if so, whether the

transaction created a security interest under the Personal Property Securities Act 1999 ("PPSA").

The NSCC operates a weekly refuse collection and disposal service within its district. In order to be collected, rubbish must be in branded bags. CPL won a tender to supply, merchandise and distribute these bags to retailers. Under its contract with the NSCC, CPL was required to sell the bags at a set unit price to retailers. Sales were reported monthly to the NSCC, who would then invoice CPL for a set amount per bag (the total sale price less an agreed margin).

At issue in this case were funds received from retailers by CPL after it went into receivership. The NSCC's entitlement to these funds depended on whether CPL was acting as NSCC's agent, when it received the funds. In answering this question, the Court focused on the terms of the contract, including the invoicing arrangements.

The critical issue for the Court was whether CPL was required to keep the funds it received from retailers in a separate account. Although the contract was not entirely coherent, the Court concluded that it clearly did not require separate banking arrangements. This decisively showed that the funds received by CPL from retailers were not held on trust for the NSCC, a conclusion that was reinforced by other aspects of the contract.

Although the Court's conclusion on the agency point meant that it was not strictly necessary to consider the PPSA issue, it chose to express a view on the matter. The Court observed that the interest of a beneficiary under a trust cannot alone amount to a security interest for the purposes of s 17(1). However, in this situation, had there been a trust obligation, it would have qualified as a security interest: the trust obligation would not have exhausted CPL's obligations to the NSCC and its purpose would have been to provide security against the possibility of contractual default by CPL.

Because CPL did not receive the funds from retailers as an agent, the appeal was dismissed.

Admiralty

Arrest of vessel – actions in rem - costs

In *OOO DV Ryboprodukt v UAB Garant* [2008] 3 NZLR 326, the Court considered the arrest of a ship for an unpaid repair bill. The respondent UAB Garant was a shipyard and repairer in Lithuania which undertook work on a vessel owned by Ryboprodukt. The total bill was over €600,000 and was only part paid when the vessel left Garant's premises. Ryboprodukt promised to pay the balance in instalments. Ryboprodukt did not pay and, while the vessel was docked at Lyttelton Wharf, Garant applied to have it arrested. It was arrested and released only when Ryboprodukt entered into an agreement to pay the balance of the bill. Ryboprodukt failed to pay and the vessel was re-arrested, then released. Eventually Garant applied for an order that the vessel be appraised and sold before judgment. Ryboprodukt sought an order striking out Garant's notice of proceeding and filed a notice of

opposition to the sale application. The High Court granted Garant's application for appraisement of the ship but adjourned the application for sale before judgment. Ryboprodukt's notice of opposition was struck out. Ryboprodukt appealed.

The main issues on the appeal were whether the proceeding was a nullity because of an incorrect claim for costs in Garant's notice of proceeding, and whether there was a proper basis for the exercise of jurisdiction to re-arrest in this case. The Court considered that proceedings in admiralty are in essence High Court civil proceedings. The Court examined whether Garant was correct to include a claim for costs in its notice of proceedings. The Court held that an admiralty plaintiff should claim costs if it wants them, just as a general plaintiff should claim costs in its statement of claim if it wants them. There was nothing wrong with Garant having claimed costs: while it was not necessary to specify a particular sum, there was nothing to prevent Garant claiming whatever figure it liked.

The Court then considered whether jurisdiction to re-arrest existed in this case. Ryboprodukt submitted that because the proceeding in truth arose out of a dispute about the effect of a subsequent refinancing agreement, the claim was no longer in the High Court's admiralty jurisdiction. The Court held it was not possible to resolve this dispute at an interlocutory stage: it is a question for trial whether a claim is properly made within the admiralty jurisdiction. However, the Court said in its view it was strongly arguable that Garant's claim remained within the admiralty jurisdiction: Ryboprodukt entered an unconditional appearance and did not dispute admiralty jurisdiction, and Ryboprodukt acknowledged in the later contracts that re-arrest remained possible if it did not comply with the terms of the repayment contracts.

The Court finally considered whether the arrest should not have been ordered because Garant had alternative security in the form of a personal guarantee. The Court noted that there was very scanty detail of this alleged guarantee and it did not appear to be satisfactory alternative security. There was a proper basis for re-arrest in this case.

The appeal was dismissed.

Civil Procedure

Appealing costs orders – leave requirements – Care of Children Act 2004

In *Hawthorne v Cox* [2008] NZCA 146, an application for leave to appeal was made regarding the failure to award costs in favour of Ms G in relation to her successful appeal in the High Court against an order placing Ms G's daughter under the guardianship of the Family Court. In the High Court, although the Judge held that it was wrong in principle for the protective jurisdiction of the Family Court to have been invoked, no costs award was made in favour of Ms G.

The issue of whether leave was required for this appeal was the first issue discussed by the Court. Under s 145(1)(b) of the Care of Children Act 2004 ("CCA"), if an order or decision of the High Court is made on appeal from a Family Court or a District Court, an appeal to this Court lies only with the leave of this Court. It was

submitted that leave was not required as the costs order is an original order of the High Court and therefore not "made on appeal" from a lower court decision. Counsel for Ms G relied on *Payne v Attorney-General* [2005] NZFLR 846, where this Court noted that leave might not be required with regard to a costs appeal where it is the first appeal against that order and not a second appeal. Having heard full argument on the point, the tentative suggestion in *Payne* that leave might not be required in relation to a costs appeal was held to be incorrect in principle and in terms of the CCA. Any costs orders on appeal are not made pursuant to any proceedings that are separate from the appeal. They are inextricably tied to the appeal made from the lower court decision. It would be anomalous for there to be an automatic right of appeal against a discretionary costs order where an appeal against the substantive decision arises only with leave, particularly as costs appeals can in some cases involve a challenge to the findings of the High Court on the substantive appeal.

Moving to the substantive issue of award of costs, the Court considered conflicting authority in the High Court: *H v A* (2002) 22 FRNZ 447 and *DLB v DLS* [2007] NZFLR 422. In *H v A*, Panckhurst J held that, in custody and access appeals to the High Court, costs do not necessarily follow the event due to s 23 of the Guardianship Act 1968 (similar in terms to s 4 of the CCA) which states that the welfare of children is "the first and paramount consideration". In *DLB v DLS*, Cooper J said that a different approach to costs should be taken on appeal to that taken in the Family Court. On appeal, the High Court Rules apply.

The Court made some preliminary comments on these conflicting authorities. It held that in awarding costs the starting point must be the welfare and best interests of the child (s 4 of the CCA). The High Court Rules are subordinate legislation and must be interpreted in accordance with that principle. This favoured Panckhurst J's approach. However the Court said the difference between the two decisions was more apparent than real. The Court accepted that different considerations may arise on appeal that were not present in the lower court. While parents should not be discouraged from raising all genuine and responsible arguments they believe to be in the best interests of the child in the lower court, the same might not apply on appeal given that litigation and uncertainty will be prolonged: see *E v C* [1995] 3 NZLR 310 at 314 (CA). The Court considered that in this case the same result would have applied whichever decision was applied, which pointed against leave to appeal being granted.

In any event, there was no error of principle in the Judge's approach. As to the contention that counsel for the child, Ms Cox, should have been ordered to pay costs, the Court commented that as a matter of principle, absent bad faith and perhaps clear incompetence, counsel for the child should not be inhibited in their work by fear of adverse costs awards. As for Mr P, the father of the child, the result of the High Court judgment was not a total victory for Ms G. Mr P did not make the application in the Family Court (which had been made by Ms Cox) and he had nothing personally to gain from it. The Judge was therefore justified in not awarding costs to be paid by Mr P.

The Supreme Court has refused leave to appeal.

Defamation – contempt of court – application to strike out an appeal

In *Siemer v Stiassny* [2008] 3 NZLR 22, the Court considered whether an application to strike out an appeal should succeed on the basis that an appellant is in contempt of court.

Mr Siemer publicly criticised Ferrier Hodgson's conduct of a receivership, primarily in relation to Mr Stiassny's involvement as appointed receiver, in breach of an injunction. Ferrier Hodgson sued for defamation and breach of contract, the latter being a compromise agreement that purported to resolve the parties' dispute. An interlocutory decision in the High Court struck out parts of Mr Siemer's statement of defence and addressed the parties' discovery obligations. Mr Siemer's continued public criticism led to him being held in contempt, meaning he was debarred from defending the defamation and contract proceedings pending further court orders.

Ferrier Hodgson applied to strike out Mr Siemer's appeal from the Judge's decision on the basis that he was debarred from defending the proceeding which was the subject of the appeal because of his continuing contempt. The Court held that the order debarring Mr Siemer from defending the High Court proceeding did not extend to the appeal. While it acknowledged that Mr Siemer remained contumacious, given the objectionable material on his website and continued allegations about judicial officers, the Court considered that it had a discretion whether to hear Mr Siemer on the appeal, to be exercised flexibly in accordance with the circumstances of the case. Mr Siemer's contempt, his "unwarranted side-show attacks" on judicial officers and his failure to pay costs previously awarded, had to be balanced against his involvement in civil litigation where serious claims involving large amounts of money were made against him, and his wish to challenge the legal basis of the orders under appeal.

The Court dismissed the application to strike out the appeal, resolving to make directions for its future conduct pursuant to r 5 of the Court of Appeal (Civil) Rules 2005. The primary direction was for Mr Siemer to submit fresh appeal documents, permitting him to argue that the holdings of the Judge were wrong in law but precluding him from making objectionable and gratuitous observations about judicial officers. The Court reserved its ability to strike out the appeal on application by the respondents or of its own motion if Mr Siemer's conduct continued to exhibit contempt for the Court's processes.

Discovery – structured finance transactions – tax avoidance

The Commissioner of Inland Revenue v BNZ Investments Ltd (2008) 23 NZTC 21,992 was an appeal against three interlocutory discovery orders in favour of Bank of New Zealand ("BNZ") made by the High Court Judge in ongoing litigation between the Commissioner of Inland Revenue ("the Commissioner") and BNZ. The Commissioner claims that BNZ, by structuring its transactions in a particular way, engaged in significant tax avoidance.

The Judge made orders in respect of three categories of documents, which on appeal the Commissioner argued were not relevant and should not be discovered. The documents in the first category were binding rulings made by the Commissioner in favour of other taxpayers (Westpac and National Bank) in respect of transactions which BNZ claims are essentially the same as those contested by the Commissioner in these proceedings. The Judge had held that these were relevant because they may constitute an admission on the part of the Commissioner that transactions that were qualitatively identical to those of BNZ did not constitute tax avoidance. The documents in the second category related to the Commissioner's consideration and analysis in respect of the category one rulings; the Judge had found that these were discoverable because they might lend weight to the first category of documents. The documents in the third category relate only to transactions entered into between BNZ and other parties. The Judge had held that these were discoverable, for the reasons applicable to the other two categories.

Counsel for the Commissioner argued that the Commissioner was not obliged to observe consistency across taxpayers and therefore that rulings made in respect of other banks were not relevant because they could not be invoked as "precedents." Counsel for BNZ accepted that the Commissioner was not bound to observe consistency across taxpayers but contended that the documents were relevant to the Commissioner's assertions that BNZ's transactions were contrived and un-commercial.

During the hearing before the Court, the Commissioner undertook not to call witnesses from inside Inland Revenue to give evidence on issues of "commerciality", "range of acceptable practice", "artificiality", or "contrivance." The Court considered that this undertaking rendered the discovery orders unnecessary at this juncture under r 300 of the High Court Rules (which the Court considered mandated a conservative approach to discovery), and did not come within the necessity disclosure exception in s 81(1) of the Tax Administration Act 1994. The Court noted that if the Commissioner's position were to shift, and he were to elect to call witnesses from inside Inland Revenue, then the "nature and circumstances" of the litigation may warrant discovery orders. But that was not the case at the time the orders were made.

Counsel for the BNZ finally submitted that rulings might be used to clarify ambiguities in the tax legislation. The Court accepted that public rulings may be admissible to clarify statutory ambiguities, but considered that private rulings issued in respect of a third party could not be invoked in the interpretation and application of the tax legislation to BNZ.

The appeal was allowed and the discovery orders were quashed.

Mental health law – immunity and leave provisions – "pursuance or intended pursuance" – limitation provisions

In *Crown Health Financing Agency v P and B* [2008] NZCA 362, the Court considered an appeal by the Crown from strike-out proceedings in the High Court,

concerning historic abuse of former patients of Porirua and Lake Alice psychiatric hospitals in the 1960s and early 1970s. The claimants in this case, who were ex-patients of the hospitals, alleged negligence, physical and sexual abuse, and the use of "electric-shock" treatment and solitary confinement as punishment. There are over 250 similar proceedings currently filed in the High Court. The Crown Health Financing Agency is the Crown entity that inherited the historic liabilities of the relevant psychiatric hospitals.

Section 6 of the Mental Health Amendment Act 1935 and s 124 of the Mental Health Act 1969, in force at the time of the alleged abuses, barred proceedings in respect of acts done in pursuance or intended pursuance of the Acts unless the High Court grants leave to the claimant to proceed. Those sections also provided an immunity from civil and criminal liability for any acts done "in pursuance or intended pursuance" of the Acts unless those acts were done in bad faith and without reasonable care. The provisions were enacted to protect mental health professionals from meritless claims by current or former patients of psychiatric hospitals.

The claimants did not apply for leave to bring proceedings on the basis that the alleged abuse did not fall within the immunity. The Crown applied to strike-out the proceedings in the High Court, claiming that it was protected by statutory immunity from any of the alleged acts that were performed "in pursuance or intended pursuance" of the legislation. In any event, the Crown argued that s 6 of the 1935 Act and s 124 of the 1969 Act barred proceedings without the leave of the Court, which could not be sought more than six months after the alleged abuses.

On appeal from a High Court judgment, the Court unanimously held that the leave and immunity provisions of the legislation apply to both committed and voluntary patients, as well as proceedings that allege the Crown is vicariously liable. Although the governing legislation has now been repealed by the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Court considered that the relevant leave and immunity provisions survived that repeal. The analysis in *Yew Bon Tew v Bas Mara Kenderaan* [1983] 1 AC 553 (PC) was preferred to that in *Davies v Public Trustee* [1957] NZLR 1021 (CA), to the extent that the latter case held time bars are procedural and cannot give rise to any accrued right or immunity once the time bar has expired.

In relation to coverage, the Court considered that an act would be in pursuance of the legislation if it related to the committal process, the running of a psychiatric institution, or the care, treatment, control and protection of patients. An act that amounted to an offence under the legislation could not be in pursuance of it. An act could be in intended pursuance of the legislation if a person could honestly, even if mistakenly, have considered that it could have been.

A majority of the Court (Glazebrook, O'Regan and Robertson JJ) stated that the following procedure was to apply. If the Crown argues that the governing legislation applies, it can apply to have the proceeding struck out on the basis that more than six months has elapsed. Alternatively, it can apply to have a preliminary hearing, with evidence on whether the alleged acts were abuses or were in fact performed in good faith.

Hammond and Baragwanath JJ offered procedural alternatives. For Hammond J, obtaining leave was a necessary precondition to bringing proceedings, following *Seal v Chief Constable of South Wales Police* [2007] 1 WLR 1910 (HL). If a leave application ought to have been made but was not, the desirable course of action was to grant a conditional stay until leave is obtained if it could be. The claimant would have the opportunity to file an originating application either applying for leave or seeking a determination that any particular acts complained of were not within the leave provisions. The claimant would be obliged to file affidavit evidence sufficient to allow a judicial determination of whether or not leave was required and, if so, whether it should be granted.

Baragwanath J's alternative procedure was to direct plaintiffs to provide on oath particulars of the claim and the evidence supporting it. If the plaintiff were to go on oath and there was no defence affidavit, there is nothing to establish a defence that the conduct was "in pursuance or intended pursuance" and summary judgment on liability might be justified. If the defendant filed an affidavit, the options for the Court would be to strike out the claim as brought without leave, adopting the course frequently seen in summary judgment litigation of rejecting the case of on side or the other.

The Supreme Court has granted leave to appeal.

Mental health law – limitation provisions – Mental Health Act 1969

The Court heard *Longman v Residual Health Management Unit* [2008] NZCA 363, an appeal from a High Court judgment which refused the appellant leave to bring his claim under the Mental Health Act 1969, at the same time as *Crown Health Financing Agency v P and B* (see above). The appellant, an ex-patient of Tokanui Hospital, alleged breaches of fiduciary duty and negligence in relation to his treatment and sought compensatory damages, exemplary damages, special damages for pecuniary loss and interest.

Section 124 of the Mental Health Act 1969, in force at the time of the alleged abuses, barred proceedings in respect of acts done in pursuance or intended pursuance of the Acts unless the High Court grants leave to the claimant to proceed. That section also provided an immunity from civil and criminal liability for any acts done "in pursuance or intended pursuance' of the Acts unless those acts were done in bad faith and without reasonable care. The provisions were enacted to protect mental health professional from meritless claims by current or former patients of psychiatric hospitals.

The appellant argued that the wording of s 124(4) of the 1969 Act permitted an extension of the six month "time bar" where the effects of abuse were ongoing, or where the facts of the abuse were, for a long period of time, unknown to the claimant.

The Court dismissed the appeal, holding that the language of the statute envisaged only situations where the cause of damage, rather than the damage itself, is ongoing. In addition, the appellant could not show that the facts of the abuse were unknown to him such that the six month period should be extended due to "ignoran[ce] of the facts that constitute the cause of action." The Court also held that the Mental Health

(Compulsory Assessment and Treatment) Act 1992 did not retrospectively repeal the leave requirement in the 1969 Act, for the reasons given in *Crown Health Financing Agency v P and B.*

Service of summons overseas – s 19 Mutual Assistance in Criminal Matters Act 1992

In *Civil Aviation Authority of New Zealand v Heavylift Cargo Airlines Pty Ltd* [2008] 2 NZLR 391, the Court considered the service of a summons on a company which had no presence or registered office in New Zealand. The Civil Aviation Authority alleged that an aircraft operated by Heavylift Cargo Airlines had infringed the Civil Aviation Act 1990. An information was laid in the District Court at Manukau but could not be served because Heavylift had no registered office in New Zealand. The Authority sought the assistance of the Attorney-General pursuant to s 19 of the Mutual Assistance in Criminal Matters Act 1992 ("MACMA"). The Attorney-General made a request of the Australian authorities that a summons be served on a representative of Heavylift at the company's registered office in New South Wales. An Australian federal police officer served the summons.

Two issues arose: does s 19 of MACMA permit service of an originating summons overseas, and was proper service effected in this case? The Authority accepted that, but for s 19, it could not serve Heavylift overseas. The Court discussed the Harare Scheme (1986) and the UN Model Treaty on Mutual Assistance. The Court then considered whether s 19 permitted the lawful service of an originating summons. From the commentary to para 15 of the Harare Scheme, it was clear that service of "originating processes" was always intended – the wording was then broadened to include other types of document. The Court held that s 19 of the MACMA does permit service of any summons, including an originating summons, overseas.

The Court then turned to whether service was properly effected in this case. The Attorney-General (in his request to the Australian authorities) had specified personal service upon a representative of Heavylift at the company's registered office. Unbeknownst to the police officer, by the time of the purported service Heavylift's registered office had moved to another address. Service was thus not carried out in accordance with the Attorney-General's request. The Court emphasised the issue was not whether service complied with Australian legislation; rather, it was concerned with whether service was effected in accordance with the terms of the New Zealand request. Service in this case was defective because of the Australian authorities' failure (by mistake) to effect service in compliance with the request. Because the summons was not properly served, the High Court made an order setting it aside. The Court agreed that the summons had not been properly served, but considered the High Court should simply have declared the summons was not properly served.

For this reason, the appeal was allowed and a formal declaration made that the summons had not been validly served to date.

Stay of proceedings – availability of declaratory judgment where damages claim settled under limitation provisions of Maritime Transport Act 1994

In *Birkenfeld v Kendall* [2008] NZCA 531, the Court dismissed an appeal by Ms Birkenfeld from a judgment ordering a permanent stay of proceedings.

Ms Birkenfeld had been pursuing a claim for damages against Mr Kendall and Yachting New Zealand Incorporated in relation to a collision that occurred between Mr Kendall's boat and Ms Birkenfeld's windsurfer in the lead up to a race at the Olympic Games in Athens. Ms Birkenfeld was severely injured and has not been able to resume her career as a board sailer. The issue of who was at fault has not been resolved, but the respondents have agreed to pay Ms Birkenfeld the maximum amount that would be available in any proceedings, that amount being limited by the provisions of the Maritime Transport Act 1994.

Ms Birkenfeld argued that the decision ordering the stay was wrong primarily on the ground that the offer to pay damages dealt only with quantum, and not with her allegation that Mr Kendall was negligent. She suggested she was entitled to seek a declaration that Mr Kendall was liable.

Although such a claim was not included in her pleadings, the majority of the Court (Arnold and Baragwanath JJ) considered whether such relief would be available under the Declaratory Judgements Act 1908. It held that it would not, as to allow an application for a declaration would be contrary to the policy of the Maritime Transport Act.

Robertson J agreed with the outcome, but wrote separately to express his view that the Court should not comment on matters which are not essential to the outcome of the case, particularly in relation to matters that were not part of the proceedings before the Court of Appeal or the High Court.

Leave to appeal to the Supreme Court has been sought.

Competition Law

Business acquisition – substantial lessening of competition – Commerce Commission clearance and authorisation – accessory liability – pecuniary penalties – ss 47, 66 and 83 Commerce Act 1986

In *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433, the Court considered an appeal from a High Court decision, which had held a vendor liable as an accessory in relation to an anti-competitive business acquisition for the first time under the Commerce Act 1986.

In 2005, NZ Bus, New Zealand's largest bus company, entered into an agreement with Blairgowrie Investments to acquire Mana Coach Services, the second largest bus company in the Wellington region. The agreement was conditional on NZ Bus obtaining Commerce Commission clearance or authorisation. During the clearance

process, the Commission expressed concerns to NZ Bus and Infratil, the parent company of NZ Bus, that the acquisition would reduce competition. A meeting was held at which NZ Bus claimed Commission staff encouraged them to proceed with the acquisition without a clearance, a concession denied by the Commission. The condition requiring Commission clearance or authorisation was subsequently waived by agreement between NZ Bus and the vendors, and NZ Bus withdrew its clearance application.

The Commission brought proceedings in the High Court to restrain NZ Bus from completing the acquisition of the 74 per cent of Mana that it did not already own, on the basis that the acquisition would substantially lessen competition in the Wellington regional market for rights to operate scheduled public and school bus services, in contravention of s 47 Commerce Act 1986.

The relevant statutory provisions were as follows. Section 47 of the Act provides that a person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market. Section 66 provides for clearance of a business acquisition by notice to the Commission. Section 83 provides that the Court can award pecuniary penalties if it is satisfied on the application of the Commission that a person has aided, abetted, counselled or procured any other person to contravene s 47 or has been in any way, directly or indirectly, knowingly concerned in, or party to the contravention by any other person of that section.

In the High Court, the Judge agreed with the Commission that the acquisition did breach the Act and that s 47 had been infringed. He further held that certain members of the Waddell family, who were associated with Mana, were accessory parties to that contravention by participating in the waiver of the clearance with knowledge of essential facts sufficient to establish contravention of s 47. However, an accessory liability claim by the Commission against Infratil failed. In a second judgment, the Judge assessed a pecuniary penalty of $500,000 against NZ Bus, and awarded ‘usual’ costs to the Commission and its actual fees paid to expert witnesses.

The parties in the case appealed and cross-appealed in such a way that effectively all the liability and penalty findings were at issue.

The Court dismissed NZ Bus’ appeal against the finding of an anti-competitive transaction under s 47. Counsel for NZ Bus had suggested that the Judge’s decision as to liability under s 47 had been driven by the findings that there was a “tacit understanding” between NZ Bus and Mana and that the two bus companies were achieving supra-competitive profits. The Court chose not to displace the Judge’s factual findings on these points, holding that if the acquisition were to go ahead, the practical outcome would be one large supplier in the market, holding a 97 per cent market share by value of the contracts in the market with few competitive restraints. The Court ultimately held that the restraints which would exist if the transaction proceeded, such as potential entry by other companies, existing competition and the Greater Wellington Regional Council’s countervailing powers, were not sufficient to deflect a finding that the acquisition would substantially lessen competition in the relevant market.

On the issues of accessory liability, the Court allowed the appeal by Blairgowrie Investments, overturning the Judge's finding of accessory liability against the vendors of Mana. The Court also dismissed the cross-appeal by the Commission against Infratil, meaning that the parent company of NZ Bus also escaped liability.

The Judge had held that an accessory is liable under s 83 of the Act only if it has knowledge of the essential facts that establish a contravention of the Act and if its participation was intentionally aimed at the acts that form the principal's contravention, namely the acquisition of assets or shares.

On appeal, Hammond J closely examined this criminal law analogy for accessory liability in the competition law context, suggesting that a "dishonest participation" model may be more appropriate. "Dishonest participation" depended on an objective assessment of whether the alleged accessory was guilty of "commercially unacceptable conduct". Under both the criminal law analogy and his preferred dishonest participation model, Hammond J held that Blairgowrie Investments as vendors were not liable because their involvement was limited and they had not been told that there was a real risk the Commission would decline clearance. The fact that the Commission had hinted to Infratil that NZ Bus might consider withdrawing the clearance application meant that Infratil similarly evaded liability.

In a separate judgment, Arnold J agreed with Hammond J that there were difficulties in transposing the criminal law accessory liability approach to the s 47 regime because the requirement that accessories have knowledge of the essential facts that comprise the contravention is difficult to apply, and because a finding that s 47 has been contravened requires an evaluative assessment on the Court's part. However, he contended that Hammond J's "dishonest participation" approach did not provide any greater certainty, given that it relied on the Court's intuitive judgment as to what was commercially appropriate on the facts of each case. Nevertheless, on the orthodox approach, Arnold J similarly held that neither Blairgowrie Investments nor Infratil had the knowledge necessary for accessory liability.

The Court dismissed the cross-appeals by the Commission and NZ Bus as to the $500,000 penalty ordered by the Judge, describing that figure as "an appropriately deterrent pecuniary penalty in a marginal case", and dismissed the costs appeal by NZ Bus.

The Supreme Court has refused leave to appeal.

Clearance decisions – mergers and acquisitions – s 66 Commerce Act 1986

In *Commerce Commission v Woolworths Ltd* (2008) 12 TCLR 194, the Court discussed the approach to be taken to clearance applications under s 66 of the Commerce Act 1986.

Until June 2006, the respondents, Woolworths and Foodstuffs, were the only supermarket operators in New Zealand. That month, the Warehouse, New Zealand's largest general merchandise retailer, entered the supermarket market with a "Warehouse Extra" store at a new shopping development in Auckland. Two more

Extra stores followed at Whangarei in November 2006 and Te Rapa in August 2007. These stores operate as supercentres, with their viability dependent on increasing the sales of general merchandise through attracting customers to buy groceries (the "halo" effect).

The case concerned whether clearance should have been granted to Woolworths and three Foodstuffs co-operatives to acquire up to 100 per cent of the ordinary shares in the Warehouse. The Commerce Commission refused clearance, but this decision was overturned on appeal by the High Court. The High Court granted leave to appeal its decision to the Court of Appeal.

The Court began by discussing the nature of an appeal to the High Court from a clearance decision of the Commission. While it recognised that updating evidence may be led, this should not extend to expert evidence critiquing the reasoning process underpinning the decision on appeal. By admitting such evidence, the High Court had effectively heard the case *de novo* and, in doing so, had not approached its appellate function in an orthodox way. This error in approach, however, was a *fait accompli*.

A significant portion of the Court's judgment was then devoted to analysing the proper application of ss 47(1) and 66 of the Commerce Act. Under s 47(1) an acquisition of a business is prohibited if it would have, or would be likely to have, the effect of substantially lessening competition in a market ("the proscribed effect"). Potential acquirers may, however, apply to the Commission under s 66 for clearance. If granted, the acquirer is then immunised from later action under s 47(1).

In order to apply s 66 properly, the Court embarked on an analysis of its legislative history. This revealed a change in the burden of proof in clearance applications since the Commerce Act's enactment in 1986. Clearance may now only be given if the Commission is satisfied that there will not be a proscribed effect. The Court then observed that application of this test involves inherent uncertainty in that it requires an assessment of the competitive outcomes of hypothetical situations.

The Court considered that the proper approach to applications under s 66 is for the Commission only to grant clearances if satisfied that the acquisition will not have (or be likely to have) the proscribed effect. The Commission should decline clearance if it is able to say that it is not satisfied that there will be no substantial lessening of competition. The High Court failed to apply this test correctly. Its approach broadly implied that if it was not satisfied that the proscribed effect is likely, it would necessarily be satisfied that such an effect is not likely. This binary approach effectively reversed the statutory test: it results in clearances being granted unless the Commission is satisfied that a proscribed effect is likely.

The main area of contention on appeal was the likely state of competition in the counterfactual (ie if the Warehouse remained independent of Woolworths and the Foodstuffs co-operatives). As a starting point, the Court concluded that the respondents had failed to establish that the Extra concept would prove not to be viable. Given recent improvements in the performance of the Extra stores, the international success of the supercentre concept, and the Warehouse's financial ability to persist with the concept, the Court was unwilling to second-guess the business judgment of the Warehouse's directors.

The Court then turned to consider the proper approach to assessing likely competition in the counterfactual. It identified a marked difference in approach between the Commission and the High Court. The Commission largely assessed the anti-competitive tendency of a takeover of the Warehouse by reference to general considerations (eg market structure and economic theory). In contradistinction, the High Court primarily focused on empirical evidence. It looked for evidence of Extra's competitive impact since inception and examined the impact of a recent acquisition of a major player in the supermarket industry.

In a number of respects, the Court rejected the approach taken by the High Court. It held that what constitutes a substantial lessening of competition is a matter of judgment. While empirical evidence should be considered, the High Court's analysis of competition relied too heavily on the price effects likely in the counterfactual. Evidence of the immediate competitive effect of a new concept, like Extra stores, is not a reliable predictor of its likely future impact. This is especially so where the only competitors have lodged clearance applications.

Instead, the Court pointed out that there was insufficient empirical evidence to justify a conclusion that the current Extra stores were having no material competitive impact. The updating evidence in fact indicated enhanced performance of these stores. In addition, the more theoretical evidence available did not support a prediction that Extra would have no material impact on competition. The Court concluded that there was a real chance of the concept succeeding. And if that happened, there was a real possibility that it would have a real competitive significance. In conclusion, given the theoretical concerns about the acquisition, the empirical evidence upon which the High Court relied was insufficient to bring it to the point of being satisfied that a proscribed effect would not be likely to occur if clearance was granted.

The appeal was allowed and the clearances set aside.

Leave to appeal to the Supreme Court was sought, then withdrawn.

Pharmaceuticals – validity of notice under s 98 Commerce Act 1986 – exemption under s 53 New Zealand Public Health and Disability Act 2000

In *AstraZeneca Ltd v Commerce Commission* [2008] NZCA 479, the validity of a notice given to AstraZeneca under s 98 of the Commerce Act 1986 was at issue. AstraZeneca argued that s 53 of the New Zealand Public Health and Disability Act 2000 ("NZPHD Act") provided it with a total exemption from the Commerce Act in this case. Section 53 states that nothing in Part 2 of the Commerce Act (restrictive trade practices) applies to any agreement to which Pharmac is a party that relates to pharmaceuticals for which full or part payment may be made from money appropriated under the Public Finance Act 1989; or any act, matter, or thing done by any person for the purposes of entering into such an agreement; or any act, matter, or thing done by any person to give effect to such an agreement.

The Commerce Commission decided to investigate to examine whether, in its negotiations with Pharmac, AstraZeneca was taking advantage of market power for the anti-competitive purpose of preventing sales of generic beta-blockers, in breach of the Commerce Act. AstraZeneca sought judicial review of the decision to issue the s 98 notice, requiring AstraZeneca to supply information, documents or evidence, based on the s 53 exemption. A prime issue was whether s 53 of the NZPHD Act should operate to protect anti-competitive conduct only to the extent that it generates the requisite public benefit.

The majority (Glazebrook and MacKenzie JJ in separate judgments) dismissed the appeal, holding that it would be premature to make a definitive ruling on the scope of s 53 of the NZPHD Act. Whether s 53 ought to be "read down" in light of its purpose ought not to be decided in a factual vacuum; therefore, the majority held that the investigation of the Commerce Commission ought to continue. In dissent, Fogarty J held that the clear words of s 53 are incapable of bearing the interpretation contended for by the respondents.

Leave to appeal to the Supreme Court has been sought.

Contract

Construction of contract – conditions – water consents

In *Craggy Range Vineyards Ltd v Campbell* [2008] NZCA 96, the Drylands Trust entered into an agreement for sale and purchase of approximately 167 hectares of land to Craggy Range Vineyards Limited. A dispute arose over the proper construction of the agreement for sale and purchase of the land.

Craggy Range purchased the land with a view to using it to grow grapes for wine production, and the value of the land was dependent upon the extent to which it could be used successfully for that purpose. Consequently, the purchase price under the agreement for sale and purchase was calculated according to the nature and quantity of water consents obtainable by Craggy Range. The entire agreement was conditional upon Craggy Range obtaining consents necessary to take water at a particular flow-rate, a condition stated to be for the sole benefit of the purchaser, and in addition the agreement provided for additional payment if Craggy Range could obtain consents adequate to irrigate an extra block of land. Finally, the agreement provided that if Craggy Range obtained water at a stipulated flow rate, then it would be deemed to have water adequate to irrigate the whole of the property, and would be required to pay the additional sum.

On appeal, there were two issues. The first pertained to the effect of Craggy Range's statement of a condition precedent being satisfied. After having obtained an initial consent, Craggy Range declared the agreement unconditional, although the quantum of the consent was less than the threshold stipulated in the agreement to render it unconditional. Subsequently, Craggy Range obtained an additional consent, which the Drylands Trust claimed triggered the additional payment provision. Craggy Range objected, contending that even with the two consents put together, it had just over the

threshold quantum. The second issue concerned whether the construction of a dam by Craggy Range as a water storage mechanism obligated it to make further payment under the contract since it meant that Craggy Range in fact had sufficient water to irrigate all of the plantable property.

The Court discussed the proper approach to the interpretation of contracts, noting that the five principles articulated by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) were affirmed in *Boat Park v Hutchinson* [1999] 2 NZLR 74 (CA). The Court also noted *Yoshimoto v Canterbury Golf International Ltd* [2004] 1 NZLR 1, where the Privy Council warned against substitution by judges of their own views for those evidenced by the parties' agreement.

In respect of the first issue before it, the Court considered that there was nothing said or done by Craggy Range to indicate that by declaring the contract unconditional with a lesser consent than it might have had, it was thereby asserting that it did not require more than that lesser quantum to irrigate the initial block of land. Rather, Craggy Range simply took the risk that extra water would be available. The appeal on this point was therefore unsuccessful.

In respect of the second issue, the Court considered that the agreement between the parties was predicated solely on the basis of water flow drawn as and when required, and not on total water capacity achieved on the basis of additional storage facilities. The construction of the dam was at the initiative and expense of Craggy Range, and did not obligate it to pay an additional sum to the vendors.

Construction of contract – "time of the essence" clause – cancellation - waiver

In *Carr v Frost* [2008] NZCA 391, Messrs Carr and Humphries were engaged in a common business enterprise as joint venturers; when relations between them broke down, they sought to divide the business assets in which they had joint ownership. To this end, they entered into an initial settlement agreement, which was later consolidated in an amended settlement agreement, which covered four transactions by which Mr Carr was to purchase the previously intermingled assets so as to effect a severance of all business dealings between the two men. The date and time for settlement was stated to be "of the essence." In the event, Mr Carr failed to settle by the stipulated time, and one of the vendors purported to cancel the entire agreement.

Before the High Court Judge, Mr Carr claimed that it was not open to a single vendor to cancel on behalf of all vendors, and that the vendors had waived the condition in any event, by their conduct after the settlement time had passed. The Judge held that settlement could not have been extended beyond the stipulated deadline without the consent of all the vendors and that since there had been no such consent, the agreement had been properly cancelled. The Judge also found that there had been no valid waiver of the essentiality of time condition.

The question for the Court was whether the essentiality of time condition gave each party to the agreement an independent right to cancel or whether some of the parties were entitled unilaterally to waive the condition, and thereby oblige the other parties

to settle. The Judge had held that the settlement agreement was an "all or nothing" agreement, and that all settlements under the agreement were interdependent and intended to be mutually settled.

The Court agreed and dismissed the appeal, holding that the essentiality of time condition provided all parties to the contract with a right of veto. All parties were obliged to satisfy the condition and all parties were entitled to cancel for its non-performance. Therefore, when one of the parties did exercise its right of cancellation, not having previously waived the essentiality of the deadline, the agreement came to an end. On the issue of waiver, the Court noted and applied *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (PC).

Construction of contract - when risk passes in the absence of a specific risk-allocation clause

In *Cavell Leitch Pringle & Boyle v Thornton Estates Ltd* [2008] 3 NZLR 637, the Court held that in the absence of provision to the contrary, the general rule is that the owner of an asset bears the risk of its loss.

Solicitors Cavell Leitch had acted for Thornton Estates in the purchase of a marina complex. The contract provided that property in the assets and responsibility for the liabilities should pass to Thornton Estates on the settlement date. Prior to that date the marina was damaged in a storm and Thornton Estates refused to settle. The vendor sued and Thornton eventually settled for approximately $1.1 m. Thornton Estates then sued Cavell Leitch and succeeded in the High Court, primarily on the ground that Cavell Leitch should have included a specific clause dealing with risk in the contract.

Although the contract did not provide expressly for the transfer of risk, the Court allowed the appeal. The express provision for transfer of property led to the inevitable inference that the contract provided concurrently for transfer of risk.

The Court also considered that Cavell Leitch was not negligent by reason of "fail[ure] to advise the plaintiff … in relation to the transfer of risk" as further pleaded. It was not a function of Cavell Leitch either to include in the contract, or to explain to Thornton Estates at the time of the contract, that risk passed with property. When drafting contracts a lawyer's task is to take due care to ensure that the client's rights are protected, not to give the client lessons in law.

The Supreme Court has granted leave to appeal.

Sale and purchase of land – whether vendor permitted to cancel contract for non-satisfaction of condition – contemporaneous settlement

In *Kiwi Freeholds Queen Street Ltd v Shanti Holdings Ltd* [2008] 3 NZLR 69, the Court addressed the cancellation rights in a property swap agreement between Mr Schofield and associated companies, and companies associated with Mr Amarsee. Under the agreement, the Schofield interests were to provide a hotel (Kiwi International) to Mr Amarsee and in return the Amarsee interests were to provide a property in Whitford plus $5.5 million. Two agreements for the sale of land and one

agreement for the sale and purchase of a business were drawn up in the standard form approved by the Auckland District Law Society. The issue was whether one Amarsee entity was entitled to cancel the Whitford contract when the other Amarsee entity failed to settle the hotel land contract.

This required the Court to consider cl 18 of the agreement, which provides that settlement of each agreement was conditional on the settlement of the other two agreements, and that settlement of all agreements was completely interdependent and had to be effected contemporaneously. The question was whether this contained a condition to which cl 8.7 of the standard conditions applied. Clause 8.7 provides that either party to the contract can cancel if a condition to which the agreement is subject is not fulfilled.

The Court held that cl 18 did not contain a condition but merely recognised the interdependent nature of the three contracts and related to the timing of settlement. Furthermore the Court noted that the subsequent conduct of the parties recognised that cl 18 was not a condition. The Schofield interests had confirmed in correspondence that the Whitford contract was unconditional, referring to cl 18 as a "contemporaneous settlement provision".

The Court noted the adverse consequences that would result if cl 18 had been held to be a condition. First an agent would not be entitled to commission until after settlement of the sale and, if the contract did not settle at all, there would be no entitlement to commission. Secondly, any deposit paid could not be released to the vendor until after settlement. Thirdly, if settlement of one of the contracts did not take place on the contractual settlement date, an immediate right to avoid the contract and all other contracts would have accrued to all parties not in default under the contracts. The Court accepted the submission that if cl 18 was construed to make the contract conditional upon settlement on the due date, time is made of the essence. This would circumvent cl 9, which provides a settlement notice procedure giving 12 working days to settle if the other party fails to settle on the due date. The Court accepted that it would be an anomalous result if cl 18 could circumvent the explicit procedure in cl 9.

Given the finding that cl 18 did not contain a condition, the Court allowed the appeal, holding that the purported cancellation of the Whitford contract by the Amarsee entity was invalid.

Settlement offer – whether change of circumstances caused offer to lapse

In *Nielsen v Dysart Timbers Ltd* [2008] NZCA 280, the Court examined the ways in which contractual offers may be regarded as having lapsed prior to acceptance.

The case arose out of litigation between the parties in relation to guarantee liabilities. Dysart Timbers had successfully obtained judgment against the Nielsens in the Court of Appeal for the sum of approximately $315,000. The Nielsens then sought leave to appeal to the Supreme Court.

Pending a determination on the leave application, the Nielsens' solicitor sent a brief email to Dysart Timbers' solicitor offering full and final settlement of the matter for $250,000. The offer concluded with, "The sum can be paid on Monday at which time the leave application to the Supreme Court will be discontinued." Approximately three hours later, the Supreme Court granted leave to appeal. Neither party had expected a decision to be made absent a formal application for an extension of time. Approximately 45 minutes later, Dysart Timbers purported to accept the settlement offer. The High Court Judge held that a valid settlement contract had been concluded.

Two arguments were raised in support of the Nielsens' appeal. The first was that the offer was subject to the leave application not having been determined before acceptance. This was rejected by the Court, which held that the reference to discontinuing the leave application merely stated a consequence of the offer being accepted.

The second argument was that the offer was subject to an implied term that it would lapse if leave to appeal was granted prior to acceptance. In dealing with this argument, the Court noted the need for a contextual analysis of the circumstances associated with the offer. It also examined a line of Scottish cases in which settlement offers were held to have lapsed because, prior to acceptance, there had been a material change in circumstances associated with the underlying litigation. In these cases, the change in circumstances was of such a magnitude so as to render the offer "utterly unsuitable and absurd".

The Court took the view that an offer will usually be subject to an implied condition that it will lapse if there is a change of circumstances of such significance that it cannot fairly be regarded as still being open for acceptance. Although the Supreme Court's decision to grant leave to appeal had obviously altered the balance of advantage between the parties, the dispute remained unresolved, and the Nielsens were still paying less than had been awarded to Dysart Timbers. On these facts, the change of circumstances was insufficiently material to justify the conclusion that the offer had lapsed.

The appeal was dismissed.

The Supreme Court has granted leave to appeal.

Settlement without abatement – affirmation or waiver

In *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2008] NZCA 422, the Court discussed the validity of cancellation of a contract for sale of land under the standard form Auckland District Law Society sale of land agreement (7ed). It was argued by Property Ventures, based on *Lingens v Martin* (1994) 2 NZ ConvC 191,940 (CA), that breaches of warranties in cl 6.2 constituted a "misdescription of property" under cl 5.4 and that it was not obliged to settle without an abatement of the purchase price. It was assumed for the purposes of the appeal that Regalwood was in breach of warranties relating to building fitness under cl 6.2.

The Court held that, to the extent that cl 5.4 may potentially apply to breaches of warranties under cl 6.2, it could not apply to warranties which apply at the date of settlement. This was because of the requirement in cl 5.4 that compensation must be demanded in writing before settlement. *Lingens v Martin* did not apply to the warranties under cl 6.2 in this case as they related to the possession date, which coincided with the settlement date in this case. The Court also said that it is unlikely that cl 5.4 extends beyond the narrow compass of its heading "Titles, boundaries and requisitions". The Court thus expressed doubt that *Lingens v Martin* was correctly decided in relation to misrepresentations that do not relate to titles or boundaries.

However, the most persuasive reason why Property Ventures was obliged to settle in full was cl 6.5, which was inserted after *Lingens v Martin* had been decided. Clause 6.5 states that where there is a breach of a warranty or an understanding, a purchaser is obliged to settle in full but without prejudice to any rights or remedies available at law or equity. The Court held that this clause ensured that remedies such as cancellation, damages, compensation or retention would be available to the party harmed by the breach of warranty after settlement. It was held that cl 6.5, rather than cl 5.4, governs breaches of cl 6. Therefore Property Ventures was obliged to settle in full without abatement.

The Court also held that there had been no affirmation of the contract by Regalwood. Although Regalwood had said in correspondence that it would seek specific performance, the Court referred to *Johnson v Agnew* [1980] AC 367 (HL) where it was held that seeking specific performance is not an election to affirm as it does not constitute an "eternal and unconditional affirmation". The Court accepted that there had been a waiver of the original settlement notice making time of the essence but later correspondence made it clear that the agreement would be cancelled if settlement did not take place on a specified date.

The appeal was dismissed.

The Supreme Court has granted leave to appeal.

Termination – pre-contractual negotiations as interpretative aid

In *Bay of Plenty Electricity Ltd v Vector Gas Ltd* [2008] NZCA 338, the Court considered whether a long term gas supply contract had been validly cancelled and the interpretation of an interim supply arrangement entered into by the parties.

The Crown bought gas from the Maui gas field under the Maui agreement, which was entered into in 1973. The agreement provided for two-yearly redeterminations of the economically recoverable reserves in the field and provided for consequential adjustments to rights of supply on a redetermination. The Crown then sold gas to NGC New Zealand Ltd ("NGC"), now Vector Gas Ltd, under the 1977 NGC agreement. In 1995, NGC entered into an agreement with Bay of Plenty Electricity Ltd ("BoPE"), the BoPE agreement, to supply gas until 2006. The BoPE agreement gave NGC a right to terminate in the event of a redetermination of the Maui agreement that resulted in the ability of NGC to supply or deliver Maui gas being

reduced to any extent. In 2003, a redetermination halved the previous estimates of the remaining economically recoverable reserves of Maui gas. As a result, in 2004 NGC purported to terminate the BoPE agreement. BoPE challenged that termination. However, before the proceedings were heard the parties entered into an interim gas supply agreement to operate pending the resolution of this dispute.

The proceeding raised two main issues. First, whether NGC had validly terminated the BoPE agreement. Secondly, whether the price specified in the interim supply agreement was inclusive or exclusive of transmission costs. The High Court Judge had held that the agreement was validly terminated and that the price in the agreement was exclusive of transmission costs. BoPE appealed.

On the first issue, the Court upheld the Judge's finding that NGC validly terminated the agreement. The Court rejected BoPE's argument that the termination clause in the BoPE agreement was akin to a force majeure clause and only operated where there was a physical reduction in supply. Instead, the Court held that the clause was triggered by a reduction in NGC's legal capacity to supply.

On the second issue, the Court overturned the Judge's finding that the price in the interim agreement was exclusive of transmission costs. The interim agreement was contained in a letter written by NGC's solicitors to BoPE's solicitors. It was the result of protracted written negotiations. NGC argued that those pre-contractual negotiations showed that the price specified, $6.50 per gigajoule, was used as a shorthand for "$6.50 per gigajoule plus transmission costs". The Court rejected this argument. It found that the letter containing the agreement was the starting point and was clear in its terms. The letter incorporated the terms of the BoPE agreement, which provided a price inclusive of transmission costs.

Accordingly, the appeal was allowed in part.

The Supreme Court has granted leave to appeal.

Employment Law

Employment agreement – holidays – annual leave

In *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd* (2008) 8 NZELC 99,386, the Court allowed an appeal from a decision of the Employment Court relating to the construction of a holidays provision in a collective employment agreement.

The collective agreement was executed in July 2005. At that time, the Holidays Act 2003 was in force and provided for a minimum of three weeks' annual leave. It also made provision to increase the minimum to four weeks in 2007. The agreement allowed for three weeks' annual leave "in accordance with the provisions of the Holidays Act 1981" and in addition a further week's holiday "in recognition of the nature of the work" making a total of four weeks' leave per year. The issue before the Employment Court was whether, when the provisions in the Holidays Act that

increased the statutory minimum came into force, the additional one week holiday provided for in the agreement was absorbed, or whether it continued as an addition to that minimum, making a total of five weeks' leave per year.

In its decision, the Employment Court analysed the language in s 6(2) of the Holidays Act, which states that the Act "does not prevent an employer from providing an employee with enhanced or additional entitlements." The Employment Court drew a distinction between the terms "enhanced" and "additional", finding that the term "enhanced" related to furthering the purposes specified in s 3 of the Holidays Act whereas "additional" related to entitlements provided for other purposes. Section 3 identifies the purposes of leave as being for rest and recreation, public holidays, and sick and bereavement leave.

The majority of the Court (Glazebrook and Baragwanath JJ) allowed the appeal, holding that the Employment Court had over-analysed the language of the statute and had drawn an erroneous distinction between the terms "enhanced" and "additional" which overlap. Because it was not clear how significant this error was in the Employment Court's reasoning, the majority referred the case back to the Employment Court for reconsideration in light of this judgment.

Chambers J dissented and would have dismissed the appeal. In his view, the Employment Court's reasoning was correct. The central point of the decision was the importance of analysing the purpose of the particular holiday in terms of s 3 of the Holidays Act. If the holiday was described by the parties as part of "annual leave" and its purpose was one of the s 3 purposes, then it was part of annual leave. For Chambers J, that decision was open to the Employment Court and was correct.

Personal grievance – age discrimination – comparator group analysis – s 104 Employment Relations Act 2000

In *Air New Zealand Ltd v McAlister* [2008] 3 NZLR 794, the Court upheld an appeal from the Employment Court on the question of age discrimination under the Employment Relations Act 2000 ("the Act").

The respondent had been employed as a senior pilot with Air New Zealand for many years. However, upon his attaining the age of 60, Air New Zealand effectively demoted him on the basis that he could no longer act as a "pilot-in-command" on sufficient international flights to maintain his flight instructor position. Air New Zealand's policy was based on a rule adopted in a number of jurisdictions that commercial pilots could not operate as pilots-in-command once they reach 60 years of age. Although New Zealand did not apply the rule, it was applied by jurisdictions through whose airspace Air New Zealand regularly flew, most notably the United States of America.

The respondent brought a personal grievance under s 103(1)(c) of the Act, alleging discrimination on the ground of age contrary to s 104(1)(a) and (b), as well as a disadvantage grievance under s 103(1)(b). Air New Zealand maintained that the international requirements forced its hand and that the demotion was not discriminatory.

In the Employment Court, the Judge found that Air New Zealand's policy breached s 104(1) and that the respondent had been discriminated against on the ground of age. She also found for the respondent in respect of his disadvantage grievance.

The Court undertook a thorough analysis of the relevant statutory principles (contained within the Act and the Human Rights Act 1993), and the international authority. It set out the three key issues thus: the identification of the appropriate comparator group for the purposes of s 104(1)(a) and (b); the proper test for causation under s 104(1); and the application of the "genuine occupational qualification" exception in s 30 of the Human Rights Act. Acknowledging that there was some overlap between the three issues, the Court focused on the first, finding that the identification of the appropriate comparator group necessarily determined the outcome of the appeal.

The Court noted that s 104(1)(b) (upon which the respondent had principally relied) asked whether the employee had been subjected to a detriment in circumstances where other employees employed by that employer on work of that description would not have been subjected to such detriment.

It was clear that the comparator group needed to comprise senior pilots holding flight instructor positions, who were less than 60 years of age. The contentious point was whether the pilots in the comparator group should have been technically qualified and able to fly into the United States or not, for whatever reason (for example, visa restrictions). Were that inability attributed to the comparator group, it would be clear that those employees would have been treated in the same way, and hence discrimination would not have been made out. Conversely, if it were not attributed to the comparator group, the airline would have had no reason to demote them, they would have been treated differently and the claim would have been made out.

The Court held that the inability to fly into the United States was part of the relevant circumstances and thus was a necessary tenet of the appropriate comparator group. If this crucial operational difference were ignored, the comparison would be meaningless. Comparison of restricted pilots with non-restricted ones would not permit a focus on the true role of age as the alleged ground of discrimination. The Judge had erred in comparing the respondent's position before he turned 60 with his position after he had turned 60, concluding that the difference was the result of his turning 60 and therefore discrimination by reason of age. While his turning 60 was undoubtedly a trigger for what occurred, such an approach did not accord with the analysis required under s 104(1)(b).

The Court held that the same analysis applied under s 104(1)(a), which is expressed in terms of employees with "the same or substantially similar qualifications, experience and skills employed in the same or substantially similar circumstances". Again, the Judge had erred in her approach.

Although the findings on the identification of the comparator group were sufficient to determine the appeal, the Court also provided some guidance on the issues of causation and "genuine occupational qualification". In terms of causation, the question was whether Air New Zealand's treatment of the respondent had occurred

"by reason directly or indirectly of" his age for the purposes of s 104(1). The Court held that this called for a straightforward factual enquiry rather than a purposive approach whereby causation would be negated if the action were justifiable. The Court considered that to find otherwise would be to minimise the role of other important aspects of the legislation.

In terms of the "genuine occupational qualification" exception, the Court rejected the Judge's narrow interpretation of "qualification" as meaning the formal requirements imposed by the Civil Aviation Authority. It held that the exception would be broad enough to include situations where age, although not part of the formal qualifications for the activity at issue, had some bearing on the employer's operations as a consequence of legal obligations which the employer had no alternative but to accept. It found that it would be artificial to refuse to recognise the international restrictions. Thus, had it got to this point, the real focus would have been on the concept of reasonable accommodation contained within s 35 of the Human Rights Act.

The Supreme Court has granted leave to appeal.

Personal grievance - remedies - unjustified dismissal – relevance of subsequently discovered misconduct – ss 123 and 124 Employment Relations Act 2000

In *Salt v Governor of Pitcairn and Associated Islands* [2008] 3 NZLR 193, the issue was whether, in determining remedies under s 124 Employment Relations Act 2000 (the "remedy reduced if contributing behaviour by employee" provision), the Employment Court was permitted to take into account information which the employer did not know about at the date of dismissal.

The appellant had been employed as the Commissioner for Pitcairn Island from 1995 and was responsible to the respondent, Mr Fell. This employment relationship gradually deteriorated from 2001 to 2003, when police had begun to investigate allegations of widespread historic sexual abuse on Pitcairn Island. The appellant sympathised with the position of various islanders that prosecutions were not necessarily appropriate. After a failed mediation in 2003, the respondent dismissed the appellant, on the grounds that he no longer had "the requisite level of trust and confidence in [the appellant's] ability to discharge [his] function as Commissioner". The Governor, in his evidence before the Employment Court, asserted that the appellant had moved from "non-cooperation to obstruction, in terms of his willingness to work with colleagues in the Pitcairn government."

The appellant regarded his dismissal from his position as Commissioner to be both procedurally and substantively unjustified, and brought proceedings under the Act seeking those findings and a full range of remedies. The Employment Relations Authority found the dismissal to be unjustified on a procedural basis, but discounted the reimbursement and compensation for humiliation remedies by 50 per cent, in addition to declining to order reinstatement. This was because of a series of subsequently discovered emails sent by the appellant from January to August 2003, containing disparaging comments relating to the Governor and other officials and which appear to have been "attempt[ing] to thwart due legal process in regard to the criminal matters that arose on Pitcairn Island."

In the Employment Court, the Judge upheld the finding of the Authority as to contributory fault, holding that the subsequently discovered emails could be taken into account in determining remedies under s 124, but increased the reimbursement of salary award by enlarging the calculation period.

The majority judgment of Chambers J (to which Robertson J subscribed) dismissed the appeal, holding that the subsequently discovered emails could not be taken into account under s 124 because they did not affect the employer's decision to dismiss, but could and should have been taken into account when determining wages reimbursement and compensation for humiliation under s 123. This s 123 analysis was justified under the doctrinal rubric that employees should not benefit from their own wrong, and was supported by the common law on contractual cancellation, the Employment Court's "equity and good conscience" jurisdiction and the meaning of "grievance" in the definition of "personal grievance". For Chambers and Robertson JJ, it was an open question as to whether the Employment Court is debarred from considering evidence of subsequently discovered conduct when determining whether a dismissal is justifiable.

Hammond J's dissenting judgment contended that the Employment Court was correct to reduce remedies under s 124, notwithstanding that the reduction was based on information which the employer did not know about at the date of dismissal. He considered that the Employment Court's broad approach to the construction of s 124 was supported by *Ark Aviation Ltd v Newton* [2002] 2 NZLR 145 (CA). However, he qualified this analysis by stating that the subsequently acquired evidence relied upon for deduction must be reasonably connected to the reasons given for dismissal and that such evidence must be proved to the satisfaction of the Court.

Practice and procedure – review proceedings – jurisdiction – s 194 Employment Relations Act 2000

In *Employment Relations Authority v Rawlings* [2008] ERNZ 26, the Court examined the circumstances in which the Employment Court may hear review proceedings under s 194 of the Employment Relations Act 2000.

Mr Rawlings was dismissed from his position with Gabbett Machinery NZ Ltd. His advocate, Mr Wall, lodged a statement of problem with the Employment Relations Authority in Christchurch. The Authority objected to what it saw as irrelevant and abusive material in the statement of problem. Accordingly, it issued a notice of direction stating that if an amended statement of problem, devoid of the inappropriate material, was not filed within four weeks, Mr Rawlings' claim would be treated as withdrawn. No response was received and the proceedings were deemed to have been withdrawn.

Mr Wall filed a statement of claim in the Employment Court seeking review of the Authority's decision. In that Court, the Judge refused to strike out the claim. The Authority appealed to the Court of Appeal.

The Court began by discussing the original direction made by the Authority (the "unless order"). After reviewing the powers conferred on the Authority by statute, the Court observed that there was arguably no statutory basis for the Authority to refuse to hear this dispute. However, because Gabbett Machinery NZ Ltd was not named as a party to the appeal, a conclusion on this issue was not reached.

The Court next considered whether the review proceedings should have been struck out. It noted that there are two methods by which the Employment Court exercises its supervisory jurisdiction over the Authority: review (under s 194) and challenge (under s 179). Both of these options are subject to restrictions. The general policy of the Act is to prevent the Employment Court exercising its supervisory powers in relation to procedural determinations made by the Authority. This is apparent in s 179(5), which precludes a party challenging determinations relating to procedure, and s 184(1A), which precludes review proceedings unless the Authority has issued a final determination.

In examining whether the respondent could have challenged the Authority's determination, the Court concluded that because the determination effectively disposed of the case, it was not just about procedure. A challenge was therefore not precluded by s 179(5).

It was also necessary to determine whether review was open to Mr Rawlings. This required an analysis of s 184(1A), which prevents review proceedings "in relation to any matter before the Authority" unless the Authority has issued "final determinations on all matters" and any right of challenge has been exercised. The Court held that, in order to make sense, the subsection must apply to "any matter which is or has been before the Authority". However, because a right of challenge existed in this case, review could not be taken until that right had been exercised.

The appeal was therefore allowed and Mr Rawlings' review proceedings were struck out.

Remedies – reinstatement – excessive compensation – leave to appeal under s 214(3) Employment Relations Act 2000

In *Commissioner of Police v Hawkins* [2008] NZCA 219, the Court considered whether leave should be granted to appeal a judgment of the Employment Court relating to the remedies to be granted as a result of constructive and unjustifiable dismissal. Under s 214(3) of the Employment Relations Act 2000, leave to appeal may only be granted if the appeal involves a question of law or by reason of public or general importance.

Counsel and the Court were agreed that the question of whether it was open to the Employment Court to reinstate Mr Hawkins, when he had previously disengaged on medical grounds under s 28D of the Police Act 1958, satisfied the criteria under s 214(3). However, a subsidiary question was more contentious: whether it was open to the Employment Court to reinstate Mr Hawkins given that nearly seven years had passed since his dismissal from the police. Section 125(c) of the Employment Relations Act states that reinstatement must be provided "wherever practicable"

where there is a personal grievance and the employee seeks reinstatement. The Employment Court finding was that it was practicable to reinstate Mr Hawkins, despite the seven year time lag; therefore a challenge to this finding was essentially factual. The Supreme Court in *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 made it clear that the Court of Appeal could not intervene where the Employment Court had engaged in a fact finding exercise which had involved the application of the law which it had correctly understood to the facts of the case, unless the fact finding was so untenable as to amount to an error in law. The Court observed that it was very rare that a factual finding would be so untenable, but noted that the unusual facts of the case may mean that the ground was capable of being made out. Therefore, leave was reserved until after a fuller factual review in the main hearing.

Leave was also granted to examine whether the Employment Court had erred in law by stating that the Court's decision regarding permissible ranges of compensation awards in *NCR (NZ) Corporation Ltd v Blowes* [2005] 1 ERNZ 932 was "not in accord with statutory discretion". Given that the Court's decision in *Blowes* was binding on the Employment Court, it was arguable that the Judge erred in law by not following that decision and that she accordingly made an excessive compensation award under s 123(1)(c)(i).

The other questions that the Commissioner of Police sought leave to appeal were essentially factual matters that did not warrant leave.

In an earlier application for leave to appeal ([2008] NZCA 164), a differently constituted Court granted leave to appeal the following questions from the substantive, as opposed to remedies, judgment of the Employment Court Judge. First, does s 114(1) of the Employment Relations Act 2000 require the employer to have turned its mind to the 90 day period and agree (expressly or impliedly) to proceed? Secondly, does consent have to be pleaded by the employee? Thirdly, can a voluntary disengagement under s 28D of the Police Act be reversed by way of a personal grievance?

Strikes and lockouts – notice – legality – s 82 Employment Relations Act 2000

Spotless Services (NZ) Ltd v Service and Food Workers Union Ngä Ringa Tota Inc [2008] NZCA 580 was an appeal concerning the lawfulness of a lockout of hospital service workers under the Employment Relations Act 2000.

In May 2007, the Service and Food Workers Union ("the union") issued strike notices for thousands of employees, under which employees would strike for the first 55 minutes of each hour and work for the last five minutes of each hour. In turn, Spotless Services (NZ) Ltd ("Spotless") issued corresponding lockout notices for the first 23 hours and 55 minutes of each day if the demands in the notices were not agreed to. Spotless Services demanded that the union agree that a minimum number of staff would not strike in order to protect patient safety. The union refused and Spotless locked out staff.

The Judge in the Employment Court held that Spotless' lockout was unlawful and not within s 82 of the Employment Relations Act because the demand to give up the right to strike was not a lawful demand.

On appeal, the Court discussed ss 82 and 84 of the Employment Relations Act, holding that s 82 must be linked to the lawfulness ground asserted under ss 83 or 84. The Court considered that the Employment Court should have considered Spotless' demands in light of the health and safety justification. The Court remitted the question of the lawfulness of the lockout to the Employment Court for consideration of whether Spotless could prove that the lockout demand was justified.

Subsequent notices were discussed in the context of *Secretary for Justice v New Zealand Public Service Association Inc* [1990] 2 NZLR 36 (CA). The Court held that the Employment Court should not have revisited the lawfulness of the lockout in the later wages claim decision. The Wages Protection Act 1983 was considered in terms of whether non-payment of wages during an unlawful lockout amounted to an unlawful deduction.

The Court allowed the appeal, set aside all orders made to date in the Employment Court and remitted the matter to the Employment Court to be dealt with in terms of this judgment.

Equity

Trusts – requirements of sham and alter ego trusts – intention of settlor and trustees when trust settled

In *Official Assignee v Wilson* [2008] 3 NZLR 45, Mr Reynolds, a property developer, settled a trust with Mr Wilson as a trustee. During the life of the trust, Mr Reynolds purchased a property on behalf of the trust. Eventually, after defaults, Mr Reynolds was adjudged bankrupt with a liability in excess of $500,000. The Official Assignee in Bankruptcy contended that the property that had been purchased was in reality the property of Mr Reynolds, not the trust, and therefore that the equity should be available to creditors.

The Court dismissed the appeal, after finding that it was not possible for the Official Assignee to maintain a position on behalf of creditors that Mr Reynolds could not himself have maintained. The Official Assignee, as a representative of Mr Reynolds, was seeking relief from the Court on the basis that the trust settled by Mr Reynolds was a sham or alter ego. The creditors behind the Official Assignee could not therefore use the legal position of Mr Reynolds as a means of addressing their losses. The Court dismissed the appeal on that basis alone, but discussed the submissions made by the Official Assignee on sham and alter ego trusts.

The Court considered three issues. First, whether a sham trust requires a common intention between settlor and trustees; secondly, whether a valid trust can become a

sham; and third, whether the High Court Judge had used the correct method for determining whether a trust is a sham.

In relation to the first issue, the Court discussed *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA); *Midland Bank plc v Wyatt* [1997] 1 BCLC 242 (CA); *Rahman v Chase Bank (CI) Trust Company Limited* [1991] JLR 103 (Royal Court); *Hitch v Stone* [2001] STC 214 (EWCA (Civ)); *Re the Esteem Settlement: Grupo Torras SA v Al-Sabah (No 8)* [2004] WTLR 1 (JRC); and *Shalson v Russo* [2005] Ch 281 (Ch). These cases stood for the proposition that a common intention is required before there can be a sham. The majority of the Court (O'Regan and Robertson JJ) considered that a common intention between settlors and trustees is required where the trust is properly characterised as a bilateral vehicle (with knowledge of, and participation in, the sham by both trustees *and* settlors), but not where the trust is unilateral (where the trustee and settlor are the same person). The majority also considered that an arguable allegation of a sham trust legitimates examination of subjective and not simply objective intention since the most effective shams are those where, on its face, the trust deed evinces a bona fide intention.

In respect of the possibility of an emerging sham, the majority considered that unless an appearance of a sham can be traced back to the creation of the trust, the trust remains valid.

In respect of the High Court Judge's approach, the majority found no merit in the appellant's claim that the Judge should have assessed whether individual transactions were shams, rather than assessing the overall picture. Finally, the majority considered the relationship between sham and alter ego trusts, and concluded that alter ego trusts form neither an independent cause of action nor the same cause of action as shams, but rather are confined to evidence to help establish a sham. On the facts, the majority concluded that the evidence did not compel the conclusion that the Reynolds trust was a sham.

In separate reasons, Glazebrook J considered that a common intention between settlors and "complicit" trustees is necessary for there to be a sham, but differed from the majority in considering that intention should be ascertained objectively from the "true construction" of the written trust deed. Glazebrook J also considered it important to distinguish between sham instruments and trusts that are bona fide in their commencement but are later the subject of breach(es). Glazebrook J agreed with the majority's conclusion on alter ego trusts.

Family Law

Child support – departure order – retrospective effect

In *Slee v Slee* [2008] NZCA 85, the Court considered whether Ms Slee's challenge to the retrospective effect of a departure order made by the Family Court was out of time and, if not, what the amount of child support which Ms Slee had to pay in respect of the 2003 financial year was.

After his separation from Ms Slee in 2001, Mr Slee had the full-time care of their two children and sought child support. Given that Ms Slee was earning well in Australia in 2003 and 2004, Mr Slee sought additional child support for those years and applied for a departure order from the initial formula assessment under the Child Support Act 1992. The Family Court's 2004 judgment made departure orders for 2003 and 2004, fixing Ms Slee's child support income for those years at $86,000 (the proper sum of child support on that income is $17,500).

Difficulties arose over the proper interpretation of the 2003 departure order because Mr Slee had applied for child support one week before the end of the financial year. Counsel for Mr Slee interpreted the 2003 order as obliging Ms Slee to pay $17,500, on the basis that it was a lump sump payment to be set-off against certain moneys held in trust. However, the Commissioner of Inland Revenue had assessed the amount owing at $381.95, a sum proportionate to the amount of the financial year remaining.

The Court was of the clear view that the appeal was out of time and the appeal was dismissed on that basis. This was because the "Implementation No 4" judgment of the Family Court in 2005, which noted that it was "perfectly clear" that the amount owing was $17,500, did not materially change the position determined by the 2004 judgment. On appeal, the High Court Judge had held that the "Implementation No 4' judgment was no more than a clarification of the 2004 judgment and was not a decision that could found an appeal. The Court noted that the appellant had "clutched at a straw"; her position was apparent in 2004, yet she did not appeal until a year later. Given the appeal was not timeous, the Court did not consider Mr Slee's cross-appeal seeking to uphold the Family Court decision on the merits.

The Supreme Court has refused leave to appeal.

Custody order – placement condition – jurisdiction – s 78 Children, Young Persons, and Their Families Act 1989

In *LC & CC v Ministry of Social Development* [2008] NZFLR 828, the Court considered whether s 78 of the Children, Young Persons, and Their Families Act 1989 ("the Act") empowered the Family Court to impose a placement condition on a custody order in favour of the Chief Executive of the Ministry of Social Development.

R, the son of the appellants, was born in 1991. He was placed in the custody of the Chief Executive in 1997, and a final custody order was made in favour of the Chief Executive under s 101 of the Act in 1998. In 2007, R was discovered acting sexually inappropriately towards another child in the care of his long-term caregivers. An interim custody order in favour of the Chief Executive was granted *ex parte* with no conditions attached. The Chief Executive then applied under s 67 of the Act for a declaration that R was in need of care and protection. When the Chief Executive filed an affidavit advising that R was to be placed within the STOP programme for young sex offenders in Christchurch, the appellants made an *ex parte* application for an order preventing the removal of R from Southland to Christchurch.

The Family Court refused the application and considered that it was unable to impose a residential condition relating to R's placement, on the authority of *Chief Executive of Child, Youth and Family Services v TK* [2007] NZFLR 12 (HC). On appeal to the High Court, the Judge noted the confusion in this area of the law and, with the consent of counsel, removed the appeal to the Court of Appeal pursuant to s 64 of the Judicature Act 1908.

Notwithstanding concerns as to the "procedural jumble" in the Family Court (the correct originating application would have been under s 125(1)(a) of the Act for a variation of the s 78 order) and doubts as to the appropriateness of removal to the Court of Appeal under s 64 in this case, the Court characterised the key issue on appeal as the legality of the Family Court's imposition of a placement condition at the time a s 78 order is made.

In allowing the appeal, the Court observed that the Family Court and the Chief Executive have different, yet complementary, roles under the Act and that suggested tensions are based on a misapprehension. Section 78 explicitly gave jurisdiction to the Family Court to impose placement conditions on the Chief Executive's appointment. In performing its functions under s 78, the Family Court was deciding what was in the best interests of the child. Until it reached that decision, the Court had not yet handed over responsibility to the Chief Executive. The Court was of the view that, in an appropriate case, where it appears to the Family Court Judge that, for good and sufficient reason, a condition as to residential placement is necessary in the best interests of the child, such a condition may be imposed by the Court on the making of a s 78 custody order in favour of the Chief Executive.

Hague Convention on the Civil Aspects of Child Abduction - whether a return order can be discharged under Care of Children Act 2004

In *Butler v Craig* [2008] NZCA 198, the Court considered whether the High Court has jurisdiction to discharge a return order made under the Care of Children Act 2004 ("the Act"). The Act adopts the Hague Convention on the Civil Aspects of Child Abduction ("the Convention") as part of New Zealand's domestic law.

Before deciding the primary issue, the Court first set out the purposes of the Convention. These are set out in the preamble and emphasise "that the interests of children are of paramount importance in matters relating to their custody" and that there is a need "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence". The Court also discussed the basic operational framework of the Convention and ss 101 – 109 of the Act, noting that the assumption of the scheme is that, unless a stated exception applies, a child ought to be returned to his or her country of habitual residence, so that questions of custody and access may be resolved in that jurisdiction. The Act does not confer a statutory power to discharge a return order, once made.

The Court noted that there are three discrete periods in which delay may be relevant to Convention proceedings. The first type of delay arises from a failure to apply for a

return order within one year of the date on which the child was removed from the state of his or her habitual residence. A late application of that type brings into play the question whether a child has become settled in his or her new environment, under s 106(1)(a). The second type of delay occurs while the application makes its way through the judicial system. The third type of delay arises from delays in enforcing a final return order and formed the basis as to why the appellant desired to have the order discharged.

Given that there is no statutory power to discharge a return order, the Court considered whether it was possible that the inherent jurisdiction of the High Court could be exercised to discharge an order. The inherent jurisdiction of the High Court can only be exercised in circumstances that fall within its proper scope and when it does not conflict with legislative provisions. The Court held that although the inherent jurisdiction can be used by the High Court to assist the District Court to exercise statutory powers conferred on it (see *Samleung International Trading Co Ltd v Collector of Customs* [1994] 3 NZLR 285 (HC)), the inherent jurisdiction was not available to assist the Family Court, as the Family Court had been given express jurisdiction by a statute to exercise originating jurisdiction over all Convention issues.

Although the Court was concerned that an ability to discharge return orders could be very problematic in legitimate circumstances, it concluded that this problem could be cured by Parliament. The Court urged Parliament to consider urgently whether to enact legislation akin to that contained in reg 19A of the Family Law (Child Abduction Convention) Regulations 1986 (Australia). However, the Court did note that s 119 of the Act confers a discretion on the Family Court to issue a warrant to authorise a specified person to uplift the child, so that he or she may be returned in accordance with the order under s 119(1) and (2). It was observed that, where there had been a material change in circumstances since an order had been made, a Family Court Judge could decline to make an enforcement order. The change would need to be of such significance that enforcement of the order would be pointless.

In the result, the Court held that the Judge was right to hold that the High Court did not have jurisdiction to make the order sought. The appeal was dismissed.

Relocation – jurisdiction

In *Blackstone v Blackstone* (2008) 19 PRNZ 40, the applicant sought leave to appeal against a High Court decision overturning a Family Court order granting her application to relocate to England with her child. The mother argued, among other things, that the Judge was wrong in law to treat *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC) as a general licence to substitute her opinion for that of the Family Court.

The Court agreed with the Judge that appeals from the exercise of a discretion are not affected by *Austin, Nichols* and that the principles in *May v May* [1982] 1 NZFLR 165 (CA) continue to apply. The Judge noted the competing High Court authority on whether appeals from parenting orders are appeals from the exercise of a discretion. She preferred the line of authority which held that an appeal from parenting orders is a

general appeal and not an appeal against the exercise of a discretion: *L v A* [2004] NZFLR 298 (HC) and *A v X* [2005] 1 NZLR 123 (HC).

The Court noted that it had already been decided that appeals from parenting orders are general appeals: *D v S* [2003] NZFLR 81 (CA). Further, the issue of whether the appeal was a general appeal or an appeal against the exercise of a discretion made no difference in this case. The Judge had said that the errors identified by the Family Court would have led to her overturning the Family Court judgment, even if the decision had been a discretionary one.

The mother also pointed to an apparent conflict between s 67(2) of the Judicature Act 1908 and s 145(1)(a) of the Care of Children Act 2004. Section 67(2) of the Judicature Act provides that an application for leave to appeal to the Court of Appeal against a decision of the High Court on appeal from an inferior court must be made to the High Court. Section 145(1)(a) of the Care of Children Act provides that an appeal from a High Court decision on appeal from the Family or the District Court only lies with the leave of the Court of Appeal.

The Court held that there is no doubt that the specific provisions of the Care of Children Act prevail over the general provisions of the Judicature Act. The Court held that the mother's leave application was properly made to the Court of Appeal.

No other errors were identified in the Judge's decision which would justify a second appeal and the application for leave to appeal was declined.

Fisheries

Licences and quotas – setting Total Allowable Catch and Commercial Catch limits – recreational interests – s 8 Fisheries Act 1996 – Hauraki Gulf Marine Park Act 2000

In *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160, the Court examined how the Total Allowable Catch ("TAC") and Total Allowable Commercial Catch ("TACC") should be set for the kahawai species under the Fisheries Act 1996, especially given the dual purposes in s 8.

Section 8 states that the purpose of the Fisheries Act is provide for the utilisation of fisheries resources while ensuring sustainability. Utilisation is defined under s 8(2) to mean conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing. The Court found that s 8 should not be seen as containing two divisible objectives - to provide for utilisation or to achieve sustainability - but instead as containing one objective which requires a balancing exercise between these two ideals.

As a result, TAC and TACC decisions should not be seen as furthering one particular objective at the expense of the other, as both will be relevant. When setting the TAC or TACC, the decision-maker is required to ensure that the decision will conform with the purpose of the Fisheries Act; however, this does not require the decision-maker to view the specific provisions in s 8(2) of the purpose statement as being mandatory

relevant considerations. The mandatory considerations when setting the TAC or TACC are set out in ss 13 and 21 respectively.

Under s 21(1), one of the factors that must be taken into account is recreational interests. When setting the TACC the Minister had used a quantitative measure based on catch history to allocate the catch limits. The recreational fishers claimed that this measure did not take into account the higher value they placed on the fish stock in issue. However, the Court found that as the Minister considered the qualitative factors at play before making the decision, the method used resulted in an outcome that conformed with the purpose under s 8(1).

Finally, the Court also had to consider the role of ss 7 and 8 of the Hauraki Gulf Marine Park Act 2000 ("HGMPA") when setting the TAC and TACC. Under s 13 of the HGMPA, the Minister was required to have "particular regard" to ss 7 and 8 of HGMPA when setting the TACC. However, when setting the TAC, the Minister is only required to "have regard" to ss 7 and 8 of HGMPA. This difference is because the TAC is not encompassed by s 13 of HGMPA, and therefore the obligation to "have regard" to the HGMPA comes from s 11 of the Fisheries Act itself. The definition of "have regard" is to ensure the matter is considered, not that it necessarily influences the decision. The Court considered that "particular regard" usually had a contextual meaning, but that one would expect it involves a greater obligation on the decision-maker than the requirement to "have regard" to a consideration. In the context of s 11 of the Fisheries Act, the phrase was read as requiring the decision-maker to satisfy himself or herself that the decision meets those of the purposes which are of most relevance, to the extent that that can be achieved in harmony with other relevant considerations applying to the decision.

The appeal and cross-appeal were allowed in part, and the declaration made in the High Court was amended to read as follows: the Minister's decisions in 2004 and 2005 were unlawful to the extent that the Minister (a) failed to have particular regard to ss 7 and 8 of the HGMPA when fixing the TACC for Quota Management Area KAH1; and (b) failed without giving any or proper reasons to consider advice from the Minister of Fisheries to review bag catch limits for recreational fishers. When next setting the TAC and the TACC for kahawai, the Minister must take account of this declaration.

The Supreme Court has granted leave to appeal.

Human Rights

Breach of natural justice – Bill of Rights damages – s 27(1) New Zealand Bill of Rights Act 1990

Combined Beneficiaries Union Incorporated v Auckland City COGS Committee [2008] NZCA 423 involved an application by Combined Beneficiaries Union ("the CBU") to the Auckland Community Organisation Grants Scheme ("COGS") for a grant of funding. COGS had introduced a strict time limit for the provision of further information in support of incomplete applications, which was to be enforced as a

mandatory and inflexible time limit. The CBU failed to meet the new deadline and its application was not considered. It issued proceedings claiming that there had been inadequate notice of the change in policy and therefore that CBU's rights to natural justice under s 27(1) of the New Zealand Bill of Rights Act 1990 ("the Act") had been breached.

The High Court Judge made a declaration that there had been a breach of s 27(1) of the Act but refused to award damages. The CBU appealed against the refusal. COGS cross-appealed, saying that the declaration of breach of the Act should not have been made. COGS argued that s 27(1) was intended to apply only to judicial or quasi-judicial bodies making "adjudicative" decisions, and that therefore the Act did not apply in this case.

The majority of the Court (Glazebrook and Hammond JJ) held that the ambit of s 27(1) of the Act is coincident with the common law right to natural justice, although that does not preclude later development of the right. This was clear from the words of the provision, the legislative context and the policy underpinning the Act.

Comments in *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC) that s 27(1) applies only to "adjudicative" decisions meant merely that the decisions had to be those which would attract natural justice obligations. Blanchard J, with whom Tipping J agreed, was using the word "adjudicative" in the same sense as the term "judicial" was used at common law: see *Ridge v Baldwin* [1964] AC 40 (HL). It was not used to exclude administrative decisions. The same applied to the comments in *Chisholm v Auckland City Council* [2005] NZAR 661 (CA).

The majority examined the issue of Bill of Rights damages in line with the principles set out by Blanchard J in *Taunoa*. They observed that Bill of Rights damages are not to be equated with private law damages. They are damages to mark the breach and deter repetition, rather than to provide redress. In addition, the majority pointed out that damages for public law wrongs are not normally available at common law and it is not the function of Bill of Rights damages to fill any perceived gap in remedies for such wrongs.

It was also held that Bill of Rights damages for breach of s 27(1) are likely to be rare. Such damages would only be awarded where there is no other remedy, where human dignity or personal integrity or possibly integrity of property is engaged and where the breach is of such constitutional significance that it would shock the public conscience. Here the breach was trivial, there was no question of dignity or personal integrity involved, and the breach was remedied expeditiously. COGS had argued that Bill of Rights damages should never be available for s 27(1) breaches. The majority left this matter open.

In dissent, Baragwanath J would have allowed the cross-appeal and would have set aside the declaration of breach of s 27(1) of the Act due to the trivial nature of the breach. Baragwanath J also expressed a view that discussion of the scope of s 27(1) ought to be reserved for a case which turns upon the specific issue.

Immigration

Appeal on humanitarian grounds to Deportation Review Tribunal – burden of proof – s 22 Immigration Act 1987

The Court considered the correct approach to take when applying s 22(4) – (6) of the Immigration Act 1987 in *Minister of Immigration v Anas Ibrahim Ali Al-Hosan (aka Anas Deeb)* [2008] NZCA 462. Section 22 concerns appeals on humanitarian grounds to the Deportation Review Tribunal ("DRT") against the revocation of a residence permit.

The DRT's approach to s 22 was to apply a two-stage test, dealing with s 22(5) first, and then, if that did not resolve the issue, to deal with s 22(4) as a residual matter. On appeal, it was argued that s 22 did not contemplate a two-stage test and that the DRT had approached the section incorrectly. The Court rejected this submission, finding that there was no mandatory order for consideration of the discretion under ss 22(4) and (5), and that the DRT was free to deal with them in any order it considered to be appropriate. However, the Court noted that the subsections involve two different tasks and each must be addressed properly, unless the decision on the first one renders consideration of the other unnecessary.

In both cases, the criteria set out in s 22(6) must be evaluated. While that does not necessitate the repetition of the DRT's views on each one at length, it does require a broad and proper evaluation of those factors in relation to each decision. The Court also noted that when evaluating the factors in s 22(6), although in many cases the factors will be the only relevant factors, s 22(6)(g) specifically brings "such other matters as the DRT considers relevant" to play in the decision-making.

The Court also heard argument as to whether a s 22 appellant was under a burden of proof. Because of the DRT's limited resources, the Court considered that an appellant will ordinarily be expected to make his or her case by putting before the DRT information which, if accepted, would lead the DRT to quash the revocation. However, it noted that in exceptional cases, where the DRT considers that it needs more information, it may seek further information from the parties or obtain the information itself and provide an opportunity for counsel for the parties to comment on it. This unusual background meant that there was no burden in the formal sense; however, an appellant has a responsibility to place before the DRT material which, if accepted, would allow the DRT to exercise its power under s 22 to quash the revocation.

On the facts, the Court found that the DRT did not correctly apply the tests set out in s 22, particularly in failing to have proper regard to the interests of Mr Al-Hosan's family under s 22(6)(f). The Court also examined a number of subsidiary issues arising on the facts of the case, such as whether the DRT had proper regard to the evidence filed after closing submissions, and whether a remedy should have been refused. One of the issues raised on cross-appeal was whether costs should be awarded, contrary to the High Court decision not to order costs. As no reasons for refusing costs were provided in the High Court decision, the Court departed from its

ordinary stance of not interfering with costs decisions and found that there was nothing to displace the normal expectation that, as a successful litigant, Mr Al-Hosan was entitled to costs.

The appeal was dismissed and the costs cross-appeal was allowed in part.

Extended detention pending deportation – exceptional circumstances – s 60(6) Immigration Act 1987

Chief Executive of the Department of Labour v Yadegary [2008] NZCA 295 concerned an Iranian national who was unlawfully in New Zealand, but could not be deported because Iran refuses to accept repatriation of citizens without a passport, and Mr Yadegary, who had destroyed his passport, refused to apply for a new one. As a result, Mr Yadegary was held in detention for two and a half years. In April 2007, he was released on bail by order of the High Court. The Chief Executive of the Department of Labour appealed.

Section 60(6) of the Immigration Act 1987 provides that, unless the judge considers that there are exceptional circumstances that justify the person's release, the judge may not order the release of a person under subsection (5) if a direct or indirect reason for the person being unable to leave New Zealand is or was some action or inaction by the person occurring after the removal order was served.

The High Court Judge held that the length of detention in this case amounted to exceptional circumstances, and release on bail was appropriate. Mr Yadegary submitted that her decision should be upheld on the basis that there were exceptional circumstances, or that the purpose of the section (to achieve deportation) was no longer possible so the detention was arbitrary.

All three of the Judges accepted that length of detention could amount to an exceptional circumstance, but differed in their assessment of the point at which the length of detention became exceptional.

O'Regan J took the view that circumstances would be exceptional if the only method of removing Mr Yadegary was with his co-operation and the purpose of coercion imposed by detention could not be expected to succeed. He acknowledged that the point at which the purpose of coercion could be said to have failed was a matter on which views could reasonably differ, but he considered that it had been reached in this case, after 29 months of detention.

Baragwanath J considered that the provision in s 60(6A) that subs (3) to (6) apply on expiry of a warrant under sub (6), imported the assessment in sub (3) as to whether detention was for an unreasonable period. Taking that into account, along with the principle of legality and the principle of proportionality in relation to imprisonment for criminal offending and contempt of court, Baragwanath J concluded that the length of detention now amounted to an exceptional circumstance. Both William Young P and O'Regan J disagreed with Baragwanath J's interpretation of the section.

In a dissenting judgment, William Young P accepted that the legislation "would not permit holding Mr Yadegary in prison until he either dies or cooperates in his removal". He considered that the possibility that Mr Yadegary would depart voluntarily had not yet been excluded, as Mr Yadegary still had hope that he might be allowed to remain in New Zealand. Given that the statutory purpose might still have been achieved, William Young P did not think that the detention was indefinite. He also concluded that the time Mr Yadegary had been in detention did not amount to an exceptional circumstance, as the legislative purpose had not been spent, and his release would encourage non-compliance by others in his situation.

The appeal was dismissed.

Judicial review – removal orders – welfare and best interests of New Zealand citizen children – ss 54 and 58 Immigration Act 1987

Ye v Minister of Immigration [2008] NZCA 291 concerned the issue of how the rights and interests of New Zealand citizen children are to be taken into account in immigration decisions concerning the removal of their non-citizen parents from New Zealand. The appeals were against a decision of the High Court, in which the applications for judicial review brought by the citizen children of each family were dismissed. The children had sought review of the Immigration Service's decisions to remove their parents (in the Ye family's case, the removal of Ms Ding and in the Qiu family's case, the removal of Mr and Mrs Qiu) from New Zealand.

A majority of the Court (Glazebrook, Hammond and Wilson JJ) allowed the appeal of the Ye children against the decision to remove Ms Ding from New Zealand. A differently constituted majority of the Court (Hammond, Chambers, Robertson and Wilson JJ) dismissed the appeal by the Qiu children against the decision to remove their parents from New Zealand. The central issue on the appeals was the procedure to be followed by the Immigration Service when making a removal order under the Immigration Act 1987, and how the rights of citizen children are to be taken into account by decision-makers under that legislation, both when making removal orders and when deciding whether to cancel removal orders.

The Court unanimously held that the principles enunciated in the Care of Children Act 2004 have not displaced the removal provisions of the Immigration Act. The interests of the citizen children were not "over-arching", nor were they the paramount consideration to be taken into account by the Immigration Service when deciding whether to remove the children's parents from New Zealand.

The effect of the Court's decision for Ms Ding was that her case was remitted to the Immigration Service for reconsideration of whether her removal order should be cancelled. The reconsideration was directed to be undertaken in light of the reasons set out in the judgment of Hammond and Wilson JJ. However, Hammond and Wilson JJ's judgment stated that reconsideration of Ms Ding's case was to be optional, because an immigration officer is under no obligation to consider whether to cancel a removal order. If an officer does decide to reconsider Ms Ding's case, he or she will undertake a limited review to see whether there is anything about the current

circumstances of the three Ye children that suggests Ms Ding should be allowed to stay in New Zealand.

The effect of the Court's decision for the Qiu children was that their appeal against their parents' removal failed. The majority held that there was no compelling reason why the removal of Mr Qiu should not take place, and the Court declined to intervene in the Immigration Service decision in his case. At the time of the decision, the departmental process in respect of Mrs Qiu had not been carried out.

The Supreme Court has granted leave to appeal.

Judicial review – removal orders – humanitarian interviews – s 47 Immigration Act 1987

Huang v Minister of Immigration [2008] NZCA 377 raised similar issues to those addressed in *Ye v Minister of Immigration* [2008] NZCA 291. The judgment of the Court was delivered by William Young P, with whom Hammond and Chambers JJ agreed. In his separate judgment, Chambers J explained his reasons for retreating from the position he took in *Ye.*

The High Court Judge had dismissed judicial review proceedings challenging the proposed removal from New Zealand of Ms Huang and the actual removal of Mr Cui. Of particular importance to the appellants was the fact that their son, Jarvis, held New Zealand citizenship.

The Court commenced its discussion with an overview of the relevant provisions of the Immigration Act 1987 ("the Act"), the International Covenant on Civil and Political Rights 1966, and the United Nations Convention on the Rights of the Child 1989 ("the CRC"). It then turned to analyse the "humanitarian interview", a process routinely undertaken by the Immigration Service. People subject to removal orders have a right of appeal to the Removal Review Authority, pursuant to s 47 of the Immigration Act. The Court held that such an appeal, if reasonably proximate to removal and properly carried out, would satisfy New Zealand's international treaty obligations. While art 3(1) of the CRC requires substantial weight to be given to the child's best interests, the effect of s 47(3) is also to require weight to be given to the state's right to control its borders. When conducting a humanitarian interview, an immigration officer is not required to engage in a full scale review of everything that has gone before; the officer can safely focus on the s 47(3) criteria.

The Court then considered the availability of judicial review proceedings in relation to humanitarian interviews. It held that in reviewing cases of this nature, the Court's role was to ensure that the best interests of an affected child had been taken into consideration; beyond this, the weight given to conflicting considerations was for the decision-maker.

On the facts, the Court held that the humanitarian interview phases of the processes in relation to both appellants involved genuine analyses of the best interests of Jarvis and were adequate. The appeal was dismissed.

The Supreme Court has granted leave to appeal.

Intellectual Property

Breach of copyright – account of profits – additional damages – s 121 Copyright Act 1994

Tiny Intelligence Ltd v Resport Ltd [2008] NZCA 281 dealt with the availability of additional damages under s 121 of the Copyright Act 1994, particularly where the plaintiff has elected an account of profits.

The High Court Judge found Resport liable for a flagrant infringement of Tiny Intelligence's copyright in a toy sword and toy trumpet. He awarded Tiny Intelligence an account of profits, which he assessed at $50,000, but refused additional damages on top of this.

Under s 121(2), courts have the power to "award such additional damages as the justice of the case may require" against the party who has infringed copyright. The issue for the Court was whether additional damages could be claimed on top of an account of profits. The Court examined the legislative history of s 121, which extended to an analysis of the virtually identical language used in the Copyright, Designs, and Patents Act 1988 (UK) (and its predecessor).

Given the parallels between the English and New Zealand legislation, the Court opted to follow the reasoning of the House of Lords in *Redrow Homes Ltd v Bett Brothers Plc* [1999] 1 AC 197. It therefore held that the phrase "additional damages" should be interpreted as an addition to an award of damages, not as an award additional to any form of relief. Parliament had not intended to create a new, independent remedy that could operate in conjunction with an account of profits; it had not intended to alter the basic principle that an award of damages is inconsistent with an accounting.

In response to the appellant's argument that restricting additional damages to cases where compensatory damages are sought would result in flagrancy sometimes going unpunished, the Court observed that gains made by a defendant can be captured in an award of additional damages. It also noted that given that an election must be made, it is appropriate for a judge, when determining liability, also to make a finding as to flagrancy. This allows the successful plaintiff to make an informed choice between what are incompatible remedies.

The appeal was dismissed.

The Supreme Court has granted leave to appeal.

Land Law

Leases – notice of intention to terminate

In *Shanks v Media 1 Ltd* [2008] NZCA 77, the Court considered whether a lease of two billboards had been validly terminated. The lessees were in arrears with rent, and on 3 July 2007 the lessors wrote to the lessee in the following terms: "if we have not received payment for this sum by 5pm 4th July 2007 our client intends to terminate the lease pursuant to its rights." There was no response, and on 17 July 2007 the lessor wrote to the lessee and said, "we now formally advise that the Lease is terminated." The issue was whether the letter of 3 July constituted valid notice of the lessor's intention to terminate the lease pursuant to the lease agreement. Did the letter give the lessee clear and unambiguous advice as to how and when the termination would operate and what steps were required to prevent it?

The High Court Judge held that the notice was ambiguous: a reasonable recipient might have concluded that the lessors intended to immediately terminate the lease if payment was not made on 4 July. The lessors appealed on the basis that the Judge was wrong to find the notice was ambiguous.

The Court emphasised that notice served on a tenant must unambiguously inform a reasonable recipient how and when it is to operate. An objective reading of a notice is adopted. The Court held that, on its face, the letter of 3 July was plain: the lessees were deemed to have known of the terms and conditions of the lease. The letter referred to the lessor acting "pursuant to its rights", which, under the lease, required giving 12 days notice before terminating. It was not reasonably possible to read the letter as giving only one day's notice. The letter was a clear notice of intention to terminate pursuant to the lease.

The appeal was allowed and a declaration was made that the lessors validly terminated the lease.

The Supreme Court has refused leave to appeal.

Maori freehold land – Maori Land Court – judicial review

In *Minister of Conservation v Maori Land Court and Trustees of Te Huria Matenga Wakapuaka Trust* [2008] NZCA 564, the Court considered the ownership of the mudflats at Wakapuaka Estuary near Nelson: are the mudflats below the mean high-water mark included in the certificate of title for the Wakapuaka block of Mäori freehold land? The Maori Land Court, in decisions made in 1986 and 1998, concluded the mudflats were part of the Wakapuaka block and made orders vesting the land in a trust, the beneficiaries of which were the descendants of ancestors who had lived and were buried at Wakapuaka. The Department of Conservation sought judicial review of the Maori Land Court's decisions on the grounds the Court had erred in law as to the status of the mudflats. The High Court Judge dismissed the application for review. The Minister of Conservation appealed to the Court of Appeal.

A majority of the Court (Chambers and Robertson JJ) allowed the Minister of Conservation's appeal. The majority discussed Mrs Huria Matenga's application to the Native Land Court in 1883 which resulted in a certificate of title being issued to Mrs Matenga as owner of the block at Wakapuaka "according to Native custom". A composite survey plan of the block was produced in 1885. The copy of the 1885 survey plan which underpinned the Native Land Court certificate of title was lost. The Native Land Court certificate of title was then converted into a title under the Land Transfer Act 1885, which was registered in 1901. The Land Transfer Act certificate of title and the plan underpinning it were clear: the mudflats were not included in the block.

Because of the lost plan, in 1986, the Maori Land Court treated the scope of the Native Land Court certificate of title as uncertain and relied on evidence of the oral history of the area to ascertain the ownership of the mudflats. It concluded that the mudflats were included in the freehold title for the Wakapuaka. The 1998 Maori Land Court decision was to similar effect. The majority of the Court looked at the documents underpinning the certificates of title, in particular at the 1885 survey plan, which did not include the mudflats as part of the block.

The majority held that the Maori Land Court erred in relying on the Native Land Court certificate of title. In the majority's view, the Maori Land Court judges were almost certainly unaware the title to the block had become a land transfer title, and they probably assumed the Native Land Court certificate of title (like thousands of other title orders) had never moved beyond the provisional register. The Land Transfer Act title based on the 1885 survey was, however, definitive and the Maori Land Court was bound to treat it as conclusively fixing the boundaries of the land. In any event, the evidence in this case almost certainly indicated that the Land Transfer Act certificate of title exactly replicated the Native Land Court certificate of title: the underlying survey plans were or must have been the same. The Maori Land Court erred in failing to accord to the Land Transfer Act title the primacy which statute grants it. The Maori Land Court had no jurisdiction, the majority held, to alter the boundaries on the survey plan underlying the Land Transfer Act certificate of title.

Baragwanath J dissented. He considered there were two essential questions arising on the appeal: whether the mudflats were claimed by Mrs Matenga in her application to the Court in 1883, and whether if the mudflats were claimed, the Native Land Court Judge could lawfully have excluded them from the title granted to Mrs Matenga. In Baragwanath J's view, the majority ought to have addressed the critical possibility that Mrs Matenga did claim the estuary. If it had been included in her application, Baragwanath J would have held it was Mrs Matenga's right to receive a Native Land Court title for the whole block including the mudflats.

In line with the majority's reasons for judgment, the Court made declarations that the orders made by the Maori Land Court in 1998 were wrongly made and the certificate of title issued under the Land Transfer Act did not include the mudflats below the mean high-water mark. The effect of the Court's decision is that the status of the Wakapuaka Estuary is not determined, save to the extent that it was not included in the Land Transfer Act certificate of title issued in 1901 to Mrs Matenga.

Leave to appeal to the Supreme Court has been sought.

Misleading and deceptive conduct – breach of fiduciary duty – damages – Fair Trading Act 1986

In *Premium Real Estate Ltd v Stevens* (2008) 12 TCLR 133, the Court dismissed an appeal against liability but allowed an appeal against the quantification of damages from a decision of the High Court.

Following the sale of their residential property, at what proved to be a gross undervalue, the respondents alleged various causes of action against the appellants, the real estate agents who had brokered the sale. They alleged breach of the Fair Trading Act 1986, negligence, breach of contract and breach of fiduciary duty.

The principle basis for their complaint was that the real estate agent acting for them had failed to disclose that the purchaser was a property speculator. Although she was well aware of this, she allowed them to maintain the belief that the purchaser intended to purchase the property for his residence. When combined with an allegedly negligent marketing campaign, the respondents were led to believe that their property was worth much less than they had hoped and, in hindsight, much less than its true value. The respondents sold the property in an agreement dated April 2004, which became unconditional in May 2004, and settled in July 2004 for $2.575 m. The purchaser began marketing the property in July 2004 with a price guide of between $3.8m and $4.8m and sold in November 2004 for $3.555m.

In the High Court, the respondents succeeded on one aspect of the Fair Trading Act claim and on the breach of fiduciary duty claim. The Judge rejected the Fair Trading Act claims in relation to the initial assessment and marketing of the property, although she upheld the claim of misleading and deceptive conduct with regard to the lack of disclosure. The breach of fiduciary duty claim was upheld on the same basis, specifically that the failure to disclose was held to conflict with the fiduciary duty of disclosure in circumstances where there was an actual conflict between the interests of the agent and the respondents. The Judge found that the agent enjoyed an ongoing relationship with the purchaser, which was significant for her in a financial sense. This relationship should have been disclosed and it was not. They were awarded $337,500 consequent on the Fair Trading Act claim, and $67,050 (a refund of the commission paid) and $675,000 (the under-value at which the property was sold, as established by the Judge based on various valuations) with respect to the breach of fiduciary duty.

The Court upheld the Judge's findings on the Fair Trading Act claim. The Court considered that the omission to disclose what was material information facilitated the purchaser's purchasing strategy and impacted on the respondents' decision to sell. The appellant argued that the omission was not causative of the loss given the purchaser's offer was the best available at the time and the respondents needed to sell. The Court rejected this. It was satisfied that disclosure would have reinforced the respondent's view as to the value of the property and would likely have led them to reassess their sale strategy, either rejecting the offer or counter-offering at a higher price. Counsel for the respondent sought to support the judgment on the Fair Trading Act claim on other grounds. He argued that the overall course of conduct, including the initial valuation and marketing of the property, should have been seen as

misleading and deceptive. The Court rejected this, again upholding the Judge's finding. The agent's view about the value was merely a matter of opinion and as such it was not an actionable misrepresentation (so long as honestly held and reasonably based) and could not constitute misleading or deceptive conduct. The Court noted a divergence of view as to whether a misrepresentation was necessary, although ultimately upheld the orthodox view.

Turning to breach of fiduciary duty, the Court rejected a submission that the agent was required not to disclose the information about the purchaser, given that it was confidential information acquired in confidence from another principal. The submission failed to address the fundamental concern, which was the actual conflict that existed between the agent's interest and those of the respondents. The Court did not accept that the fact that the purchaser was a property speculator was confidential information. Even if his method of trading could be regarded as confidential, the conflict created by the ongoing commercial relationship between the purchaser and the agent should have been disclosed. The Judge's findings on breach of fiduciary duty were therefore also upheld.

There was an appeal and a cross-appeal on the question of damages. The respondents argued that the agent should have been obliged to account for the profit made by the purchaser on the re-sale. The Court was directed to no authority for extending the duty to account to an unrelated third party and was not prepared to do so. The cross-appeal was thus rejected. However, the appeal on quantum was allowed. The Court held that the Judge was wrong to calculate damages on the assumption that the respondents would have retained the property had full disclosure been made. It found that the evidence established that, notwithstanding the breach, the respondents were prepared to accept $2.8m for the property. In other words, the respondents were prepared to sell at an undervalue and thus should not have been compensated based on an assessment of the full value of the property. Damages were reduced accordingly.

The Supreme Court has granted leave to appeal.

Mortgages – incorporation of loan agreement – whether mortgage secured debt

Westpac Banking Corporation v Clark (2008) 6 NZ ConvC 194,670 concerned a fraudulent mortgagor, "Ms Fenech" (the purported registered proprietor of a Remuera property) who entered into a loan agreement with Westpac Banking Corporation secured against the property. Mr Clark acted as solicitor for both Westpac and "Ms Fenech" in the matter. Mr Clark gave a solicitor's certificate to Westpac on 30 September 2005, undertaking to lodge the mortgage for registration promptly. Westpac advanced the money to "Ms Fenech" on 4 October 2005 in reliance on this certificate and undertakings. "Ms Fenech" made no payments of either interest or principal on the loan. Westpac had no knowledge of the fraud until 18 November 2005 when it had notified the Registrar of that possibility. However, Mr Clark failed to register the mortgage until 6 December 2005 at which point the Registrar refused registration.

Westpac applied for summary judgment against Mr Clark with regard to his breach of undertaking. Summary judgment was refused by the High Court Judge as he held that

the issues of causation required exploration at full trial. Westpac appealed against that decision. The Court confirmed the decision of the Judge but on different grounds.

In this case, the mortgage documentation secured "all obligations', with the amount lent to the fraudster set out in an accompanying loan agreement. The question before the Court was whether loan documentation that was referred to in the mortgage instrument, but was not itself registered, also would have acquired indefeasibility upon registration of the mortgage instrument. The Court held that although terms of an unregistered document can be incorporated into a registered mortgage by reference, it is a question of interpretation as to whether they are in fact incorporated in the mortgage instrument. In this case, they were not. If a mortgage and the underlying loan documentation are both forged, and the registered mortgage instrument does not incorporate the terms of the supporting loan agreement, then the terms of that loan agreement are not indefeasible. The result was that the mortgage, had it been registered by Mr Clark promptly in terms of his undertaking, would have been indefeasible but it would have secured nothing.

The appeal was dismissed.

The Supreme Court has granted leave to appeal.

Restrictive covenants – interpretation principles – meaning of "subdivision" – s 218 Resource Management Act 1991

Big River Paradise Ltd v Congreve [2008] 2 NZLR 402 concerned the interpretation of a restrictive covenant and the proper approach to be taken to such an exercise.

The two properties at issue were located on opposite banks of the Clutha River. On the north bank was the Cleary property, which is subject to a restrictive covenant in favour of the Congreve property, which was on the south bank. Central to the case was a restrictive covenant, which provided that "[n]o subdivision of the Servient Lot shall permit the creation of more than three separate allotments nor permit more than one dwelling to be erected on each such allottment."

At issue was a proposal to create 52 leasehold interests on the Cleary property. Each lease would be for a term of less than 30 years and allow the lessee to erect a dwelling. The Court considered whether the restrictive covenant prohibited this development. This turned on the meaning of the words "subdivision" and "allotments". The appellants argued that the terms should be interpreted according to their definitions in the Resource Management Act 1991. Because the proposed leasehold interests were for terms of less than 35 years, the proposal did not fall within the definition of subdivision in s 218(1)(a)(iii).

An important point for the Court was whether the covenant should be construed according to the principles governing the interpretation of public documents (*Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 3 NZLR 740 (PC)) or those governing the interpretation of contracts (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL)). The Court discussed the different

approaches taken to interpreting easements in recent cases and the considerations permitted when a court considers modifying an easement or covenant under s 317 of the Property Law Act 2007. It concluded that, at the very least, the restrictive covenant should be construed by reference to the location and characteristics of the properties that it affects.

It was then necessary for the Court to consider whether to give the terms in issue ambulatory meanings. This was because, given the definition of "subdivision" in the Resource Management Act at the time of the covenant's creation, the proposal would have qualified as a subdivision. The Court observed that even where words are given a mobile interpretation, it is by reference to their intended meaning when agreed upon; the interpretative exercise does not change the scope of the underlying contract.

In the Court's opinion, there was no good reason to construe the words in issue by reference to the Resource Management Act. Instead, the covenant was interpreted by reference to its purpose, which was to preserve the amenities of the Congreve property, primarily by limiting the number of houses on the Cleary property to three. On a purposive approach, the proposed development involved a subdivision of the property into more than three separate allotments. It was therefore a breach of the restrictive covenant.

The appeal was dismissed.

The Supreme Court has refused leave to appeal.

Restrictive covenants – whether proposed construction constituted a building

In *Thompson v Battersby* (2008) 9 NZCPR 12, the Court considered the correct approach to the interpretation of a restrictive covenant.

The case concerned a clause which provided that the owner of land shall not "erect or permit to be erected any building or permit any drainage to be carried out upon or under [the restricted zone]". The issue was whether a proposed wall and deck extension were "buildings" for the purpose of the covenant.

The High Court Judge had interpreted the covenant in the same way as any other contractual document, applying the approach taken in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL). In relation to this, the Court cited its earlier decision in *Big River Paradise Ltd v Congreve* [2008] 2 NZLR 402 which had noted that a judge may not be entitled to take into account all the extrinsic evidence which might be admissible in a dispute between the parties to a contract when interpreting a restrictive covenant that has been notified under the Land Transfer Act 1952, as supported by *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 239 ALR 75 (HCA). In *Big River Paradise Ltd*, the Court expressed considerable doubt as to whether the *Westfield Management Ltd* approach would apply to the interpretation of a restrictive covenant. While the Court was not required to express a view on this issue as it felt the outcome would be the same irrespective of the approach adopted, counsel addressed their arguments on the

basis of the *Investors Compensation Scheme Ltd* approach, so the Court addressed those arguments on the same basis.

In dismissing the appeal, the Court interpreted the restrictive covenant in its own terms, having regard to the purpose for which it was created. The Court did not find an analogy with the interpretation of the word "building" in s 129 of the Property Law Act 1952 useful, as this did not contribute to determining the purposive intention of the drafters of the restrictive covenant. Instead, the Court interpreted the restrictive covenant by drawing on a historical report which explained the intention of the drafter when including the covenant, as well as the natural and ordinary meaning of the words and the context of the other provisions in the covenant.

Media Law

Publication restrictions – meaning of "any report of proceedings" – s 27A Guardianship Act 1968 – ss 5 and 14 New Zealand Bill of Rights Act 1990

Television New Zealand v Solicitor-General [2008] NZCA 519 concerned the proper interpretation of the now repealed s 27A of the Guardianship Act 1968. That section prohibited "any report of proceedings" under the Guardianship Act without the leave of the Court that heard those proceedings. In 2004, the Family Court had granted two parents shared custody of their son, and after a temporary variation to the custody order in favour of the mother, the father took the child into hiding and contacted Television New Zealand which subsequently broadcast three television items on the dispute between the parents.

Television New Zealand was then prosecuted under s 27 of the Guardianship Act, but the District Court Judge dismissed the informations laid by the Solicitor-General, concluding that there had been no "report of proceedings." The District Court Judge was ordered by Randerson J to state a case for the High Court. The High Court Judge allowed the appeal, considering that s 27A prohibits "any public disclosure about a case that is, will be, or has been, before the Court, by any person." Following that ruling, the High Court granted Television New Zealand leave to appeal the following question of law, as rephrased by the Court of Appeal: what is the scope and nature of "any report of proceedings" in s 27A of the Guardianship Act 1968 which cannot be published without the leave of the Court which heard the proceedings?

Television New Zealand contended that the prohibition on "reports of proceedings" is limited to what occurs in a courtroom, and that any more extensive interpretation would unjustifiably infringe freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990. The Solicitor-General argued that the High Court Judge's interpretation, although broad, met the demonstrable justification test in s 5 of the New Zealand Bill of Rights Act.

The Court discussed the purpose of the Guardianship Act, and concluded that s 27 was enacted to ensure optimal privacy of Family Court matters, and especially the privacy of vulnerable children. The Court considered that the Judge had stated the

scope of the prohibition too widely, and preferred to adopt the interpretation favoured by Panckhurst J in *Director-General of Social Welfare v Christchurch Press Co Limited* HC CHCH CP31-98 29 May 1998 (HC), namely that while a proceeding is current, publications that identify parties are prohibited. The Court considered in addition that publication of a particular party's legal status resultant upon the outcome of a proceeding is not prohibited where the report does not link the status with the hearing. Crucial to the Court's analysis was a distinction between a "hearing" (what occurs in a courtroom) and a "proceeding" (any matter in respect of which a court's jurisdiction is invoked for adjudication or determination). In respect of the New Zealand Bill of Rights Act, O'Regan and Robertson JJ considered that the proper approach was that articulated in *R v Hansen* [2007] 3 NZLR 1 (SC), but that s 27 of the Guardianship Act passed the s 5 demonstrable justification test.

In separate reasons, Baragwanath J discussed the competing interests of privacy and freedom of expression, and concluded that the purpose of the Guardianship Act was to protect the interests of the child, and that those interests trumped freedom of expression.

The Court dismissed the appeal. The prohibition upon publication of "any report of proceedings" extends beyond reports of hearings. "Proceeding" means any matter in respect of which the Court's jurisdiction is invoked for adjudication or determination. "Report" is not limited to detailed or sensitive information, but means any particularised information that pertains to a "proceeding." The publication of anonymised information that does not have the effect of identifying the parties to, or children affected by, a proceeding, is not within the scope of the s 27A prohibition. Publication of a particular party's legal status resultant upon the outcome of a proceeding (such as identifying a person as the custodial parent of an identified child) is not prohibited by s 27A where the report does not link that status with the hearing.

Resource Management

Procedure – strike out

In *Friends of Pakiri Beach v McCallum Bros Ltd* [2008] 2 NZLR 649, the Court considered resource consents for the extraction of sand in the Hauraki Gulf. The Environment Court granted resource consents for dredging sand to two dredging companies ("the dredgers"). The Friends of Pakiri Beach ("the Friends") strongly opposed the dredging and lodged an appeal in the High Court under s 299 of the Resource Management Act 1991. The dredgers applied to strike out the appeal on the basis that it contained issues that were questions of fact and not questions of law. The High Court Judge struck out most of the proposed grounds of appeal. The Friends considered they had a right of appeal under s 66 of the Judicature Act 1908 to the Court of Appeal against the decision of the High Court. In case the Court of Appeal found they had no right of appeal under s 66, the Friends also sought leave to appeal to the Court of Appeal under s 308 of the Resource Management Act. A different High Court Judge dismissed the application for leave under s 308 and the Friends appealed against this dismissal to the Court.

There were seven procedural questions for the Court. The first issue was whether a respondent to an appeal to the High Court under s 299 of the Resource Management Act can apply to strike out that appeal in advance of the appeal being heard. If the answer to that question is yes, the next issue was whether there is a right of appeal to the Court of Appeal under s 66 of the Judicature Act. The Court held that the High Court has an inherent jurisdiction to strike out appeals, including appeals from the Environment Court. However, the jurisdiction is one "to be very sparingly exercised, and only in very exceptional cases", such as where there is a plain abuse of the Court's processes. If there is any doubt as to whether a strike out order is appropriate, the Court considered that the High Court should set down the strike out application to be heard contemporaneously with the substantive appeal. The Court held that the High Court's decision striking out certain parts of the Friends' proposed appeal was not appealable under s 66 of the Judicature Act, because it should be treated as a decision of the High Court under s 299 of the Resource Management Act. The Court held the parties' positions vis-à-vis the possibility of appeal should be identical whether the strike-out application is heard at the same time as the appeal or at different times. The Friends' purported appeal under s 66 was dismissed, but there remained the possibility of the Friends making an application for special leave to appeal out of time under s 308 of the Resource Management Act.

The Friends later applied for special leave to appeal out of time. Leave was subsequently granted by the Court on the question of whether the High Court erred in holding that the grounds of appeal which were struck out were not arguably questions of law arising from the Environment Court's decision. Ultimately the Friends' appeal was allowed by consent. The upshot of this procedural manoeuvring is that the whole proceeding is back in the High Court. On the hearing of the appeal, the High Court will consider, as part of the appeal, whether the Friends' proposed grounds of appeal are questions of law and, if so, what the answer to them is.

Resource consents – integrity of regional planning instruments – thematic approach to policy statements – application of statutory baseline test

In *Auckland Regional Council v Living Earth Ltd* [2009] NZRMA 22, the Court considered three questions of law relating to the Resource Management Act 1991 ("RMA").

The case related to resource consents that were obtained by Living Earth on appeal to the Environment Court. These consents concerned a proposed composting operation to be established on Puketutu Island. Composting, an industrial activity, was not provided for under the Manukau City District Plan and was contrary to the objectives and policies of the Auckland Regional Policy Statement ("ARPS").

The first question of law was whether the Environment Court was wrong not to specifically address the impact of granting consents on the integrity of the ARPS. Instead, it had restricted its analysis to the impact on the integrity of the District Plan. In the Court's judgment, this was sufficient. The concept of plan integrity is more obviously applicable to district plans, as these supply the rules that control land-based activities. Sections 104 and 104D of the RMA do not make plan integrity, especially

by reference to regional policy statements, a mandatory consideration. Moreover, in this case the Environment Court had considered the inconsistency between the proposal and the ARPS in detail, addressed the integrity of the District Plan, and considered all relevant provisions in the ARPS.

The second question was whether the Environment Court was wrong to analyse the ARPS by abstracting themes. The Court held that this approach was sensible. Moreover, all relevant portions of the ARPS had been considered.

The third question the Court addressed was whether the Environment Court had failed to properly apply the permitted baseline test, partially codified in s 104(2). This test allows a court to disregard an adverse environmental effect of the activity in question if another activity with that effect is already permitted under the plan (the permitted baseline). The adverse effect in issue in this case was the odour to be emitted from the proposed composting plant. In particular, the appellant's complaint was that the Environment Court had acknowledged that there would be differences of intensity, frequency, duration and character between the likely effects of the activity and those within the permitted baseline but had then disregarded these differences. The Court observed that the test under s 104(2) did not require precise correspondence between effects permitted under the baseline and those associated with the proposal. Irrespective of this, the Court concluded that the Environment Court's reference to the test had not been critical to the result it reached. Indeed, its conclusion that the odour effects of the proposed operation would be no more than minor was reached without recourse to the permitted baseline.

Given that the appellant's challenge on all three points had failed, the Court dismissed the appeal.

Resource consents – priority of competing applications

Central Plains Water Trust v Ngai Tahu Properties Ltd (2008) 14 ELRNZ 61 was concerned with the issue of priorities in relation to competing applications for resource consent.

The appellant applied for resource consent to take water in 2001. The Canterbury Regional Council informed the appellant that the application was notifiable, but the notification and hearing would not proceed until its contemplated use applications were filed. That was done in November 2005. In the meantime, the respondent filed take and use applications in relation to the same river.

The respondent applied to the Environment Court for a declaration that its applications were entitled to priority over the appellants. The Environment Court granted the declaration and the High Court upheld it. Both Courts considered that the fact the appellant's application was put on hold by the Canterbury Regional Council, pending the submission of an application for a resource consent to use the water, deprived it of priority.

Fleetwing Farms Ltd v Marlborough District Council [1997] 3 NZLR 257 (CA) held that Parliament had adopted a "first come first served" approach in relation to

applications for resource consents. The question for the Court in this case was what the relevant date at which to determine who is first was.

The majority of the Court allowed the appeal. Baragwanath J, with whom Hammond J concurred, concluded that an application for resource consent to take water which is not disqualified by unreasonable delay and which, although recognising the need for subsequent use applications could not as filed be rejected as a nullity, takes priority over an application which relates to the same resource and which, although complete in itself, was filed later by a party with knowledge of the earlier application.

Robertson J, dissenting, considered that priority was to be determined by the application which is first ready for notification and that, where there was a decision to defer notification under s 91 of the Resource Management Act 1991, the application was not ready for notification.

The Supreme Court has granted leave to appeal.

Social Security

Housing New Zealand – tenancy agreements – income-related rent assessment – special circumstances

In *Housing New Zealand Corporation v District Court at Auckland* [2008] NZCA 430, the Court unanimously allowed an appeal by Housing New Zealand ("HNZ") against a decision of the High Court. The respondent, the late Mr Meryn Bradburn, was a HNZ tenant who was concerned about the manner in which his income-related rent was assessed. Mr Bradburn said HNZ should have given him notice of his "right" to apply for a lower rent because of special circumstances. In the District Court, the Judge found that HNZ should have given Mr Bradburn notice of his right to apply for special circumstances. HNZ appealed to the High Court. The High Court Judge upheld the District Court Judge's ruling and held that HNZ must consider special circumstances claimed by the tenant before it calculates an income-related rent. The High Court Judge also held that HNZ must notify its tenants of the existence of the special circumstances discretion.

The Court discussed the income-related rent regime and how HNZ calculates tenants' income-related rents. The Court noted in particular that HNZ had discretion as to which income to assess, and how to assess it, when making this calculation. Counsel for HNZ submitted that the special circumstances discretion was not central to the calculation regime, because there was already responsiveness and discretion built into the scheme.

The Court agreed with HNZ's analysis of the income-related rent regime. The Court noted that Parliament had set out the calculation mechanism in some detail and it is designed to ensure that HNZ fulfils its obligations to provide affordable housing to people in need. The Court held that the special circumstances discretion did not have the extended role envisaged by the High Court, which, if correct, would have huge financial repercussions for HNZ, and would lead to almost insurmountable difficulties

if HNZ were to delegate to its front-line staff the power to determine special circumstances when assessing rents.

The effect of the Court's judgment is that there is no right for HNZ tenants on income-related rents to apply for, or to be heard, as to HNZ's exercise of the special circumstances discretion. Nor is there is an obligation on HNZ to give notice to its tenants that there is an opportunity to apply for the exercise of the discretion.

Superannuation – reciprocity with Australia

In *Bredmeyer v Chief Executive of the Ministry of Social Development* [2008] NZCA 557, the Court considered the entitlement of New Zealanders living in Australia to receive New Zealand superannuation under the Social Welfare (Reciprocity with Australia) Order 2002 ("the Order").

Ms Bredmeyer was born in New Zealand but has lived overseas since 1968. Since 1990 she has lived in Australia. After turning 65 she applied for New Zealand superannuation pursuant to a social security reciprocity agreement between New Zealand and Australia, which the Order gives effect to. Article 9(3) of the agreement provides that the amount of superannuation payable shall "not exceed the amount of Australian age pension that would have been payable to that person if he or she was entitled to receive an Australian age pension but was not entitled to receive New Zealand superannuation". The Chief Executive of the Ministry of Social Development determined that because Ms Bredmeyer was not entitled to receive the Australian age pension, which is means tested, she was not entitled to receive New Zealand superannuation. Ms Bredmeyer appealed unsuccessfully to both the Social Security Appeal Authority and the High Court.

Before the Court, Ms Bredmeyer argued that as she was not entitled to receive an Australian age pension, art 9(3) did not disentitle her from receiving New Zealand superannuation. After reviewing the history of the social security reciprocity agreements with Australia, the Court rejected this argument. It held that the purpose of the agreement was to ensure that for New Zealand superannuation and the Australian age pension time spent in either country can be credited in the calculation of residence. As such, a person is not disqualified in terms of residency requirements by shifting from one country to the other. Moreover, the legislative history of earlier agreements supported the view that if the Australian age pension was income or assets tested then New Zealanders living in Australia would only be entitled to the benefit if their income or assets were below the cutoff point.

The appeal was dismissed.

Leave to appeal to the Supreme Court has been sought.

Tort

Defamation – defences – truth and honest opinion – repetition and conduct rules

In *Simunovich Fisheries Ltd v Television New Zealand* [2008] NZCA 350, the Court considered appeals from three interlocutory judgments on procedural and evidential matters in the largest defamation litigation in New Zealand history ($30m in damages is claimed).

The appellants are a fishing company, which acquired substantial rights to fish for scampi during the 1990s. The allocation of scampi fishing rights was the subject of several court proceedings between 1993 and 2003, where the Ministry of Fisheries was criticised for its management of the fishery. In April 2002, the Right Honourable Winston Peters delivered a speech in Parliament, claiming that Ministry officials were guilty of corrupt practices, which led to several governmental inquiries. In October 2002, TVNZ screened an "Assignment Special" programme; the NZ Herald, published by APN (the second respondent), published ten articles in a similar vein over a nine month period. Simunovich contends that each of these publications are capable of carrying one or more of five defamatory meanings imputing dishonest and corrupt conduct to Simunovich. TVNZ and APN plead truth and honest opinion to a number of these meanings.

In Judgment No 7, the High Court Judge addressed Simunovich's complaints regarding the truth and honest opinion defences, principally that the respondents pleaded the opinions and allegations of third parties as facts in support of the defences. The Judge held that the opinions of others could be pleaded as "circumstances" under s 38 of the Defamation Act 1992 but not as primary facts. The Judge followed English authority that recognises three categories of defamatory allegations: statements of fact ("tier 1"); claims that there were reasonable grounds for believing the statement of fact to be true ("tier 2"); and claims there were grounds for investigating whether the statement of fact is true ("tier 3").

The issues before the Court in relation to the truth defence were whether s 8(3)(b) of the Defamation Act was available to the respondents, and the facts and circumstances that a defendant who asserts truth may plead.

Counsel for Simunovich held that the respondents may not plead s 8(3)(b) because Simunovich relies on the whole of the publications. Section 8(3)(b) provides that, where proceedings are based on all or any of the matter contained in a publication, the defence of truth will succeed if the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth. Following *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA), the Court held that the respondents could plead s 8(3)(b), with or without s 8(3)(a).

The Court observed that the question in relation to s 38 of the Defamation Act (particulars in defence of truth) was the relevance of the proposed particulars to the truth and honest opinion defences, and whether the phrase "facts and circumstances" in s 38(b) allows a defendant to prove facts by showing others alleged the defamatory

statement was true. The respondents had contended that the opinions of judges, Winston Peters, and former fisheries officials were capable of establishing serious grounds to believe that Simunovich had acted unlawfully. The Court held that the repetition and conduct rules did apply to the tier 2 imputations in this case, it not being in dispute that they applied to the tier 1 imputations. To discharge the repetition rule for tier 2 imputations "would be to alter significantly the balance between freedom of expression and protection of reputation, making it very much easier to report defamatory allegations by framing them in terms of reasonable grounds to suspect." However, the respondents were not permitted to seek to prove the truth of the tier 1 and 2 imputations by reference to the opinions or assertions of others. Furthermore, the Court held that judicial decisions could not be primary facts for defamation law purposes, although their authorship lent them reliability.

Applying the principles to the pleadings, the Court noted that s 38 required the defendant to plead those statements that it says are true statements of fact, together with the facts and circumstances on which the defendant relies in support of the allegation that they are true. The respondents in this case were to identify the facts they say are true by reference to each of the s 8(3)(a) and (b) defences, and then plead separately any supporting facts and circumstances relied upon to show that those facts are true. True statements of fact may not include the fact that others made allegations or expressed opinions.

The issues in relation to the honest opinion defence were firstly whether a defendant may plead the opinions or assertions of others, whether as publication facts or as supporting facts and circumstances; and secondly, whether a defendant may plead facts and circumstances that are neither referred to in the publication nor publicly known, and which may post-date the publication.

The Court held that each respondent must identify those parts of the defamatory publications that are said to be honest opinion, and the person to whom each such opinion is attributed. The respondent must identify publication facts by reference to the truth of which it alleges that those defamatory publications were honest opinion. The respondents may plead other facts and circumstances that are capable of proving the publication facts. They should be separately pleaded so that they are distinguished from the publication facts. While it may be necessary to portray something of the relevant background, and to set out by way of context material that connects the main facts relied on, the respondents may not seek to prove the truth of publication facts by reference to the opinions or assertions of others.

In relation to Judgment No 7, the appeal was allowed in part as amendments were required to the truth and honest opinion defences pleaded by TVNZ and the NZ Herald.

The Court also dismissed Simunovich's appeal from Judgment No 6, which concerned applications by the respondents for further and better discovery covering documents relating to the economic loss claims, and Judgment No 5, holding that disclosure of the draft scripts of the Assignment programme, held by TVNZ's solicitors, would evidence a privileged communication.

The Supreme Court has granted leave to appeal.

Leaky building syndrome – duty of care - council liability for inspection of motel units

The issue in *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446 was whether a council could be liable to a motel owner for failure to diagnose building defects during the building inspection and certification process. The Court held that the common law under *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) did not extend the council's liability beyond domestic dwellings.

Baragwanath J left open the possibility as to whether amendment of the pleadings to assert health and safety issues as a distinct cause of action could have led to a different result. O'Regan and Robertson JJ were of the view that such an amendment could make no difference.

The appeal was dismissed and the High Court decision striking out the action was upheld.

Misfeasance in public office – immunity of witnesses from suit – summary judgment

New Zealand Defence Force v Berryman [2008] NZCA 392 concerned an appeal from unsuccessful summary judgment and strike out applications heard by an Associate Judge in the High Court. In the main proceedings, the Berrymans' are suing the Attorney-General, on behalf of the New Zealand Defence Force ("NZDF"), for misfeasance in public office.

As a preliminary issue, the Court held that it did not have jurisdiction to hear an appeal from the decision of an Associate Judge on a strike out application. Accordingly, the appeal could only relate to the dismissal of the summary judgment application.

The length and complexity of the factual background to the Berrymans' proceedings make only a brief summary possible. In 1994 a bridge on the Berrymans' property, which had been built by the NZDF in 1986, collapsed, killing Mr Kenneth Richards. An Army Court of Inquiry was convened to investigate the causes of the bridge's collapse. Its findings, issued in September 1994, were largely based on a report that had been commissioned by the Army ("the Butcher report").

In 1997, a coronial inquest into Mr Richards' death was held. Both the Army and the Berrymans participated in the inquest. The Coroner was not, however, told of the Court of Inquiry's report or the evidence it had gathered (including the Butcher report). Nor was he told about a report commissioned by the Berrymans into the reasons for the bridge's collapse, which contained similar findings to the Butcher report.

In relation to the claim of misfeasance in public office, the Court grouped the Berrymans' allegations into two classes. First, that the Army had allowed false evidence to be given and incorrect submissions to be made at the inquest. Secondly,

that the Army had improperly withheld knowledge of the Court of Inquiry report and associated material (including the Butcher report) from the Coroner.

The Court first considered whether r 158 of the Armed Forces Discipline Rules of Procedure 1983 was an answer to the misfeasance in public office claim. This rule provides that material collected by a Court of Inquiry is "not admissible in evidence against any person in any other proceedings". Counsel for the NZDF submitted that this rule meant the evidence given to, and the report of, the Court of Inquiry could not be admitted in the main proceedings. The Court was reluctant to accept this very literal approach to the rule's scope, instead noting it could arguably be read as only protecting those who participated at the original inquiry. In any event, the Court expressed the opinion that, with carefully drafted interrogatories, the Berrymans' would be able to circumvent the rule.

In relation to the first class of allegations, the Court was of the opinion that the actions complained of were the subject of immunity: those who give evidence or make submissions to a court cannot later be sued for what they said or did. This immunity, the Court held, decisively disposed of the first class of allegations. The Berrymans' were impermissibly attempting to impose civil liability in relation to evidence given and submissions made in the course of judicial proceedings.

Next, the Court considered the allegations relating to the NZDF withholding knowledge from the Coroner. Only certain people within the NZDF, known as superior commanders, were empowered to release the material at issue. The Court decided that if the Berrymans could prove that NZDF personnel, acting in their capacity as public officers, had consciously decided not to recommend that a superior commander release the material, such actions could give rise to a claim for misfeasance in public office. The Court was of the opinion that while the hypothesis that such events had taken place was not particularly probable, it had not been excluded by the evidence available. There was therefore an insufficient evidential basis for summary judgment to be given.

Finally, the Court considered a cause of action under the New Zealand Bill of Rights Act 1990. It observed that this cause of action had been unsuccessfully run in prior proceedings and therefore could not be re-run by the Berrymans.

Because on one narrow point the NZDF had not shown that the Berrymans' claim could not succeed, the Court refused to enter summary judgment. The appeal was dismissed.

Negligence – alleged historic abuse – duty of care

In *A v Roman Catholic Archdiocese of Wellington* [2008] 3 NZLR 289, the Court examined claims of negligence arising out of alleged historic abuse that occurred while the appellant was a child under the care of the respondents.

The appellant's claims related to two periods: the first was between 1968 and 1973, after her mother placed her into an orphanage run by the Sisters of Mercy; and the second was between 1974 and 1977, when she moved to secondary school and was

primarily the responsibility of Catholic Social Services. On appeal, her claim was that both agencies were liable to her, directly and vicariously, for abuse she had suffered.

Crucial to the Court's decision was its analysis of the legal basis upon which the appellant was cared for during the first period. Section 13 of the Child Welfare Amendment Act 1927 made provision for a manager of a children's home to assume control over a child by parental agreement. During the currency of such an agreement, the manager effectively became the child's guardian and could apply to the Children's Court for enforcement of the agreement, even as against the child's parents. The Court held that the informality of the appellant's initial placement with the orphanage indicated that there had not been an agreement pursuant to s 13.

The Court then considered two incidents of sexual abuse at the hands of care providers organised by the respondents during the first period. The appellant argued that the respondents were vicariously liable for this abuse, relying on *S v Attorney-General* [2003] 3 NZLR 450 (CA). However, because there had not been a s 13 agreement, the respondents were not in the same position as the Superintendent had been in *S v Attorney-General.* They were acting effectively as agents for the appellant's mother and had not assumed responsibility for year round care. Hence, the holiday care providers were not the respondents' agents and there was no basis for vicarious liability. The Court also held that other claims in relation to sexual abuse after 1 April 1974 were now barred by s 317 of the Injury Prevention, Rehabilitation, and Compensation Act 2001.

The Court then looked at the claims of negligence arising out of physical abuse at the orphanage. Although it disagreed with the High Court's conclusion that the force used was at all times justified under s 59 of the Crimes Act 1961, it held that evidence of isolated incidents of inappropriate corporal punishment were not sufficient to make out the claim for systemic negligence, as opposed to assault and battery.

Finally, the appellant's claim for emotional harm was examined. Fundamental to this aspect of the claim was the extent to which the respondents owed a duty of care to promote the appellant's emotional well-being. The Court held that the duty imposed on those providing institutional care of children did not extend to maximising their emotional well-being. However, the duty did encompass taking reasonable steps to avoid emotional harm, including where it was clear that the child was living in an environment that was detrimental to the child's "moral well-being". On the facts of this case, none of the appellant's claims were made out. Essentially, the Court concluded that it had not been shown that either the orphanage had not been run in a way that did not meet contemporary standards of reasonableness or that the actions taken by the respondents had been unreasonable.

Negligence – carriage of goods – exclusion of liability – Carriage of Goods Act 1979

In *Southpac Trucks Ltd v Ports of Auckland Ltd* [2008] NZCA 573, Southpac's truck was damaged on the Ports of Auckland wharf, when a Ports of Auckland employee negligently drove a forklift into the truck. Southpac sued Ports of Auckland, which sought to rely upon the limited liability provision in the Carriage of Goods Act 1979. Section 16(2) provides that "no employee of a carrier shall be liable as such… for the

loss of or damage to any of those goods" unless the damage is intentionally caused. While the driver of the forklift was an employee of Ports of Auckland, he was not otherwise involved in the actual carriage of the truck, so Southpac contended that the limitation provision was simply not applicable.

The District Court Judge held that the limitation provision did not protect Ports of Auckland for the unrelated act of its employee. However, the High Court Judge held that Ports of Auckland was covered by the Carriage of Goods Act because at the time the damage occurred Ports of Auckland was a "carrier" within the meaning of the Carriage of Goods Act by virtue of its sub-sub-contractual relationship with the truck's actual carrier.

A majority of the Court (O'Regan and Robertson JJ) allowed the appeal, considering that the language of the Carriage of Goods Act precluded the High Court Judge's interpretation because if liability were limited simply by virtue of Ports of Auckland being a carrier, there would be no meaning for the phrase "no carrier shall be liable as such." Further, the majority considered that the words "as such" recognise that different activities give rise to different risks and that the risks inherent in acts of carriage arise from a particular kind of activity, namely actual carriage. The majority concluded that what is critical for the application of the limited liability regime is that at the time of the damage the actual carrier is in possession of the goods and is responsible for them as an actual carrier.

Accordingly, the majority held that the High Court was incorrect in holding that Ports of Auckland could avail itself of the statutory exemption from liability conferred by s 6 of the Carriage of Goods Act 1979. The High Court was also incorrect to hold that the operator of the fork hoist was exempt from liability under s 16(2), with the consequence that his employer could not be vicariously liable.

Baragwanath J dissented, considering that the liability of Ports of Auckland was limited under the Carriage of Goods Act. He considered that Ports of Auckland was within the limitation regime because it was in constructive possession of the truck by virtue of its contractual relationship to the actual carrier. On this view, it was possible for there to be concurrent carriage by more than one party, and it was not necessary that the party who sought to limit its liability be the actual carrier at the time of the damage. Baragwanath J considered that this interpretation accorded with what he considered to be the purpose of the Carriage of Goods Act, namely that parties functionally engaged in carriage, however remote from actual carriage, should be within the scope of the legislation.

Leave to appeal to the Supreme Court has been sought.

Negligence - misfeasance in public office – breach of statutory duty under s 63(4) Fisheries Act 1983 - remedies

In *Minister of Fisheries v Pranfield Holdings Ltd* [2008] 3 NZLR 649, the Court considered a number of issues arising from the torts of negligence, misfeasance in public office and breach of statutory duty.

The Court first examined the tort of breach of statutory duty under s 63(4) of the Fisheries Act 1983. To determine if there was a duty, the Court followed the approach set out in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL). The first step is to establish if there is a statutory duty, which requires an evaluation of the nature of the decision-making power in the statute in question. The question of whether there is a statutory duty is a question of construction. On the facts, it was found, in light of *Westhaven Shellfish Ltd v Chief Executive Ministry of Fisheries* [2002] 2 NZLR 158 (CA) and the clear words of s 63, that there was not a statutory duty to issue commercial fishing permits, unless an applicant has a right to take fish under quota as set out in s 63(2). In all other cases, the decision to issue a permit under s 63 is discretionary.

The Court also found that where there had been separate proceedings that indicated a breach of public law, and this had been acknowledged by a declaration, the declaration did not translate to requiring damages in tort law. The effect of such a decision would be to turn a declaration granted as a remedy in public law proceedings into a form of property right which must be enforced by courts in subsequent proceedings. This proposition had no authority and was not contained in the pleadings.

The second tort examined was whether there had been a breach of the duty of care. The Court once again followed the analysis in *X (Minors)* that the defendant had a statutory discretion, and that nothing done within the ambit of that discretion could give rise to a duty of care or an action for damages for breach of such a duty.

Thirdly, the Court examined the "non-targeted malice" branch of misfeasance in public office, as defined by Lord Steyn in *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1 (HL). In particular, the Court focused on the ingredient of non-targeted malice that requires that the public officer must have acted with knowledge of the illegality of his or her act, or with a state of mind of reckless indifference to the illegality of the act. At issue was the level of knowledge required before a state of mind of recklessness would be established. Having reviewed the case authorities on the matter, the Court concluded that recklessness required an element of bad faith or dishonesty, in the sense of actual knowledge of unlawfulness or wilfully disregarding the risk that an act was unlawful. This requires more than mere uncertainty as to the lawful position and a failure by officials to enquire as to the lawfulness of their actions.

The Supreme Court has refused leave to appeal.

Negligence – misleading and deceptive conduct – liability of company director – s 9 Fair Trading Act 1986

In *Body Corporate 202254 v Taylor* (2008) 12 TCLR 245, the Court discussed the law relating to the personal liability of company directors in negligence and for misleading and deceptive conduct, contrary to s 9 of the Fair Trading Act 1986.

The appellants all owned units in a residential development (Siena Villas) that suffers from leaky building syndrome. Because the companies most responsible for the

development are no longer in existence, the appellants' claims were against Mr Taylor, the person who controlled those companies. These claims fell into two classes. First, it was alleged that Mr Taylor was negligent in his conduct and management of the development. Secondly, it was alleged that Mr Taylor was liable for misleading and deceptive statements advanced in a promotional brochure supplied to prospective purchasers. A full Court was convened to allow the appellants to challenge the decision in *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA). William Young P, for himself and Arnold J, gave the lead judgment, with his reasoning on each claim supported by a differently constituted majority.

William Young P, with whom Glazebrook, Arnold and Ellen France JJ concurred, held that the negligence claims, aside from one based on a non-delegable duty of care owed by Mr Taylor as the director of the development company, should not have been struck out. *Trevor Ivory* and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL) were subject to detailed analysis. William Young P observed that *Trevor Ivory* may not be the last word on this topic, noting the academic criticism it has received. In his view, the approach taken in relation to s 9 of the Fair Trading Act could influence the development of this branch of the common law; a broad approach could well undercut the policy premises underpinning *Trevor Ivory*. However, an evaluation of competing policy considerations would be best dealt with in the context of factual findings made at trial. For these reasons, it was held to be inappropriate to strike out the negligence claims.

Chambers J adopted a different approach to the negligence claims. In his opinion, the Court did not need to grapple with *Trevor Ivory*. He would have reinstated the claims on the basis that Mr Taylor was the builder and developer of Siena Villas. In his view, it was settled law that careless builders are liable in negligence for the damage their actions cause to the subsequent owners of the buildings. It did not matter whether Mr Taylor was, at the time, acting as an employee.

The Court also largely found against Mr Taylor in relation to the Fair Trading Act causes of action. It unanimously held that only the claim based on alleged representations as to the identity and substance of the developer should be struck out. However, the Court divided on whether s 9 should be confined to the conduct of people trading on their own account. William Young P, with whom Chambers and Arnold JJ concurred, held that s 9 was not so confined. On this approach, the employees or directors of companies can be directly liable for engaging in misleading or deceptive conduct. Such an approach, in the majority's opinion, best accorded with the wording of the Fair Trading Act and the weight of New Zealand and Australian authority. Glazebrook and Ellen France JJ dissented on this point. They would have overruled previous decisions and restricted s 9 to people trading on their own account.

Negligence – whether private law duties owed by a limited liability company with some regulatory functions

In *Bank of New Zealand v Deloitte Touche Tohmatsu* [2009] 1 NZLR 53, the Court considered whether the New Zealand Exchange Ltd ("NZX") was to be treated as a public regulator immune from private law duties.

Access Brokerage Ltd ("Access") was a stockbroker and member of NZX. Access was placed into liquidation after it was unable to meet obligations to clients. The Bank of New Zealand ("BNZ"), Access' banker, settled Access' indebtedness and took assignments of Access' clients' rights of action. BNZ and Access then issued proceedings against NZX and Deloitte Touche Tohmatsu ("Deloitte"), who acted as inspectors on behalf of NZX. The plaintiffs claimed that the defendants breached a duty of care in tort to protect Access' clients (who BNZ was subrogated for) and Access against losses resulting from the liquidation of Access in carrying out the annual inspection required by NZX's rules. It was alleged that the inspection was not carried out with reasonable professional skill, care and competence. A further allegation was that when serious issues and breaches of the NZX rules were identified, NZX failed to take satisfactory steps to require Access to correct the situation or, if that was not possible, to suspend Access' designation as an NZX firm.

The High Court Judge struck out the claims against NZX. He held that the purpose of the inspection function related to protection of the market as a whole and not to protect the clients of individual brokers. BNZ and Access appealed against the decision to strike out. The principle issue on the appeal was whether NZX was a public regulator immune from private law duties.

The Court began by reviewing the statutory and regulatory background, including the Securities Markets Act 1988, the Securities Act 1978 and the relevant NZX rules. On the basis of this review the Court observed that while NZX may have some regulatory functions, it necessarily has the focus of a listed company on commercial success. This was in contrast with the focus of a regulator who acts solely on the basis of the regulator's view of the public interest and the common good. In addition, the Court found that an important part of the NZX rules and the inspection function was to protect the clients of brokers. Accordingly, the Court held that it was arguable that NZX owes some private law duties.

Issues of causation and the extent to which Access' collapse was attributable to it and not to NZX and Deloitte were dependent on the factual matrix and could not be resolved on a strike-out application.

The appeal was allowed.

The Supreme Court has refused leave to appeal.

C CRIMINAL CASES

Adequacy of directions / summing up

Kidnapping – identification direction – parties direction – s 126 Evidence Act 2006

R v Davis [2008] NZCA 424 was an appeal against conviction and sentence in relation to charges of aggravated burglary, wounding with intent to cause grievous bodily harm, and kidnapping.

Counsel for the appellant contended that the Judge failed to warn the jury, pursuant to s 126(2)(a) of the Evidence Act 2006, that a mistaken identification can result in a serious miscarriage of justice. The Judge gave the orthodox warning about identification evidence as required prior to the enactment of the Evidence Act. Section 126 now requires an additional mandatory warning that a mistaken identification can result in a serious miscarriage of justice, where the case against the defendant "depends wholly or substantially on the correctness of one or more visual or voice identifications of the defendant or any other person." However, the Court applied the proviso to s 385(1) of the Crimes Act 1961, as the Court was satisfied that the jury adopted a careful approach notwithstanding the failure to give a s 126(2)(a) warning.

There was also an issue as to whether the parties direction given was sufficiently tailored to record whether the appellant was a party to a common intention to prosecute the unlawful purpose of kidnapping, insofar as whether the appellant knew that kidnapping could well happen or that there was a real or substantial risk of it happening in the course of the other offending. The Court found that the Judge needed to spell out, in the clearest terms, that to be convicted of being a party to the crime of kidnapping, the jury had to be satisfied that there had been an agreement to do something unlawful; whilst the offenders may have had different roles and degrees of involvement, each had agreed to participate to achieve the common goal. Crucially, the jury had to be clearly directed that the appellant would be a party to the kidnapping offence if the kidnapping was known to be something that could well happen during the course of those events.

From the directions provided, it could not be definitively said that the jury concluded the appellant was guilty simply because the kidnapping was an offence committed in the course of the enterprise, whether or not he knew it was something that could occur. As a result there had been a misdirection and the conviction on the count of kidnapping alone was quashed. The appeal against sentence was allowed.

Manslaughter – co-offenders – video statement

In *R v Brider* [2008] NZCA 47, the Court considered an application for leave to appeal out of time on the basis that the trial Judge's direction on the law as it related to manslaughter was incorrect.

The appellant was convicted of manslaughter and four further counts relating to a series of assaults committed on the same night. The lead charge for sentencing purposes was one of causing grievous bodily harm and the effective term was seven and a half years imprisonment. The victim was stabbed to death by a co-accused, who was convicted of murder.

One of the appellant's co-offenders, in *R v Hartley* [2007] 3 NZLR 299 (CA), successfully appealed his conviction for being a party to manslaughter. In that case, the Court held that it was necessary for the Crown to prove that the appellant was aiding and abetting in terms of s 66(1) of the Crimes Act 1961, in respect of offending of the type which actually occurred. In *Hartley*, the Court held there was not a foundation for a manslaughter verdict as the assault which occurred was completely different from that which the co-offender was assisting.

While the Crown accepted that the Judge's direction was incorrect, in accordance with *Hartley*, they considered that the misdirection did not give rise to a substantial miscarriage of justice because the appellant would still have been convicted of manslaughter. Crown counsel submitted that the appellant was clearly aware that the principal offender was going to stab somebody, in reliance on matters contained in the appellant's video statement. He submitted that the jury would inevitably convict because the appellant accepted the risk, dismissed it and proceeded with wilful blindness. However, defense counsel contended that the passage in the video statement relied on by the Crown did not equate with foresight or knowledge. Indeed, the appellant had dismissed the possibility of the principal offender stabbing anyone.

Although it was accepted that the video statement could support the Crown contention, the Court was not convinced that the comments would lead to a conviction with the correct direction. Given that the ambiguity in the interpretation of the words in the statement was a proper matter for the jury to resolve, the appeal against conviction was allowed and a retrial was ordered. To reflect this, the lead sentence was reduced to six years with a minimum non-parole period of three years.

Mens rea - possession

In *R v Yorston* [2008] NZCA 285, the Court found that the Judge's failure to address the jury in the District Court on the mental element of possession was sufficiently serious to render the convictions unsafe and to amount to a miscarriage of justice. The appeal was allowed and the appellant's convictions on nine counts arising from the possession of precursor substances, equipment and material were quashed.

The convictions hinged upon a thumbprint belonging to the appellant that was found on a bottle of hydrochloric acid, one of a variety of chemicals and equipment found in his friend's flat. In summing up, the Judge told the jury that "[p]ossession means either having them in actual or potential physical possession or control and it can also be joint possession." She did not mention the mental element of possession, which comprises knowledge and intention: *R v Cox* (1990) 5 CRNZ 653 (CA). The Court found that if the jury had known that the Crown had to prove another element of the offence, it might have come to a different verdict. It also agreed that reference to joint possession in the absence of a direction as to mens rea might have led the jury to

proceed on the basis that it was enough if the appellant knew that someone else intended to exercise control over the items and intended to use them for the production of methamphetamine.

Two further grounds of appeal were rejected. The Court did not accept that the Judge should have directed the jury that there needed to be a useable quantity of the precursor substance in issue. Although there was only a small quantity of hydrochloric acid left in the bottle, it was a useable quantity in the sense that it could have been combined with hydrochloric acid from another source. Moreover, the scientific evidence before the jury indicated that dilute hydrochloric acid can be used in the manufacture of methamphetamine. A challenge to the Judge's direction in relation to the fingerprint evidence was also rejected.

Mens rea – robbery – grievous bodily harm - intoxication

In *R v McGowan* [2008] NZCA 200, the Court considered challenges to two convictions, both concerned with the directions of the trial Judge pertaining to mens rea.

The appellant challenged his convictions for robbery and causing grievous bodily harm with intent to facilitate flight from the commission of a crime. He was convicted of robbing the complainant of his car. At trial, the primary issue was the identity of the person who took the car. On appeal, however, the appellant argued that there was an inadequate evidential basis for the verdict of guilty, particularly in relation to proof that he had intended to deprive the complainant permanently of his car. The Judge's direction on this element of the offence was also challenged. The Court held that the background to the incident, as well as evidence of what the appellant said and did when taking the car, provided an adequate basis for inferring that he held the requisite intention. Further, the Judge's direction was succinct but sufficient, given the appellant had not put this element in issue at trial. Accordingly, this conviction was allowed to stand; an appeal against the sentence of four years imprisonment on this charge was dismissed.

In relation to the grievous bodily harm charge, the Court held that the Judge had misdirected the jury in relation to intoxication in two ways. First, the Judge had directed on intoxication in terms of its impact on capacity to form an intent rather than as simply a factor in determining the relevant state of mind. Secondly, the Judge did not clearly correlate the evidence as to alcohol with whether, at the time of driving, the appellant had an actual appreciation of the likelihood of serious harm to the complainant. Although the Court regarded it as scarcely conceivable that the appellant did not hold the requisite state of mind, it was particularly troubled by a question asked by the jury that referred to the appellant's "ability to foresee the effects of his actions". This suggested the jury may have been thinking in terms of capacity to foresee likely consequences. Given this, the Court quashed the conviction and directed a new trial.

"Motive to lie" – counsel incompetence – failure to call evidence

In *R v Hill* [2008] NZCA 31, the Court considered whether there had been a miscarriage of justice resulting from an omission in the Judge's summing up and in trial counsel's failure to call certain evidence. Mr Hill was convicted on one count of injuring with intent to injure, one of sexual violation by rape, and one of assault with a weapon. He was sentenced to a term of nine and a half years imprisonment, with a minimum non-parole period of four and a half years. He appealed against conviction; an appeal against sentence was not pursued and was dismissed accordingly.

The alleged omission in the Judge's summing up related to Mr Hill's participation in a video interview with an investigating detective, which was played to the jury at trial. The detective had questioned Mr Hill as to why the complainant would fabricate her allegations. The Judge had not dealt with the detective's questioning relating to the complainants' "motive to lie" in summing up. Counsel for the appellant contended that this questioning should have been the subject of a particular warning in the summing up. Crown counsel conceded that it would have been preferable for the Judge to have addressed the "motive to lie" in summing up but submitted that no miscarriage of justice occurred because there was no possibility that the jury would not have correctly comprehended the burden of proof. The Court held that the Judge gave full directions as to onus and standard of proof and made it clear that the issue for the jury was whether it believed the complainant beyond a reasonable doubt. The Judge supplemented this by the proper direction in respect of the accused giving evidence. In dismissing this appeal ground, the Court considered that there was no realistic risk that the jury might have carried out a reversal of the onus of proof on the mistaken assumption that "motive" was exempt from the clear instructions given by the Judge.

The evidence that trial counsel failed to call related to the complainant's demeanour over the time of the alleged offending. Counsel denied that Mr Hill ever asked him to consider calling the witnesses in question, based on Mr Hill's instruction to run the trial "exactly as we did at first trial." Assuming that Mr Hill had asked counsel to lead the new evidence, the Court considered that the evidence would have been of little probative value because the complainant was going to some lengths to conceal from her small community what was happening to her. Because the evidence was on a point that was not contested at trial – that the relationship was a normal one to outward appearances - the Court dismissed the possibility of a miscarriage of justice under this head.

The appeal was dismissed.

Propensity evidence – prior consistent statements – historical evidence

In *R v Stewart* [2008] NZCA 429, the appellant appealed against conviction for historic sexual offending. The Court considered the issues of propensity evidence and prior consistent statements under the Evidence Act 2006.

The appellant argued that the Judge erred in admitting, and directing the jury as to how they might use, evidence from two friends of the complainant as to lesser sexual

offending against them. The Court discussed a seven step approach suggested by counsel. It added that a specific direction on propensity evidence is required to explain to the jury what relevant evidence has been called, to what it is directed and how the jury may use it. Those ideas were captured within the seven steps, but judges should not be bound to a specific formula irrespective of the particular circumstances of the case. On the contrary, it is essential that the Judge be given sufficient flexibility to tailor the direction to the needs of the particular case. In the case at hand, the direction had some defects, but there was no miscarriage of justice overall.

It was also argued that the Judge should not have permitted prosecution to present prior out of court statements made by witnesses in re-examination, because the statements related to counts in which there was no allegation of recent invention. The Court found that it was not feasible for the defence to fence off the counts in relation to which there was no claim of recent invention from those that were.

Finally, the appellant submitted that the Judge should have given the jury a stronger warning as to the danger of relying on historical evidence. The Court found the warning could have been stronger but, taken as a whole, there was no imbalance in directions.

The appeal was dismissed.

Secondary party liability – s 66(1) Crimes Act 1961

In *R v Wilson* [2008] NZCA 409, the appellant challenged his convictions under s 229A of the Crimes Act 1961 on the basis that the trial Judge misdirected the jury on the mental elements required of a secondary party under s 66(1) of the Crimes Act 1961.

Mr Wilson had stood trial on an indictment containing 15 counts alleging that he had, with intent to defraud, obtained false New Zealand passports capable of being used to obtain a privilege. Mr Wilson had bought the falsified passports from Mr Vergis, and then on-sold them. On appeal, Mr Wilson complained that the Judge summing up did not clearly identify the discrete elements to be established for his liability as a secondary, rather than principal, party. In the summing up, the Judge had directed that a person liable under s 66(1) of the Crimes Act must simply have had "intent to defraud."

The Court, following *R v Hunt* [2007] NZCA 179, considered that the Judge's direction was inadequate because it effectively conflated liability as a secondary party with liability as a principal party. The Court held that the Judge should have directed the jury that the Crown had to prove beyond reasonable doubt that Mr Wilson had known that Mr Vergis had intended fraudulently to obtain the passports, and that he had intentionally assisted Mr Vergis to obtain them. The Court emphasised that this did not amount to a formal distinction between "principal" and "secondary" liability in terms of s 66(1). However, if on the facts of a particular case an accused acted in a supporting, rather than primary, role, it is incumbent upon the trial Judge to make a mens rea direction tailored to the particular accused so that the jury is focused on the legal elements necessary to reach a verdict.

Accordingly, the appeal against conviction was allowed and a retrial was ordered.=

Sexual offending – consent direction

In *R v Hayward* [2008] NZCA 256, the Court allowed the appeal, ordering a re-trial because the trial Judge had failed to give an adequate direction on consent in relation to sexual offending charges during his summing up. The defence case was that no sexual offending had ever occurred. The Judge expressed the position to the jury by saying that "if you were to find the acts occurred, there would be no basis for considering that either the complainant had consented or the accused had believed on reasonable grounds or had reasonable grounds to believe that she was consenting." No further direction as to consent was given.

On appeal, the Crown accepted that the Judge had a duty to direct the jury as to all the elements of the offence, and the Crown was required to prove beyond reasonable doubt that there was no consent or honest belief in consent.

The Court also noted that the Judge did not give a direction under s 122 of the Evidence Act 2006 as to historical cases, and that such a direction might be appropriate at the re-trial.

Wilfully attempting to pervert course of justice – lies direction – failure to cross-examine

In *R v Dewar* [2008] NZCA 344, the Court dismissed the appeal of Mr Dewar, who was convicted on four counts of wilfully attempting to obstruct, pervert or defeat the course of justice under s 117(e) of the Crimes Act 1961, in his investigation as a senior-serving police officer of Louise Nicholas' allegations of historic sexual violation by various police officers. Mr Dewar was sentenced to four and a half years imprisonment on those four counts.

Mr Dewar appealed against his convictions and alleged a miscarriage of justice on two grounds: first, that the trial Judge wrongly gave the jury a lies direction in relation to his evidence; and secondly, that the Crown prosecutor failed to cross-examine him in relation to evidence which was at odds with evidence given by a Crown witness. Mr Dewar further submitted that the sentence imposed was manifestly excessive.

The Court rejected the lies direction and cross-examination appeal grounds. The lies direction was triggered by the prosecutor's closing submission that Mr Dewar had deliberately lied in his representations to two journalists. The Court considered that the Judge's lies direction was "entirely orthodox and unobjectionable" and could not be criticised at common law or under s 124 of the Evidence Act 2006 (which did not apply at the time of trial). The Judge had not inappropriately blurred the issues of possible inconsistencies and possible lies in his summing up, so that the jury may have confused the two.

The contention in relation to cross-examination was that the Crown prosecutor inappropriately failed to cross-examine Mr Dewar on evidence given by Ms X, a key

Crown witness. Ms X's evidence that she had engaged in group sex with Mr Dewar and Mr Shipton was used by the Crown to highlight Mr Dewar's motive and intent for not investigating Mrs Nicholas' allegations involving Mr Shipton, namely that of "protecting his mates". Mr Dewar's evidence in chief emphatically denied having met Ms X. Notwithstanding the rule in *Browne v Dunn* (1893) 6 R 57 (HL), that a witness should be cross-examined if a court is to be asked to disbelieve them, the Court considered that the rule was not absolute and need not be "slavishly followed" where a witness is aware that their evidence is not accepted on a particular point.

The Court upheld the sentence of four and a half years imprisonment as being well inside an appropriate range. Counsel for Mr Dewar had maintained that the starting point of six years was too high given the nature of the offending and that the Judge had given inappropriate weight to Mrs Nicholas' victim impact statement. The Court considered that "it is hard to imagine a more serious s 117 case in New Zealand" and that the offending had struck at the heart of the administration of justice, with Mr Dewar exploting Mrs Nicholas' vulnerability for his own ends.

Baragwanath J dissented in part, contending that a conviction was wrongly entered on Count 3, on the basis that the hearsay evidence offered by Mr Dewar at the various trials of another police officer was not in fact inadmissible. However, Baragwanath J agreed that quashing the conviction on Count 3 would not affect the sentence.

Elements of Offences

Arson – meaning of "no interest" in damaged property – s 267 Crimes Act 1961

In *R v Wilson* [2008] NZCA 505, the Court considered the elements of a charge of arson under s 267(1)(b) of the Crimes Act 1961. That section provides that a person commits arson where he or she "intentionally or recklessly… damages by fire… any immovable property… in which that person has no interest". At issue was whether a tenant can be said to have "no interest" in the tenanted property.

In answering this question, the Court observed that while the Crimes Act does not define an "interest" in property, it is well established in land law that a tenancy is an interest in land. The Court then turned to consider the legislative history of s 267. It found that this history supported a literal reading of the provision. A tenant has, for the purposes of s 267, an interest in the property.

The effect of the Court's judgment is that a tenant can only recklessly be guilty of arson where he or she knew or ought to have known that danger to life was likely to ensue (s 267(1)(a)).

Mr Wilson's appeal was allowed and his conviction for arson was quashed.

Burglary – authority to enter premises – s 231 Crimes Act 1961

In *R v Keen* [2008] NZCA 36, the Court considered whether the trial Judge had misdirected the jury on the law to be applied to the count of aggravated burglary (s

231 Crimes Act 1961), in response to a jury question. The appellant appealed against conviction on the basis that the Judge's direction to the jury was wrong in law and made the conviction inevitable.

The Judge had left the fact of authority to enter and its extent to the jury, as well as the determination as to whether or not the accused intended to commit a crime on the property when he entered it. The Judge answered a jury question in the affirmative, as to whether implied authority is lost where there is an intention to commit a crime.

Counsel for Mr Keen submitted that the Judge failed to direct the jury adequately on the question of whether or not the appellant had authority to enter the premises. He argued that because the appellant believed he was on the premises pursuant to authority to enter granted by his relatives, a necessary element of the burglary offence was absent.

The Court dismissed the appeal, holding that it was clear that the authority was exceeded in this case and that the Judge's answer to the jury question was correct. The authority could only extend to matters relating to the appellant's property, relatives or dog that were allegedly on the premises. The authority did not extend to kicking open the door nor entering to commit a crime. The Court considered that it may be of assistance to the jury where the issue of authority to go onto a property arises that the Judge formulates the questions for the jury in these steps: first, what is the authority asserted; secondly, what is the extent of the authority; and thirdly, was it exceeded.

Defences – provocation

In *R v Fraser* [2008] NZCA 68, Mr Fraser was convicted of murdering his ex-partner's boyfriend, and claimed on appeal that the partial defence of provocation should have been left to the jury because there was an evidential basis for it.

Early on Christmas Day 2005, Mr Fraser went to his ex-partner's address, where he found her in bed with her boyfriend. An altercation between Mr Fraser and the boyfriend ensued. Mr Fraser then left the property, not returning until later that afternoon, when he arrived with a concealed shotgun, entered the house, and shot his ex-partner's boyfriend. The High Court Judge ruled that provocation was not to be left to the jury because there was no "credible narrative of causative provocation" in terms of the test enunciated in *R v Matoka* [1987] 1 NZLR 340 (CA) and *R v Timoti* [2005] NZSC 37. Mr Fraser complained that the Judge went beyond his judicial function when he made an assessment of the credibility of the narrative. He argued that the trial Judge should only enquire as to whether there was evidence of provocation, and leave the credibility assessment to the jury.

The Court considered that the legal assessment of whether there was a "credible narrative" necessarily entails some evaluation of fact, which the trial Judge must undertake before presenting the defence to the jury. In cases where an accused's conduct is extreme in its brutality, and there is robust evidence negating the plausibility of a chain of causative provocation, a trial Judge is correct not to put

provocation to the jury. However, this is not to be done lightly: *R v Erutoe* [1990] 2 NZLR 28 (CA).

The appeal was dismissed.

Manufacturing methamphetamine – Misuse of Drugs Act 1975

R v Rua [2008] NZCA 38 was an appeal against conviction in relation to charges of manufacturing methamphetamine under the Misuse of Drugs Act 1975. At trial, the Crown had used evidence of methamphetamine found by the police. On appeal, Mr Rua complained that the methamphetamine found by the police was not in a usable form, and asserted that his conviction was unreasonable, since "manufacture" in the context of s 6 of the Misuse of Drugs Act means to "work into a form of a drug which is useable."

Noting conflicting High Court authorities on this point, the Court considered that to gloss "manufacture" with a useability requirement would unjustifiably limit its scope, and be inimical to the scheme of the Misuse of Drugs Act which is intended to prohibit the creation of controlled substances, not simply the final production of them. The Court considered that once the composition of a chemical substance was altered to yield a prohibited substance, manufacturing was complete. Thus, manufacture under the Misuse of Drugs Act means creation of a prohibited substance, not generation of a useable product.

The appeal was dismissed.

Money laundering – conspiracy – purpose of concealment – s 12B Misuse of Drugs Act 1975

The appellants in *R v Rolston* [2008] NZCA 431 were convicted of a number of offences that centred around a conspiracy to supply methamphetamine, including a number of money laundering charges as well as a number of drug charges that were independent of the conspiracy.

The appellants argued that the convictions on the counts referable to the alleged methamphetamine selling conspiracy were unreasonable. The basis for this ground of appeal was that, while it was accepted there was a conspiracy to sell drugs, the appellants claimed that the drug involved was cannabis not methamphetamine. The appellants relied on evidence of cannabis possession and ambiguous text messages and conversations to substantiate this. The Court found that while there was a possibility that the substance was cannabis, this possibility had been put to the jury at trial, along with the Crown case that it was methamphetamine and it was therefore for the jury to determine which substance had been involved. The evidence provided a sufficient basis for a reasonable jury to accept that the Crown had proved beyond reasonable doubt that the substance was methamphetamine.

A further ground of appeal related to a pre-trial ruling which held that a video statement by one of the co-accused was admissible, provided that the jury was directed that the statement was admissible against that accused only. It was argued

that the statement should have been edited to remove the prejudicial comments against the other co-accused, as directions given to juries to disregard inadmissible evidence were ineffective. A number of academic studies and articles, as well as comments in case law both in New Zealand and in other jurisdiction, were provided to the Court to support this argument. However the Court found that this was not sufficient to overturn the recent clear statement by a Full Court in *R v Fenton* CA223/00, CA299/00 14 September 2000 regarding the effectiveness of jury directions. The Court found that, while there is jurisdiction to edit statements, there was no need to depart from the Judge's assessment of the prejudicial effect of the statement and exercise of the discretion not to edit the statement.

The money laundering charges related to breaches of s 12B of the Misuse of Drugs Act 1975. An issue arose as to the correct interpretation of the requirement under s 12B(4)(c) that a person deals with property "for the purpose of concealing that property". The question was whether mere concealment of the property itself was enough, or whether the concealment must be of the property's illegal origins. The case law on this point was divided. After examining the authorities and legislative history of the provision, the Court found that the intention of Parliament was not to criminalise all dealing with criminal proceeds: it is only if the purpose of the dealing is to conceal the property's illegal origins that the requirement will be satisfied. The Judge's directions did not provide the jury with a correct statement of the element of the offence relating to the purpose of concealment. Thus, the convictions relating to this count were quashed, and acquittals were entered.

In all other respects, the appeal was dismissed.

The Supreme Court has refused leave to appeal.

Rape – absence of consent – indecent act with intent to offend – s 126 Crimes Act 1961

The appellant in *R v Annas* [2008] NZCA 534 had been convicted by a jury on one count of rape and three counts of performing an indecent act with intent to offend under s 126 of the Crimes Act 1961. The jury either acquitted or failed to reach a unanimous verdict on 14 other counts. The Court allowed the appeal, holding that the rape conviction could not be justified on the evidence, and the appellant was discharged on that count. The indecent act convictions were set aside on the basis of a misdirection by the trial Judge and a new trial was directed.

The rape charge related to a girl who was a family friend of the appellant. The appellant was an amateur photographer, who groomed the complainant from a young age by taking pictures of her in various states of undress. It was common ground that the pair had sexual intercourse. The jury acquitted the appellant on a specific charge relating to the first act of intercourse, when the complainant was around 13 or 14 years of age, but convicted on the representative charge of rape over the following years, until the complainant put a stop to it when she was aged 17.

The Court agreed with the appellant's submission that the prosecution had failed to prove there was an absence of consent. Although it was clear that the consent was

manufactured, to assimilate grooming and seduction of a girl with absence of consent would be to change what has to date been the approach of the law.

The indecent act convictions related to photographs the appellant took of a second complainant naked, when she was a child, and looking up her skirt, when she was a teenager. The Judge wrongly injected an objective element into the mens rea, directing that the jury should acquit if it considered it possible that the accused honestly and reasonably believed that this conduct did not have the potential to insult or cause offence. The Court found that later correct responses to the jury's questions did not remedy the error and ordered a retrial on the relevant charges.

Two further issues were raised in relation to the indecent act convictions. The first was a question as to the relevance of the mother giving consent to the photographs being taken. The Court said that while a mother's consent cannot make an indecent act decent, the mother's consent goes to both the objective question of whether the act was in fact indecent and to whether the jury should find criminal intent. Secondly, the Court endorsed the Judge's formulation of the requisite intent as being an intention "to insult or offend the complainant's dignity, her right to modesty or privacy."

Evidence

Admissibility of evidence – co-conspirators exception to hearsay rule – multiple counts – s 12A Evidence Act 2006

In *R v Messenger* [2008] NZCA 13, the appeal related to the High Court Judge's ruling that the co-conspirators exception to the hearsay rule applied. Where the co-conspirators exception applies, statements made or acts done by one or more alleged offenders in the absence of the accused but in furtherance of the common purpose are admissible against the accused and, in the case of statements, as evidence of their truth.

The Court pointed out that s 12A of the Evidence Act 2006 preserves the common law relating to the admissibility of statements of co-conspirators or persons involved in joint enterprises. Further, s 27 of the Evidence Act, which states that evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant but not against a co-defendant in the proceeding, is expressly made subject to s 12A.

The Court stated that before the acts or declarations of one alleged conspirator can be admitted as evidence against any accused, there must be reasonable evidence of the following three elements: that there was a conspiracy or joint enterprise of the type alleged; that the accused was a member of that conspiracy or joint enterprise; and that the statements were made and/or the acts were done were in furtherance of the conspiracy or joint enterprise. The evidence need not be such that it would sustain a verdict of guilty. It must merely reach a stage where the Judge considers it safe to admit the evidence of a co-conspirator.

For the first element, there must be reasonable evidence of a common intention to commit some offence. There is no need to show every detail of the conspiracy or joint enterprise. There must, however, be a sufficient link between the alleged common enterprise or conspiracy and the counts in the indictment. The second element cannot be made out by reference to what the conspirators have said about the accused in his or her absence. It requires independent evidence, which shows at least the essential matters which constitute the conspiracy or joint enterprise and also, on the facts as known to the accused, that what the enterprise or conspiracy has agreed to do is unlawful. However, the Court said that it is not necessary for the accused to know the identity of all parties to the conspiracy or joint enterprise as long as the individual is aware that the enterprise goes beyond their agreement with one other person and knows the general ambit of the conspiracy. The third element means that statements and acts done after the accused has ceased to be a member of the conspiracy or joint enterprise are not admissible against him or her under the co-conspirators rule. However, the Court referred to the theory of ratification which might allow a statement made by a co-conspirator prior to joining the conspiracy to be admitted to prove the origin, character and object of the conspiracy but not the person's participation in the conspiracy: *R v Mahutoto* [2001] 2 NZLR 115 (HC).

The appellant had also argued that the question of whether there was a common enterprise ought to have been considered separately in relation to each count. The Court dismissed this argument, stating that the substantive charges arose directly out of the common enterprise and therefore that they met the test of sufficient connection. The Court also found that there was sufficient independent evidence linking the accused to the common enterprise and that the Crown had shown that the conspiracy was of the kind alleged.

The appeal was dismissed.

Admissibility of evidence – complainant's previous sexual experience – s 44 Evidence Act 2006

In *R v M* [2008] NZCA 261, the Court held that there was a miscarriage of justice because evidence of the complainant's previous sexual experience had not been admitted. The appellant had been convicted of three counts of indecently assaulting the 11 year old complainant and one count of inducing her to perform an indecent act upon him.

The transcript of two interviews with the complainant was made available to defence counsel shortly before the trial. It contained hints that the complainant had previous sexual experience with persons other than the appellant and had made other complaints. The Court allowed fresh evidence to be adduced from which it appeared that within the space of a few months the complainant had made allegations of sexual abuse involving four other men.

The Court held that the evidence of the complainant's previous complaints or questions relating to them were of such direct relevance to the facts in issue that it would be contrary to the interests of justice to exclude the evidence or questions. The jury should have been aware that the complainant's knowledge of sexual matters

could not be accounted for solely on the basis of the alleged sexual activity with the appellant. The number of allegations, and the way in which they were made, suggested that it was possible that the complainant had fabricated the complaint, or had consciously or unconsciously transferred attribution.

The appeal was allowed, the convictions quashed and a retrial ordered.

Admissibility of evidence – lawfulness of searches – challenge to a forfeiture order

In *R v Cheng* [2008] NZCA 253, the Court considered a forfeiture order made under the Proceeds of Crime Act 1991. The appellant was charged with possessing methamphetamine for supply and absconded from New Zealand before he could be arrested. The police obtained a search warrant for his safe deposit box and found it contained more than $400,000 in cash. The Solicitor-General applied for an order forfeiting certain of the appellant's assets in New Zealand. He contended these assets were the proceeds of criminal activities. The Proceeds of Crimes Act provides a forfeiture application may be pursued even where an accused has absconded; in such circumstances the hearing proceeds "as if it were a criminal trial but without the accused".

The High Court was satisfied beyond reasonable doubt that the appellant had been dealing methamphetamine and ordered the forfeiture of the cash and of a Porsche car. The appellant appealed on the basis that the various searches which led to the discovery of the evidence of drug dealing were unlawful and unreasonable, with the consequence that the evidence was inadmissible.

The Court considered the various searches contended by the appellant to be unlawful. The first search was a search of the appellant's person by a police officer. The appellant submitted the police officer did not have reasonable grounds for believing the appellant was in possession of a controlled drug or had committed an offence with respect to a controlled drug. The Court surveyed the evidence which the police had at the time of the search: a fingerprint of the appellant's had been found at the house of a known drug dealer; there had been a complaint that the appellant's girlfriend was being supplied with drugs by him; and the appellant appeared with glazed eyes and was unsteady on his feet. The Court had no doubt this information, taken together, was sufficient to justify the constable's search of the appellant.

The second search was of the appellant's car. Following his search of the appellant, the constable asked him to turn out his pockets. They contained a knife and a Porsche car key. The constable became suspicious because the appellant had earlier told him he did not have a car on the premises. The constable went into the underground car park and "beeped" the car key to identify the appellant's vehicle. The appellant submitted the constable had unlawfully taken the car key and this invalidated the subsequent search. The Court accepted the taking of the key was wrongful, but held there was no causal connection between this taking and the later search. The appellant's car could easily have been located without the key (the constable already knew from the key it was a Porsche car), and entry to it could lawfully have been achieved by force. There was no need to apply the balancing exercise in *R v Williams* [2007] 3 NZLR 207 (CA) as the search of the car was not unlawful.

The appeal was dismissed.

Admissibility of evidence obtained by interception devices – refreshing a witness' memory – s 312L(a) Crimes Act 1961

In *R v Foreman* [2008] NZCA 55, the Court considered pre-trial appeals concerning the admissibility of evidence obtained by interception devices, and a change of venue ruling in the High Court.

Mr Foreman was charged with murdering Mr Nicholas, a Hawkes Bay farmer, and with procuring a named person to wilfully attempt to pervert the course of justice by making a false statement to the police.

Two issues arose pre-trial. First, the accused applied to have the trial moved from the High Court in Napier to the High Court at Wellington. Secondly, the accused sought a ruling that certain evidence which the Crown intended to rely on at trial, obtained pursuant to an interception warrant, was inadmissible. The Judge dismissed both applications. Mr Foreman appealed against both rulings.

The Court dismissed the appeal against the change of venue application. The starting point was that a jury should be drawn from the community in which the alleged offence occurred "so far as practicable" (s 5(5) Juries Act 1981). A further principle was that either party is entitled to seek a change of venue, which may be granted if the Court regards it as "expedient to the ends of justice" (s 322(1) Crimes Act 1961). The Court further held that a party seeking a change of venue must demonstrate that there is a "real risk" that a fair and impartial jury may not be possible at the place where an accused is committed for trial.

Counsel for Mr Foreman argued that the Judge had made an error of principle by requiring a very distinct degree of risk before a trial will be moved. The Court rejected an overly semantic formulation, preferring a context-sensitive evaluation of how relevant considerations bear on the fairness of a trial at a particular venue.

The change of venue application rested on the extensive media coverage of Mr Nicholas' murder and Mr Foreman's delayed apprehension, and affidavit evidence indicating predetermination in the Hawkes Bay community. The Court considered that the Judge weighed all the relevant factors and did not err in principle by putting the "change of venue" bar too high. While it agreed with the Judge that the affidavits were "more troubling" than the media coverage, the Court considered that a certain degree of notoriety attendant on the trial was inevitable.

The evidential issue was whether s 312L of the Crimes Act 1961 permitted monitors' logs from an interception period during the police investigation of Mr Foreman to be admitted. At the conclusion of the interception period, an instruction to destroy the recordings was issued, in accordance with s 312J(1) of the Act. While the recordings were destroyed in accordance with s 312J(1), the monitors' logs and written transcripts were not. The Crown intended to call the monitors to give evidence of the intercepted calls they had heard and that the monitors would refresh their memory

with reference to their logs. Counsel for the accused objected to this course, arguing that the logs were not "full particulars of a private communication" within the meaning of s 312L(a), and could not be received as evidence as a result.

The first limb of s 312L(a) obliges the Crown to provide a transcript of the private communications which it intends to adduce in the form of a recording. Because the recordings were destroyed, that could not be done in this case. The second limb of s 312L(a) concerns "a written statement setting forth the full particulars" of the communication the Crown intends to adduce by oral evidence.

The Judge ruled the evidence admissible, holding that a full transcript need not be provided in order to satisfy s 312L(a). Moreover, he contended that the extracts cited from the logs were "full particulars". He also noted that the adequacy of the monitors' logs and compliance with the notice requirement were conceptually distinct, and that an isolated passage could be excluded if it led to an unfairly prejudicial effect under s 8(1) of the Evidence Act 2006.

On appeal, the majority of the Court (John Hansen and Priestley JJ) reversed the Judge's ruling, holding that the monitors' logs and transcripts were inadmissible and that the relevant witnesses would not be entitled to refresh their memories from those sources. They considered that s 312L contained an express prohibition on a Court receiving evidence of private communications unless there had been compliance with the section. They concluded that the mandatory requirement to give a "written statement setting forth the full particulars of the private communication" did not extend to selected extracts of the illegally retained logs; further, they argued that specific portions of the logs would not have been what Parliament envisaged in s 312L nor that the Crown's intention to call monitors to refresh their memories from selected portions of the log would have fallen within the rubric of oral evidence about a private communication. The majority considered that the logs were never intended to be a record of the full particulars of the intercepted conversation, but were an "adjunct" to the recording process. Moreover, they regarded that s 312L should be interpreted in a way that is consistent with the right of citizens to be free of unlawful intrusion and surveillance.

Hammond J dissented on the evidence point, upholding the admissibility of the monitors' logs at trial because adequate particulars were given for the purposes of s 312L(a). He surveyed the common law principle relating to refreshing memory: that witnesses are free to use whatever means they choose to refresh their memories prior to trial, although the means used can affect the weight given to their evidence. Further, s 90(5) of the Evidence Act 2006 provided that a witness may consult a document made or adopted at a time when his or her memory was fresh. Hammond J rejected the assertion of counsel for the accused that the words "full particulars" mean the exact underlying conversation. The second limb of s 312L(a) was construed as recognising the reality that there may not be a recording available and that oral evidence may be given provided that adequate particulars are offered.

Admissibility of evidence – opinion evidence – proviso to s 385(1) Crimes Act 1961

In *R v Matenga* [2008] NZCA 260, a medical expert had given evidence at trial that it would be "extremely rare" for consensual intercourse to occasion an injury of the kind suffered by the complainant. The Crown accepted that this opinion should not have been ventured and the appellant argued that a miscarriage of justice had occurred as a result.

Consent had been the crucial issue at trial, the appellant's defence being that the complainant consented to the sexual contact, or that he reasonably believed that she had. On appeal, he sought to rely on an earlier decision of the Court where the appeal had been allowed on the basis of similar inadmissible opinion evidence which the Crown accepted went beyond what doctors experienced in the field regard as permissible: *R v G* [2008] NZCA 2.

However, the Crown submitted that the case could be distinguished in that the evidence in the present case had not occasioned a risk of a miscarriage of justice given the evidence as a whole. The Crown also drew a distinction between proof that the complainant did not consent on the one hand, and proof that the appellant did not hold a reasonable belief in consent on the other. With respect to the former, the Crown said that the case against the appellant was overwhelming. In terms of the latter, the Crown argued that the inadmissible evidence had no logical bearing. Whether the appellant was shown not to have an honest belief in consent must have depended upon whether the complainant's account was accepted. It obviously was, and the appellant's version rejected, with the result that the assertion of a reasonable belief in consent immediately fell away.

The Court accepted the Crown's submission and applied the proviso to s 385(1) of the Crimes Act 1961, being convinced that the wrongful admission of the evidence was not such as to undermine the integrity of the trial or to have potentially influenced the verdict. The Crown case in support of absence of consent was overwhelming. All of the contextual circumstances were inconsistent with consensual activity and the appellant's description of the sexual encounter inherently implausible. In this regard the Court's earlier decision was clearly distinguishable, the evidence in that case being far more finely balanced and the inadmissible evidence providing direct support for the Crown case. The Court had no doubt that the jury would still have found an absence of consent, even without the inadmissible evidence. The Court also agreed that the inadmissible evidence was less relevant to disproving an honest belief in consent.

Being satisfied that no substantial miscarriage of justice had actually occurred, the appeal was dismissed.

The Supreme Court has granted leave to appeal.

Admissibility of evidence – police video interview - rights of children under Part 4 Children, Young Persons, and their Families Act 1989 – entitlement to free legal advice under Police Detention Legal Assistance Scheme - role of nominated person

In *R v Z (CA604/07)* [2008] 3 NZLR 342, the Court considered the admissibility of a video interview and video reconstruction involving a 14 year old accused, in relation to the entitlement to free legal advice. Z faced a charge of murder after the death of a man in a group attack in a park. At first instance, a High Court Judge ruled the interview and reconstruction inadmissible on the ground that the appellant had not truly appreciated the jeopardy he faced when he waived his right to counsel. An appeal against that decision was allowed, but the Court did not address the issue of entitlement to free legal advice.

That issue came before another High Court Judge who again ruled the interview and reconstruction inadmissible. The Judge concluded that there was an obligation under s 215 of the Children Young Persons and their Families Act 1989 ("CYPFA") to explain the entitlement to free legal advice under the Police Detention Legal Assistance Scheme ("PDLA").

On appeal, the Court did not uphold that finding as it would involve overruling *R v DH (CA215/02)* CA215/02 18 July 2002. It would also impose a retrospective requirement on police to give advice on the PDLA and lead to the automatic exclusion of any statement where that advice had not been given, subject to ss 223 and 224 of the CYPFA. Given that Z's police interview took place before the application date of the relevant Chief Justice's Practice Note [2007] 3 NZLR 297, there was no obligation to explain the entitlement to free legal advice unless the test set out in *R v Alo* [2008] 1 NZLR 168 (CA) was met.

The Court was unanimous in holding that Z did not fully understand his right to counsel: he appeared to think that lawyers were there only to help in court, and the role a lawyer could play during a police interview was not explained. As there was a failure to comply with the explanations required by s 215 of the CYPFA, absent reasonable compliance under s 224 or a spontaneous utterance under s 223 (inapplicable in this case), the statement was inadmissible under s 221(2) of the CYPFA. It was presumed that inadmissibility under s 221(2) of the CYPFA would not be subject to the balancing exercise contained in s 30(6) of the Evidence Act 2006, although there was not full argument on this point.

The Court was also unanimous in holding that the interview became oppressive. Although the tone of the interview was calm and measured, there were some persistent and repetitious points as well as some instances of emotional blackmail. The constable also gave his opinion as to whether the co-accused were telling the truth. All these aspects were held to be inappropriate.

The majority of the Court (Glazebrook and Hammond JJ) also pointed out that, under s 27 of the Evidence Act, statements of co-accused are not admissible against another accused. Therefore, there may be questions as to the fairness of putting a co-accused's statement to an accused (especially where that accused is an unrepresented child or young person) without explaining that such statements cannot be used in evidence against him or her (although the co-accused could choose to give evidence at trial). This point was, however, left open. Writing separately, Ellen France J considered it was likely to be unduly complex and unnecessary to require the officer to explain such matters.

The majority also held that recordings of statements between Z and his nominated person during a break in the interview were inadmissible because of s 226 of the CYPFA. (Such statements had been relied on in an earlier appeal to the Court of Appeal in relation to the admissibility of Z's video interview.) It is insufficient to tell the suspect and the nominated person that the video is to be left running as this may be easily forgotten in times of stress. Ellen France J considered it possible that there may be a difference between admissibility to prove a trial issue as opposed to satisfying the Court of Z's understanding in a pre-trial context.

This case is also notable for the majority's comment that more ought to be done to ensure that the duty to offer special protection to children and young persons under s 208(h) of the CYPFA is fulfilled. This may mean trying to ensure that a child or young person accused of a serious crime takes legal advice. The majority referred to a Canadian brochure given to parents and guardians, counselling them to get legal advice for their children.

Admissibility of evidence – prior consistent statements – res gestae – s 35 Evidence Act 2006

In *R v Barlien* (2008) 23 CRNZ 1020, the appellant challenged his convictions for sexual offending against three girls. The main issue was whether the convictions should be set aside because evidence of two of the girls' previous consistent statements just after the offending should not have been led.

The Court accepted that the evidence of what the complainants said would have been admissible at common law as contextual evidence to explain the actions of both the complainants and the adults. It also would have been admissible as statements forming part of the *res gestae*. The complaints could be seen as spontaneous statements made during the drama of events. However, previous consistent statements are now inadmissible unless s 35(2) or (3) of the Evidence Act 2006 applies. In this case those exceptions did not apply. Therefore, although the evidence was relevant and would have been admissible at common law, it was now inadmissible.

The Court rejected an argument that the actual words of the complaint were so inextricably linked with the complainant's conduct that the statements must be regarded as conduct. The Court distinguished *R v Turner* [2007] NZCA 427, which held that evidence that the complainant had told her friend of the alleged rape amounted to "conduct" and not recent complaint evidence. The Court noted that in *Turner* it was the fact of the complaint that was led rather than the actual words of the complaint. The Court left open whether *Turner* would be decided in a similar manner under the Evidence Act.

However, the Court concluded that there had been no substantial miscarriage of justice as the essential allegations would have been before the jury in any event. This is because the complainant's mother immediately confronted the appellant about the allegations. The appellant's statements in response to that confrontation were clearly admissible under s 27 of the Evidence Act. Since his reaction was inextricably tied to the allegations, the complaints put to the appellant would also be admissible. The

Court pointed out that the rule in s 35 relating to previous consistent statements does not apply to the statements of defendants offered by the prosecution.

The appeal was dismissed accordingly.

In a postscript, the Court discussed what it termed the "illogical distinction" between conduct and statements in the Evidence Act. It acknowledged that the concern behind s 35 was to prevent the Court being inundated with repetitive material. However, s 8(1)(b) gives the Court control over this. The Court also noted that the requirements of s 35 may deprive the jury of relevant material. The admissibility of relevant evidence in the form of a previous consistent statement now depends on how the accused decides to run his or her case, for example whether a claim of recent invention is made. Where a complaint is not made immediately, s 35 does not prevent the jury from surmising as to why the complaint was delayed even where defence counsel does not raise the issue of recent invention. The Court also commented that the common law *res gestae* exception seemed to have been mistakenly excluded from s 35 of the Evidence Act. The Court referred these questions to the Ministry of Justice and the Law Commission.

Admissibility of evidence – passwords – right to silence – privilege against self-incrimination – ss 29, 30 and 65 Evidence Act 2006 – s 198B Summary Proceedings Act 1957

In *R v K* [2008] NZCA 561, the Court considered an appeal against a pre-trial ruling given by a District Court Judge, relating to the admissibility of evidence obtained following disclosure by the appellant of a password. The appellant faced charges under the Films, Videos and Publications Classification Act 1993 ("FVPCA") of making and possessing objectionable publications.

The Court held that s 29 of the Evidence Act 2006 did not assist the appellant because the password had been voluntarily disclosed as a result of non-oppressive, albeit persistent, police questioning. In any event, the Court questioned whether s 29 by itself could be of assistance given it was the evidence subsequently obtained that was sought to be excluded, rather than the password itself.

Turning to s 30 of the Evidence Act and the question of whether the evidence had been "improperly obtained", the Court emphasised that the right to silence is not absolute. Although the officers could not pressure an accused so as to overbear his or her will, they were not obliged to accept an initial refusal to disclose and cease questioning. The Court was not convinced that the privilege against self-incrimination was necessarily engaged in the circumstances and, even if it were, it considered that it had been waived in accordance with s 65 of the Evidence Act. In the result, the Court concluded that the evidence had been properly obtained.

Although it was not necessary to the outcome of the appeal, the Court also considered whether the officers could have required disclosure under s 198B of the Summary Proceedings Act 1957. The Court considered that the need for s 198B powers in cases such as this is obvious. However, there is real doubt as to whether the powers in s

198B apply in respect of warrants issued under s 109 of the FVPCA. The Court called upon Parliament to clarify the position.

The appeal was dismissed.

Admissibility of evidence – veracity of complainants – trial counsel error - joinder

The appellant in *R v Davidson* [2008] NZCA 410 had been tried by jury in respect of charges of sexual violation of two young girls. Initially, there were two separate indictments, one in respect of each complainant. The Judge granted leave at a pre-trial stage for the Crown to file an amended indictment that consolidated the charges in a single indictment. The Judge considered that the determinative question was whether the evidence of each complainant would be admissible at the trial of the appellant in respect of alleged offending against the other complainant. He concluded that, although there were some differences, the two sets of allegations against the accused shared important similarities and that the assessment by the Court of the veracity of the two complainants would be essential in circumstances where their veracity would be under attack.

Mr Davidson appealed. First, he appealed against the Judge's ruling that the two indictments could be merged. The Court considered that to the extent that the evidence of each complainant would tend to corroborate the account given by the other complainant and the complainants' veracity would be challenged, the evidence of each girl was admissible as propensity evidence under s 43 of the Evidence Act 2006. The Court held that any risk of prejudice was curable by judicial direction.

Secondly, Mr Davidson complained that his trial counsel failed to advise Mr Davidson against giving evidence of his prior convictions and on the counselling that he had since received. However, the Court considered that Mr Davidson had been adequately advised, and was well aware of his counsel's view of the prejudice that may arise from Mr Davidson's election to give evidence on previous convictions.

Thirdly, Mr Davidson complained that the Judge allowed the jury to see a video of the elder complainant in which she alleged offending by the appellant, but not an earlier video in which she had made no allegations. The Judge had ruled that it was unnecessary to play the earlier video, and that under s 8 of the Evidence Act, the trial process would be distorted if it were played. On appeal, Mr Davidson complained that the earlier video in which the complainant denied any offending by Mr Davidson, as a foil to the later video in which she alleged offending, was relevant to the complainant's veracity. The Court considered whether the Judge had been correct to address the issue of admissibility under s 37 of the Evidence Act (the veracity rules), or whether it should have been addressed under s 96 of the Act (cross-examination on previous statements of witnesses). The Court noted that s 96 imposes procedural requirements on a party seeking to rely on previous inconsistent statements, but it does not govern their admissibility. The Judge had therefore erred in considering the admissibility of the tape under the veracity rules in s 37 because the defence sought to rely on the earlier tape primarily as evidence that the offending had not taken place, rather than as an earlier inconsistent statement. The Court considered that the Judge was wrong to conclude that the earlier video would distort the trial process, and that

since it was highly probative its not being admitted meant that the jury was unable properly to assess the credibility of the complainant. Finally under this ground of appeal, the Court accepted that the jury should not have been directed by the Judge that the earlier video was not evidence of the truth of its contents, but rather that the defence case was that the defendant's statement in the earlier video was true. The Court concluded that if the video evidence had been admitted, the jury might reasonably have come to a different verdict and therefore that there was a miscarriage of justice.

The appeal was allowed, the appellant's convictions were quashed, and a re-trial was ordered.

Admissibility of evidential breath-test result – ss 22 and 23 New Zealand Bill of Rights Act 1990 – s 114 Land Transport Act 1998

In *R v Casey* [2008] NZCA 335, Mr Casey was charged with driving with excess breath alcohol under s 56 of the Land Transport Act 1998, and he elected trial by jury. Mr Casey had been stopped by a police sergeant who had obtained the keys to Mr Casey's vehicle. The sergeant had other pressing duties to attend to, and told Mr Casey to remain where he was and await another police officer to carry out breath test procedures. The other officer soon arrived and took a breath test, following which Mr Casey accompanied the officer to the station for an evidential breath test, which he failed.

The District Court Judge dismissed a challenge to the admissibility at trial of the evidential breath test print-out. On appeal, Mr Casey claimed that the roadside detention breached s 22 of the New Zealand Bill of Rights Act 1990; that there was no qualifying breath test as defined by s 2 of the Land Transport Act and therefore that the officer's requirement that Mr Casey accompany him to the station for an evidential test was unlawful; and that he was not availed of his right to consult a lawyer under s 23 of the New Zealand Bill of Rights Act.

In respect of the initial roadside detention, the Court considered that the police officer had complied with his statutory obligations to Mr Casey under s 114 of the Land Transport Act 1998, and that there was no breach of s 22 of the New Zealand Bill of Rights Act because the temporary restraint of the appellant was not a "detention": see *Police v Smith v Herewini* [1994] 2 NZLR 306 (CA). In any event, the restraint in question was neither arbitrary nor unlawful.

In respect of the initial breath test, Mr Casey claimed that there was no evidence that the test had been carried out properly. Mr Casey pointed to gaps in the evidence given by the breath-testing police officer. However, the Court held that since he had failed to challenge the officer's evidence at the pre-trial stage and to cross-examine, this ground of appeal must fail.

Finally, the Court held that there was no breach of Mr Casey's right to consult a lawyer and be informed of that right, since he had been so informed and had simply not sought one. The police officer was under no positive duty to arrange a lawyer for Mr Casey: *R v Alo* [2008] 1 NZLR 168 (CA).

The appeal against the pre-trial ruling was dismissed.

Admissibility of recantation of evidence – miscarriage of justice

R v Toleafoa [2008] NZCA 447 concerned an appeal against conviction brought on the basis that there had been a miscarriage of justice. The miscarriage was said to have arisen because the evidence of a Crown witness at trial was alleged to have been false. She was said to have since recanted from her evidence given at trial, and leave was sought to adduce evidence by way of an affidavit from a private investigator who had interviewed the witness after the trial. A transcript of that interview was an exhibit to the affidavit.

The Court refused leave to adduce the evidence. The legal principles surrounding recantation of evidence after trial were set out by the Court in *R v M* CA135/05 4 July 2006. The Court concluded that it was not possible to evaluate the credibility of the witness's recantation on the basis of a hearsay version which had not only been untested by cross-examination but also unsworn. Furthermore, the jury had been alive to the possibility that the witness was giving false evidence at trial, as the witness had amended her police statement before trial, and that the witness was giving evidence at trial only reluctantly. In addition, the evidence of the witness was not necessarily essential to the Crown case, as other relevant evidence was available. With that context in mind, given that the alleged recantation evidence was not credible, it was considered inappropriate to admit it in support of the appeal. Without the evidence, there was nothing to support the contention that a miscarriage occurred.

The appeal was dismissed.

Breath screening and evidential breath tests – necessity of evidence of compliance with Transport (Breath Tests) Notice (No 2) 1989 – s 64 Land Transport Act 1998

In *R v Aylwin* [2008] NZCA 154, the issue was whether an enforcement officer must give evidence to the trial court that breath screening and evidential breath tests were conducted in the manner set out in the Transport (Breath Tests) Notice (No 2) 1989 ("the Notice"). Mr Aylwin had been charged with driving with excess breath alcohol (s 56(1) of the Land Transport Act 1998), and refusal to accompany an enforcement officer without delay to a place when required to do so (s 59).

The Court held that, after the 2001 amendments to the Land Transport Act, there is no need for the police to prove the manner of administration of the tests. For the failure to accompany charge, the police must, as well as the other elements of the charge, prove only that the breath screening test had been conducted in fact. For the driving with excess breath alcohol charge, the police must prove that the breath screening and evidential breath tests had been conducted in fact, the results of the tests and provide a certificate of compliance for the approved device used.

In 2001, s 64(4) of the Land Transport Act had been widened to exclude a defence not only for errors in the breath screening test but also for errors in the evidential breath

test. This amendment was designed to limit technical legal challenges to the conclusiveness of breath tests. Parliament had removed the defence of error in favour of another safeguard against wrongful conviction: the right of all motorists to elect to undergo a blood test. As a result of the 2001 amendment, there can never be any defence if the manner of operation provided for in the Notice has not been complied with. If there is no possibility of error in result, then there will have been reasonable compliance under s 64(2) of the Land Transport Act. If there might have been an error in the result, s 64(4) provides that this is no defence. The Court held that there is little point in requiring proof of the manner of administering the tests where it can never lead to any defence.

The appeal was dismissed.

An appeal against this decision was dismissed by the Supreme Court.

Co-accused evidence – identification evidence – fresh evidence

In *R v Henry* [2008] NZCA 292, the Court allowed an appeal against conviction on a charge of assault with intent to rob.

The appellant's co-accused had always maintained that the appellant was not the assailant, and he expressed this view in his video evidence shown at trial. However, the video evidence was not evidence for or against his co-accused under s 27(1) of the Evidence Act 2006. It would have been difficult for him to have become a witness as he was not compellable, and to have voluntarily given evidence would have exposed him to cross-examination on any matter that counsel wished to put to him. In any event, neither counsel believed that he was telling the truth. Following trial, the co-accused continued to assert that the appellant had not been responsible and the appellant's counsel, impressed by this, became concerned as to the possibility of a miscarriage of justice.

The appeal was advanced on the basis that the evidence of identity at trial had been finely balanced. Had the evidence of the co-accused been available to the jury there was a possibility that it would have swung it to a state of reasonable doubt. The evidence was not fresh in that it had been known at trial, although the Court could not overlook that sometimes, for whatever reason, significant evidence is not called at trial when it perhaps should be. The overriding criterion was always what course would best serve the interests of justice; on the facts, those interests required that the conviction be set aside and a retrial ordered.

Cross-examination of complainant - previous sexual experience – s 44 Evidence Act 2006

In *R v G (CA515/07)* [2007] NZCA 546, the Court considered an application for leave to allow cross-examination of a complainant as to her previous sexual experience.

The appellant, G, was charged with one count of sexual violation by rape and one charge of burglary. The complainant, N, said that she went home after drinking and passed out on the top of her bed. She said that she remembered nothing until she

woke up naked with the appellant naked beside her. The complainant said that she did not invite the appellant into her house. On the other hand, the appellant said that the complainant flirted with him earlier in the evening, invited him home and that consensual sexual intercourse took place. In support of the appellant's account, he applied for leave to cross-examine the complainant on various matters concerning her sexual experience, including previous relationships that the appellant says the complainant discussed with him, the complainant's favoured contraceptive practices and DNA evidence found on the complainant's bedding belonging to a man other than the appellant. The application was largely unsuccessful before the District Court Judge and the appellant applied for leave to appeal.

The Court began by noting that s 44(1) of the Evidence Act 2006 prevents questions being put to a complainant relating "directly or indirectly to the sexual experience of the complainant with any person other than the defendant" except with the permission of the judge. Section 44(3) provides that the judge must not grant permission "unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding … that it would be contrary to the interests of justice to exclude it".

The appellant argued that permission should be granted because evidence of a conversation the morning after the alleged rape between the appellant and the complainant about previous sexual partners showed the complainant was not comatose at the time of the sexual activity. Further, the appellant said the conversation was inconsistent with the complainant having been raped. The Court found, however, that it was not necessary for the complainant to be cross-examined about her previous sexual experience. The alleged conversation included other matters of a personal but not sexual nature that could be put to the complainant as being equally inconsistent with rape. It was not necessary to introduce the evidence relating to sexual experience to make this point.

As to the evidence of contraceptive practices, the Judge had ruled that the appellant could be asked about her usual contraceptive method but that if she denied using a particular practice, evidence to the contrary could not be put to her. Having decided that the evidence was relevant, the Court said the Judge did not have the power to exclude this further evidence. The Court noted that s 44(4) provides that the permission of a judge is not required "to rebut or contradict evidence given under subsection (1)".

As to the ESR evidence, the appellant submitted that it was also admissible under s 44(4). However, the Court stressed that while evidence in rebuttal or contradiction does not need to prove the contrary proposition, it must "have some force". The evidence the appellant proposed to call was "so equivocal as not to amount to anything". On this basis it could not be said to be evidence in rebuttal or contradiction.

Accordingly, leave to appeal was allowed and the appeal was allowed in part.

Exclusion of unreliable statements – exclusion of statements influenced by oppression – ss 28 and 29 Evidence Act 2006

In *R v H* [2008] NZCA 263, the Court allowed the appeal, ordering that the case be returned to the District Court for consideration of whether a confession should be excluded as unreliable or influenced by oppression.

The applicant initially gave two statements to police denying three charges of arson, but then gave a third statement confessing to the charges. When she was assessed by a psychiatrist in relation to her fitness to stand trial, the report revealed that the applicant was suffering from post-traumatic stress disorder. Judge Weir did not consider that this was sufficient to establish an evidential foundation to consider the issue of reliability or oppression.

The Court disagreed with the Judge's assessment. It considered that the circumstances were such that even if counsel had not raised the issues of reliability or oppression, one would expect the Judge to have done so. Once such an issue was raised, the onus would then fall on the Crown to show on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

Fresh evidence – expert evidence

In *R v Hutton* [2008] NZCA 126, the Court faced an appeal from convictions on two representative counts of theft of pounamu from the West Coast of the South Island. The Crown case was that the pounamu had been stolen from the Cascade Plateau and was the property of Te Runanga o Ngai Tahu. The appellant claimed that he had mined the stone from an area known as Big Bay, where he had enjoyed a licence to mine. This theory was advanced at trial and clearly rejected by the jury.

On appeal, the appellant first sought to argue that the verdicts were unreasonable and could not be supported having regard to the evidence. Although the Crown case was entirely circumstantial, the Court was unable to accept that the verdicts were unreasonable. The evidence advanced by the Crown was sufficient to establish guilt beyond a reasonable doubt.

The appellant also sought to adduce fresh evidence that he said was sufficiently cogent such that it may have affected the outcome of the trial had it been available to the jury. The Court acknowledged that it was not always necessary that evidence be fresh before the Court would consider it. If the evidence was strong and demonstrated a real risk of a miscarriage of justice, the requirement that it be fresh would assume less importance. Further, as the Court was not the ultimate arbiter of guilt if there was apparently cogent and admissible fresh evidence that might have caused a reasonable jury to entertain a reasonable doubt about guilt it would be necessary to quash the conviction. Nonetheless, the evidence sought to be advanced was for the most part not fresh and added little or nothing by way of support for the appellant's case. Leave to adduce additional evidence was refused on the basis that it was not cogent, and it fell "well short" of raising a reasonable doubt.

The Court touched upon the issue of what it referred to as "evidence of colour", namely background or scene-setting evidence. It noted that such evidence was often led by the Crown in criminal cases and warned that such evidence will often be of

peripheral relevance yet have the potential to be prejudicial. As such, the Crown should be discriminating in its approach. In some cases, and this was not such a case, evidence of colour may be such that a miscarriage will result.

Various allegations of unfair conduct by the Crown and the police were dismissed by the Court, as well as suggestions that the Judge had misdirected the jury on the burden of proof and the use of intercepted telephone conversations. However, a submission that the Judge failed to adequately instruct the jury in relation to expert evidence was more problematic. Both parties had presented a large amount of expert evidence in direct conflict with each other. The Court was concerned that the Judge had not given the jury sufficient guidance in relation to that evidence. It said that besides noting that experts are entitled to give opinion evidence and that it is the jury's role to assess what weight is to be given to that evidence, a judge may need to assist in other ways. For instance, it may be necessary to identify and elaborate on the key points in which the experts differ, and to explain how these differences relate to the burden of proof. The Court considered it "unrealistic" to leave the jury to grapple unaided with complex expert evidence. Nonetheless, the majority of the Court (Arnold and Keane JJ) considered that there was no real prospect that a miscarriage of justice had occurred as a result. The jury could not have been in any doubt as to the defence contentions, and ultimately the scientific evidence could not have been decisive. Baragwanath J disagreed, regarding the trial process as unfair and considering that there was a distinct risk that the jury had reached an inaccurate assessment of the expert evidence which may have influenced their ultimate decision.

In dismissing the appeal, the Court paused to emphasise the obligations of expert witnesses. It communicated a desire that counsel in criminal cases refer expert witnesses to their role and obligations and ask witnesses to state at the outset of their evidence that they understand and accept them.

Hearsay evidence – search warrants – improperly obtained evidence – s 30(2) Evidence Act 2006

In *R v Rock* [2008] NZCA 81, the Court heard an appeal from a District Court decision which held that evidence obtained as the result of the execution of a search warrant was admissible. The appellant faced trial on 16 counts of importing objectionable material, contrary to s 209(1)(c) of the Customs and Excise Act 1996.

The factual background was that New Zealand Customs received information from an associate of the United States Bureau of Immigration and Customs that Mr Rock had used a credit card "clearing house" to access child pornography sites. Pursuant to this information, Customs successfully applied for and executed a search warrant on Mr Rock's house, focused on his computers and credit card statements. The application did not specify how Mr Rock's personal details had been obtained, and did not include Mr Rock's credit card details, even though that information was known to Customs.

Mr Rock claimed that the information upon which the application was based was hearsay, since the reliability of the informants and even their identities was not

revealed in the application, and because relevant information was omitted from the application, namely a credit card statement from the date of his alleged offence.

The District Court Judge had held that although the information was hearsay (and perhaps even double or multiple hearsay), it was significant that this was an international investigation and that search warrants in other countries had been granted based on similar evidence. The Judge also considered that the missing credit card statement was of no moment, since it was "a matter of common sense" that purchases do not show up on credit cards for 14 days.

The Court disagreed with the District Court's approach, considering that when the information contained in a warrant is not personally known to the applicant, the issuing officer must be satisfied of its reliability. Further, the Court considered that it was significant that particular credit card statements were missing from the application, since it was at least possible that their inclusion in the application may have led to the warrant being refused: *R v Williams* [2007] 3 NZLR 207 (CA). In concluding that the evidence obtained via the warrant was "improperly obtained", the Court considered its exclusion under the balancing test in s 30(2) of the Evidence Act 2006. Noting that the evidence would not have been discovered but for the execution of the warrant, and that there had been no urgency to excuse the failure to obtain complete information, the Court concluded that the s 30(2) balancing test favoured exclusion of the evidence. The Court considered that only exclusion would affirm the "vital obligation" for applicants to provide all information relevant to the application and not just a misleading selection obtained as a result of the execution of the search..

The appeal was allowed and the evidence was ruled inadmissible.

Omission of evidence – failure to disclose previous convictions

In *R v Petkovski* [2008] NZCA 262, the Court held that the omission of two types of evidence rendered the conviction unsafe and ordered a retrial.

Mr Petkovski was convicted of wounding an employee with intent by stabbing him with a knife. He and the complainant presented two competing versions of what had happened, Mr Petkovski alleging that the complainant was the aggressor, and that the cut to the complainant's hand was accidental. Given that there was only peripheral evidence to support either story, the credibility of the parties was very important.

The first ground of appeal related to an evidence ruling by the trial Judge. The complainant stated in evidence that he was no longer able to work as a chef because of the injury. The defence sought to call his current employer, who it said would testify that the complainant's work had not been affected. The Judge ruled that the employer could not be called. No reasons were recorded.

The second ground of appeal related to the Crown's inadvertent failure to disclose that the complainant had two previous convictions for violence. These were not discovered until after the trial.

The Court held that the exclusion of the subsequent employer's evidence on its own did not render the conviction unsafe, but the exclusion in combination with the non-disclosure of the two assault convictions did. The complainant's credibility, and the question of who was more likely to have been the aggressor, were at the heart of the trial. If the jury heard all the information, a verdict of not guilty was a reasonable prospect.

Prior inconsistent statement by defendant – interrelationship between ss 27, 37 and 38 Evidence Act 2006

In *R v T* [2008] NZCA 460, the Court held that s 27 of the Evidence Act 2006 sets out a general rule that is not subject to s 38 of that Act. In other words, a previous inconsistent statement of the defendant in relation to the offence at trial will be admissible under s 27, notwithstanding the fact that the requirements of s 38(2) are not met. Such a statement will be admissible even if it contains a material lie which the prosecution will be able to use as evidence of guilt and/or as a basis for suggesting to the jury that the defendant's evidence at trial is not to be believed. Where the latter occurs, it will not, without more, amount to a challenge to the defendant's veracity for the purposes of ss 37 and 38 as lying on a particular occasion does not itself show a disposition to lie. Although a contrary interpretation is arguable, to so hold would bring about a significant and seemingly inadvertent change in the law.

The appeal was dismissed.

Propensity evidence – consent or reasonable belief in consent - relevance of similar fact authorities – s 43 Evidence Act 2006

In *R v Healy* (2007) 23 CRNZ 923, the Court considered the approach to be taken to the admission of propensity evidence under the Evidence Act 2006.

Mr Healy was charged with sexual offending in relation to two separate incidents involving a girl. Prior to his trial he sought severance of the counts involving the first complainant from those relating to the second complainant. The High Court Judge declined to order severance on the basis that the evidence of each complainant was admissible as propensity evidence in relation to the charges concerning the other complainant. Mr Healy sought leave to appeal.

The Court took the opportunity to consider the approach that should be taken to s 43 of the Evidence Act dealing with the admission of propensity evidence, emphasising that the words of the statute are the most helpful starting point. To the extent that other decisions suggest that the starting-point is a comparison with the common law or some judicial gloss on the words based on earlier authorities, such decisions were not to be followed. The move away from the common law's "similar fact" nomenclature to that of "propensity" was deliberate. There was also a danger in reliance on old similar fact cases as such cases reflected an environment where the position of the law was that similar fact evidence was not to be used to support propensity reasoning. The Evidence Act rejects such an approach. In the Court's view, the provisions relating to propensity evidence "offer the opportunity of a clean slate in this area that should be grasped".

Applying the words of s 43, the Court found that the evidence was admissible on a propensity basis. The appellant argued that propensity evidence was inappropriate where the issue was consent or reasonable belief in consent. However, the Court said that evidence of each of the complainants added some credibility to the account of the other. In doing so the Court declined to adopt the approach taken by the High Court of Australia in *Phillips v R* (2006) 225 CLR 303.

For these reasons, leave was granted but the appeal was dismissed.

Propensity evidence – ss 40 and 43 Evidence Act 2006

In *R v Hurring* [2008] NZCA 245, the Court allowed the appeal, declaring the contents of the appellant's scrapbooks to be inadmissible at his forthcoming trial on related counts of burglary and indecent assault of a nine year old girl.

The scrapbooks were found in the appellant's home on execution of a search warrant eight days after the alleged offending. They showed pictures taken from advertisements of young girls, on some of which the appellant had written obscenities and others of which were collated with adult pornography.

The Court was satisfied that the evidence relating to the scrapbooks tended to show the appellant's propensity to have a particular state of mind, namely a propensity to fantasise in a sexual way about young girls (although not exclusively young girls). However, after assessing its probative value according to the balancing criteria in s 43(3) of the Evidence Act 2006, the Court concluded that the evidence had no probative value as to what happened when the appellant was in the complainant's bedroom, and only moderate weight as to the appellant's state of mind at that time. The probative value was clearly outweighed by the risk of unfair prejudice.

Propensity evidence – severance application – ss 7, 8 and 40-43 Evidence Act 2006

In *R v R (CA403/2008)* [2008] NZCA 342, R appealed against two pre-trial rulings made in the High Court. R was charged with sexual and physical violence against his ex-wife and two of his children, alleged to have been committed over extended periods during his marriage. There was a successful application to sever the sexual offending counts from the other counts. In the ruling under appeal, the Judge gave leave for the Crown to lead, in the trial involving sexual allegations, evidence by one of the child complainants of alleged non-sexual violence. The Judge also permitted the Crown to file an amended indictment containing a representative count of threatening to kill, which R complained was an integral part of the physical abuse allegations and should not therefore have been included in the trial of the sexual allegations. The Crown cross-appealed against the Judge's refusal to permit it to lead, in the same trial, other evidence of one of the child complainants about non-sexual violence towards the child, his brother and his mother.

The Court dismissed R's appeal, after considering the contested evidence in light of ss 7 and 8 of the Evidence Act 2006. Noting that the evidence was particularly probative and that it was not possible to isolate the allegations of sexual abuse from

the allegations of physical abuse, the Court agreed with the Judge that the jury would have a distorted picture if it was not presented with the evidence in question. The Court discussed s 40 of the Evidence Act, noting that propensity is a broad, but not always appropriate, frame of reference when assessing the relevance and admissibility of evidence. The Court allowed the Crown's cross-appeal, considering that the evidence was highly probative and insufficiently prejudicial to warrant exclusion.

In respect of all the evidence, the Court noted that judges can utilise judicial directions as and when required to assist juries where there are large volumes of evidence requiring consideration: *R v Hurring* [2008] NZCA 245.

Propensity evidence – veracity evidence – evidence of lack of previous convictions

In *R v Kant* [2008] NZCA 194, the Court was required to consider a defendant's lack of previous convictions as being evidence of good character, and the admissibility of such evidence under the Evidence Act 2006.

The appellant was convicted of indecently assaulting a young female employee. Trial counsel failed to elicit from the officer-in-charge that the appellant had no previous convictions. The appellant submitted that this had led to a miscarriage of justice. The Court examined whether evidence of "good character", that an accused has no previous convictions, was admissible under the Evidence Act. At common law, such evidence was admissible for certain purposes with the consequence that the Court had a discretion to permit the prosecution to call evidence of an accused's bad character. Before the Evidence Act came into force, the Court said there was difficulty in drawing a bright line distinction between the relevance of such evidence to credibility and to propensity. The Court emphasised that the Evidence Act makes a clear distinction between veracity and propensity evidence, and so earlier cases must be treated with circumspection.

The Court then discussed the twin concepts of veracity and propensity under the Evidence Act. Veracity means, in broad teams, "truthfulness". Evidence about a person's veracity is only admissible if it is substantially helpful in assessing that person's veracity. Where a defendant proposes to offer evidence of his or her own veracity, there is no restriction on such evidence other than the substantial helpfulness test. Propensity evidence, on the other hand, is evidence which tends to show a person's propensity to act in a certain way or have a particular state of mind. A defendant in criminal proceedings may offer propensity evidence about himself or herself: unlike for veracity evidence, there is no substantial helpfulness requirement, although the proposed evidence must be relevant in terms of s 7 like all evidence.

The Court held that an absence of previous convictions is not within the definition of propensity in the Evidence Act, because such evidence is generally neutral. The Court also considered, albeit with some diffidence, that the lack of previous convictions will not generally be admissible as veracity evidence, because it does not bear directly on a defendant's disposition to refrain from lying, and it will usually be neutral in effect. However, the Court emphasised that this was a tentative view and that it would warrant attention by the permanent Court at the earliest opportunity.

The appeal was dismissed.

Procedure

Costs – jurisdiction to award interest – Costs in Criminal Cases Act 1967

In *R v Connolly* [2008] NZCA 548, the Court had to determine whether the High Court had jurisdiction to award interest on costs payable to acquitted persons under the Costs in Criminal Cases Act 1967.

The Costs in Criminal Cases Act and the Costs in Criminal Cases Regulations 1987 are silent on whether interest can be awarded. As a result, the Court examined three alternative bases for establishing jurisdiction.

The first was an award under s 19(2) of the Crown Proceedings Act 1950. Section 19(2) provides that costs awarded against the Crown carry interest if costs awarded to the Crown carry interest: in other words, there must be reciprocity. It was argued that s 4 of the Costs in Criminal Cases Act permitted the Crown to seek interest on costs awarded against a convicted person, as the Crown could arrange for the costs order to be filed in the High Court under s 11. This order would, it was submitted, have the effect of a judgment of the High Court and r 538 of the High Court Rules would apply, which provides that every judgment debt shall carry interest from the time of judgment being given until the judgment is satisfied.

The Court rejected this argument. The Court observed that s 4(4) contemplates that the primary enforcement mechanism would be recovery as for a fine, and fines do not carry interest. Section 11 did not appear to apply in cases of an award of costs in favour of the Crown made in a trial context (as this was covered by s 4), as it seemed more likely that it applied in relation to the appellate jurisdiction of the High Court and the Court of Appeal. This was supported by the structure of the Costs in Criminal Cases Act. As a result, the Crown is unable to recover interest on costs awarded in its favour in criminal matters under s 4. Consequently the reciprocity requirement of s 19(2) cannot be fulfilled and therefore the Crown Proceedings Act does not provide jurisdiction to award interest on costs under the Costs in Criminal Cases Act.

It should also be noted that although the Court was asked to consider whether the Crown Proceedings Act was limited only to civil liabilities, not criminal law, the Court was not ultimately required to answer this question and left the issue open.

The second basis explored was s 5 of the Costs in Criminal Cases Act. Section 5 relevantly provides that the Court may order that an acquitted person "be paid such sum as it thinks just and reasonable towards the costs of his defence." It was suggested that an award of interest was just and reasonable by reference to s 5. However the Court rejected this argument as interest was not covered by the statutory definition of "costs" in s 2, as it was not an expense of carrying on a defence or conducting an appeal.

The final basis was s 87 of the Judicature Act 1908. Section 87 provides for an award of damages in proceedings for recovery of any debt or damages, and, importantly, provides for interest to be awarded for the period "between the date when the cause of action arose and the date of the judgment". However the period in issue was from the date of judgment up to the date of payment. Additionally, a characterisation of a claim under the Costs in Criminal Cases Act as "proceedings in the High Court for the recovery of any debt or damages" was rejected, especially as they were criminal proceedings. For these reasons, s 87 did not provide jurisdiction.

In allowing the appeal, the Court found that there was no jurisdiction for the High Court to award interest on costs payable to acquitted persons under the Costs in Criminal Cases Act.

Discharge of accused after verdict of guilty – s 347 Crimes Act 1961

In *Fong v Attorney-General* [2008] NZCA 425, the Court heard an appeal from a judgment of the Full Court of the High Court in which judicial review proceedings were successfully taken by the Attorney-General. Those proceedings reviewed a District Court Judge's decision to discharge the appellant pursuant to s 347(3) of the Crimes Act 1961 after the jury had returned a verdict of guilty on one charge of rape.

The Court reviewed the facts surrounding the alleged rape in detail, noting that neither the appellant's nor the complainant's account of events was particularly plausible. It also found troubling the considerable confusion that existed as to the timing of key events and the District Court Judge's failure to untangle this confusion in his summing up.

The Court then turned to consider the way in which a judge's power to discharge an accused pursuant to s 347 should be exercised. It observed that the cases in which post-verdict discharges had previously been granted were far removed from the present circumstances. A comparison was then drawn between the grounds on which a discharge may be granted and those on which an appeal against conviction under s 385 is considered. It concluded that it is not appropriate for trial judges, post-verdict, to review the decision of the jury as if exercising the appellate function under s 385. Accordingly, the District Court Judge ought not to have exercised the s 347 jurisdiction after verdict.

Given the case had effectively been in limbo since the High Court judgment setting aside the discharge, and not without some misgivings, the Court decided to address the case as if it were an appeal under s 385. For reasons already given, the Court held that the failure of counsel and the Judge to resolve the confusion that existed in relation to the timing of key events resulted in a miscarriage of justice.

The Court then considered whether it would have directed a new trial if it were hearing an appeal against conviction. It noted that the Crown case was not strong and there was a significant possibility that a retrial would result in either a s 347 discharge or an acquittal. In the Court's view, the process, both at trial and post-verdict, had failed. Furthermore, a new trial would inevitably take place more than four years after the alleged offending; the appellant would also have been on bail and had the

uncertainty of proceedings hanging over him for nearly four years. These special circumstances, which would have been relevant to whether a retrial would be ordered on a successful conviction appeal, were fundamental to the Court's conclusion that the processes against the appellant should be brought to an end.

The Court accordingly allowed the appeal and quashed the decision of the High Court, resulting in the reinstatement of the s 347 discharge.

Discharge of jurors – pressure on jury to return verdict

In *R v Juburi* [2008] NZCA 118, the Court considered an appeal against conviction on one count of importing a Class B controlled drug and of having the drug in possession for supply, on two grounds: first, claimed impropriety in the discharge of a juror; and secondly, improper pressure on the jury by the Judge to return a verdict.

The first ground of appeal was whether discharge of an ill juror by a District Court Judge without giving counsel the opportunity to make submissions as to whether adjournment of the trial to enable the juror to recover is desirable gave rise to a miscarriage of justice. The Court dismissed that ground of appeal. Although compliance with the procedure set out in *R v N (CA373/04)* (2005) 21 CRNZ 621 (CA) was preferable, it was within the Judge's discretion under s 374(3)(a) of the Crimes Act 1961 to discharge the juror.

The second ground of appeal was whether the Judge placed improper pressure on the jury to return a verdict, effectively setting a time limit on further deliberations. The Court also dismissed that aspect of the appeal. Notwithstanding her concern as to the length of jury deliberation, articulated in discussions with counsel, none of the Judge's remarks infringed acceptable practice based on the leading authority, *R v George* [1984] 1 NZLR 272 (CA).

Discharge of jurors – s 374(4A) Crimes Act 1961

R v Harris [2008] NZCA 298 concerned a trial of ten people charged jointly and separately with drug dealing offences, which lasted about 20 weeks. During the course of the trial, two jurors were discharged. The Court upheld the High Court Judge's decision to continue with ten jurors.

The Court first dismissed a submission that a miscarriage of justice arose from a factual error made by the Judge in summing up. The Court was satisfied that the error was immaterial.

The more difficult question was the jury issue. One juror had been dismissed on the second day of the trial. One month into the trial the Judge dismissed an application by the Crown to dismiss another juror. Three weeks later another juror fell ill and had to be dismissed. The Judge decided to continue with ten jurors because he considered that there were exceptional circumstances, as required by s 374(4A) of the Crimes Act 1961. His reasons were that the trial was in its seventh week, the jury had heard four weeks of evidence, the accused had been apprehended more than two years ago, and if the jury were discharged it was likely a re-trial could not commence for nearly a year.

The Court commented that the highly discretionary nature of the power to discharge or continue with a reduced jury reflected Parliament's acknowledgement that the trial Judge is uniquely placed to make this decision. However, as the Supreme Court held in *R v Rajamani* [2008] 1 NZLR 723 and *R v Wong* [2008] NZSC 29, whether or not exceptional circumstances exist is a factual precondition that is reviewable. The threshold of exceptional circumstances is satisfied if they are "in combination … distinctly out of the ordinary": *Wong* at [9]. The Court went on to say that while both *Rajamani* and *Wong* provide guidance on the approach to be adopted, they illustrate that the question is one of fact and degree. This is why the conclusion of the trial Judge, reached with the benefit of the knowledge of the trial, must be accorded appropriate weight.

In dismissing the appeal against conviction, the Court considered that the Judge was correct to find there were exceptional circumstances on two bases, taken separately or together. The first was the extent of the resources and costs already committed by the parties, their counsel and the state over seven weeks out of a projected 12 week trial. The second was the effect of the delay that would accompany a retrial, which was likely to be close to a year, with its associated strain on administrative and judicial resources and on the participants in the trial.

The Supreme Court has refused leave to appeal in a related case: [2008] NZSC 97.

Discharge – previous acquittal plea – prior jeopardy – s 347 Crimes Act 1961

In *R v Taylor* [2008] NZCA 558, the Court dismissed an appeal by Arthur William Taylor. Mr Taylor appealed against his conviction and sentence on three counts of kidnapping and one count of escaping lawful custody. In 2005 Mr Taylor was a serving prisoner. He travelled to central Wellington accompanied by three prison guards. On arrival in the city Mr Taylor and the guards were confronted by an accomplice of Mr Taylor, Mr Royal, who was armed with an air pistol. Messrs Taylor and Royal forced the guards to unlock Mr Taylor's handcuffs. They handcuffed the guards together and then escaped. They were caught by the police shortly afterwards.

Mr Taylor was initially charged with three counts of aggravated wounding and three counts of kidnapping, one of each type of charge for each prison guard. Shortly before Mr Taylor's trial was due to start, the Crown Solicitor advised he had decided to drop the three counts of aggravated wounding. He invited the judge to discharge Mr Taylor on those three counts, which was done. When asked how he pleaded to the three kidnapping counts, Mr Taylor said "previous acquittal". The basis of his previous acquittal pleas to the kidnapping counts was his deemed acquittals on the aggravated wounding counts: s 347(4) of the Crimes Act 1961. The High Court Judge ruled that the pleas were not available to Mr Taylor. Mr Taylor was convicted following a jury trial, returning guilty verdicts on four charges. Mr Taylor contended on appeal that his pleas of previous acquittal should have been accepted by the Judge.

A majority of the Court (Chambers and Panckhurst JJ) dismissed Mr Taylor's appeal against conviction. The Court held the Judge was correct to disallow Mr Taylor's pleas of previous acquittal. Chambers J considered the drafting of the provisions of the Crimes Act dealing with pleas of previous acquittal. Two elements must be shown before a plea of previous acquittal is permitted: that the charge at the former trial was substantially the same as the charge at the second trial, and that at the former trial the accused was in jeopardy of conviction. In this case, Chambers J said there was no former trial on the aggravated wounding charges and Mr Taylor was never in jeopardy of conviction. In rare circumstances, such as Mr Taylor's case, a discharge under s 347 will not qualify as a previous acquittal. In this case the situation arose because the Crown Solicitor adopted the wrong procedure. No injustice was done and, there was no pressing reason why the law should be strained so Mr Taylor could reap an undeserved benefit. Chambers J considered that the Judge was correct not to accept Mr Taylor's pleas of previous acquittal on the kidnapping counts.

Panckhurst J agreed with the reasons given by Chambers J but decided to write separately on the single topic of Mr Taylor's pleas of previous acquittal. He considered there was a statutory conflict between a discharge "being deemed to be an acquittal" and the provisions which govern pleas of previous acquittal. Which words should prevail? Panckhurst J emphasised that for over 100 years the plea of previous acquittal has been dependent upon the existence of three cumulative requirements: sufficient similarity of charges, prior jeopardy and a final determination. To ignore the requirement of previous jeopardy would be unprincipled. For this reason, Panckhurst J held that the Judge was correct not to allow Mr Taylor's pleas of previous acquittal.

In a dissenting judgment, Fogarty J disagreed with the conclusions reached by Chambers and Panckhurst JJ. Fogarty J did not see the availability of a plea of previous acquittal as turning on whether the accused was in jeopardy at a former trial. He considered prior jeopardy to be a common law concept which the majority wrongly imported into the Crimes Act provisions. In Fogarty J's view, the deemed acquittal provisions and previous acquittal provisions could be read consistently. In this case, the offences of aggravated wounding and kidnapping were substantially the same. Fogarty J would have allowed Mr Taylor's plea of previous acquittal and set aside the convictions for kidnapping.

The Court was unanimous that all other points of appeal failed and that a conviction on the charge of escaping was correct. Mr Taylor also appealed against his sentence. The Judge had sentenced Mr Taylor to four years imprisonment. The Court upheld that sentence.

The appeal was dismissed.

Leave to appeal to the Supreme Court has been sought.

Guilty pleas – right of election to give evidence – trial counsel error – miscarriage of justice

In *R v K (CA197/07)* [2008] NZCA 3, the appellant had been tried before a District Court Judge and a jury on one count of indecent assault and one count of sexual violation by rape. On arraignment, he had pleaded guilty to assaulting the female complainant on two separate occasions and to breaching a protection order that she had taken out against him. K was found guilty of the two counts in respect of which he had pleaded not guilty, and on all charges was sentenced to an effective term of imprisonment of nine years. He appealed against conviction, on the basis that the defence case was run in a manner that resulted in a miscarriage of justice.

The trial strategy that lay behind the entry of the guilty pleas was to make it clear that K accepted responsibility for violent, but not sexual, offending. Prior to trial, there was a communication breakdown between K and his counsel; counsel misunderstood that K had authorised for the defence to proceed on the premise that sexual intercourse had not occurred at all, rather than that consensual sexual intercourse had occurred. The result of this was that K's right of election to give evidence was removed because the suggestion that intercourse did not occur at all would be contrary to the evidence that K would be expected to give.

The issue on appeal was whether counsel had implied authority to conduct the defence as he did.

The Court noted that counsel error will result in a successful appeal against conviction only if a miscarriage of justice resulted: *R v Sungsuwan* [2006] 1 NZLR 730 (SC). In this case, K had no comprehension of the distinction between the manner in which his counsel ran the case and the premise that consensual sexual intercourse had occurred. Discussing *Sankar v The State of Trinidad and Tobago* [1995] 1 All ER 236 (PC), *R v McLoughlin* [1985] 1 NZLR 106 (CA), *R v Le* CA208/00 14 September 2000 and *TKWJ v R* (2002) 212 CLR 124 (HCA), the Court noted that if K had elected to give evidence at the end of the Crown case, counsel would have been required to seek leave to withdraw. In the circumstances, the Court considered that counsel's failure to explain fully to K the implications of forgoing his right of election placed K's case "squarely" within the circumstances envisaged in *Sungsuwan*, and therefore gave rise to a miscarriage of justice.

Considering whether it was appropriate to apply the proviso in s 385(1)(c) of the Crimes Act 1961, the Court noted *R v Howse* [2006] 1 NZLR 433 (PC) and *Bain v R* (2007) 23 CRNZ 71 (PC). In terms of those decisions, the Court concluded that the proviso ought not to be applied because the error of K's counsel had resulted in an unfair trial.

The appeals were allowed and a new trial was ordered.

Joint charge – taking jury verdicts

In *R v Mohetuki* [2008] NZCA 494, the issue for the Court was whether a verdict of guilty had been entered against the appellant in relation to one charge of injuring with intent to injure. The indictment charged this offence against the appellant and her co-defendant (Ms Hemopo) jointly.

When it came to taking verdicts, the Registrar asked the foreperson, "On count one, do you find the accused, Tia Maria Hemopo together with Melanie Mohetuki guilty or not guilty?" A single verdict of guilty was returned.

The Court noted that the Registrar should have taken separate verdicts in relation to each defendant. At issue was the materiality of the failure to do so. In the Court's opinion, it was reasonably clear that the jury had concluded that the appellant was guilty on count one. However, the Registrar's use of the phrase "together with" instead of "and" left open the possibility that the foreperson was expecting a further question on count one in relation to the appellant's guilt. Given the paramount importance of following standard procedures in taking jury verdicts, emphasised in *Ramstead v R* [1999] 1 NZLR 513 (PC), the Court was left with the view that the exchange between the Registrar and the foreperson was insufficiently clear to be properly treated as a verdict of guilty against the appellant.

Accordingly, the appeal was allowed, the conviction quashed, and a new trial ordered.

Juries – whether police to provide non-disqualifying criminal histories of potential jurors to Crown solicitors and defence – Juries Act 1981

In *R v King* [2008] 2 NZLR 460, Ms King and a number of other accused had been charged under the Misuse of Drugs Act 1975. Pre-trial, one defence counsel applied for an order prohibiting the Crown from using data that listed whether a prospective juror had criminal convictions when considering whether to challenge a person selected by ballot to be on the jury, or alternatively that the accused have access to the same information. The Judge ruled that jurors' criminal records could not be used to inform such challenges, but at the conclusion of the trial and at the request of the Crown, the Judge stated three questions of law for the opinion of the Court. First, whether the police may access the national criminal records database to provide the Crown with prospective jurors' criminal histories to assist the Crown to decide whether to oppose a juror. Secondly, if the police may access and dispense the information to the Crown, whether the Crown can use that information for its peremptory challenges. Thirdly, whether if the Crown may use the information, defence counsel should also be able to use the information for its peremptory challenges.

The Court unanimously answered the first two questions in the affirmative. Robertson J delivered the lead judgment, and noted that the Juries Act 1981 expressly provided for peremptory challenges and that those challenges are discretionary. He found that neither the Privacy Act 1993 nor the New Zealand Bill of Rights Act 1990 precludes Crown use of criminal records data for the purpose of peremptory challenges.

Concurring in the result, but for different reasons, William Young P and Chambers J also concluded that the Privacy Act does not prevent police access to jurors' criminal records, nor does it prevent Crown use of them in making peremptory challenges.

On the third question, a majority of the Court (William Young P and Chambers J) held that defence counsel is not ordinarily entitled to criminal records information for

its peremptory challenges, but that if, in a particular case, it is likely that jurors with criminal histories might be adversely disposed towards a defendant, then defence counsel may access the information. Robertson J dissented on this point, considering that since criminal records data is substantially in the public domain, it should be provided to the defence. He concluded that guaranteeing defence access to the same information as the Crown would promote procedural fairness.

Juror misconduct – post-verdict juror communication

In *R v T* [2008] NZCA 119, the Court was required to consider issues relating to juror misconduct. The appellant was convicted of sexual violation by unlawful sexual connection. The victim was the 14 year old daughter of one of the appellant's colleagues, at whose house the appellant had been drinking that evening. At the appellant's trial, a juror was seen speaking to the victim after she gave evidence, with one reportedly giving her a hug. The trial Judge put this allegation to the juror in question and sought her response. The juror denied having spoken to the victim and the Judge's impression was that the juror was being truthful. Nothing more was done. Counsel for the appellant submitted the trial Judge should have investigated the juror more thoroughly and put her under oath.

The Court disagreed and held it would have been inappropriate for the Judge to have conducted his inquiry formally and under oath. The Judge dealt with the matter in a way which was transparent and appropriate, and the appellant's trial counsel was apparently satisfied with how the matter was handled. Even if Ms T's account of events was accepted, the juror conduct complained of fell well short of bias.

The Court then considered a letter which had been written by a juror after the trial conveying concerns about the verdict. The juror approached the appellant's trial counsel before sentencing with her concerns, at which time counsel directed her to put them in writing to be sent to the trial Judge. It appears the juror also at some point spoke to the appellant's partner. The juror eventually gave a letter to the appellant's counsel, who handed it to court registry staff. For some reason it was not given to the trial Judge. Appellate counsel became aware of the letter and asked it be included in the case on appeal.

The Court expressed concerns about the conduct of trial counsel in relation to the letter, especially when he discovered that the appellant's partner knew one of the jurors. Counsel was not given a full opportunity to provide a full account of his conduct or be questioned about it. However, trial counsel should have ensured the trial Judge was aware of the letter and of the contact between the juror and the appellant's partner. Appellate counsel, for her part, should have evaluated whether the letter disclosed a potential ground of appeal and then considered approaching the juror (through an independent person such as a police officer or barrister) and obtaining an affidavit. The appeal should not have proceeded on the basis of an unsworn letter. The Court also had doubts about the letter's authenticity (it was not signed) and it did not bring into question the integrity of the verdict.

The appeal was dismissed.

Leave to appeal – extension of time for appealing – swearing evidence on oath

In *R v Slavich* [2008] NZCA 116, the Court considered an application for an extension of time for appealing against conviction on several counts of dishonesty.

The appellant was a chartered accountant in private practice who, according to the prosecution, was one of the "compliant" professionals that enabled a Mr Orchard to perpetrate a number of significant frauds. The appellant did not file an appeal until ten months after his convictions were entered, and no application for an extension of time was filed.

The Court traversed the applicable principles for an extension of time in s 388 of the Crimes Act 1961, *R v Knight* [1998] 1 NZLR 583 (CA) and *R v Lee* [2006] 3 NZLR 42 (CA). The Court considered that applications of this type reduce to two heads: first, why was the appeal filed late; and secondly, what, if any merit, does the appeal appear to have.

The appellant mistakenly believed that a Notice of Appeal had been filed by previous counsel within time. The Court held that without the benefit of cross-examination, the appeal must proceed on the basis that the appellant held the honest, though mistaken, belief that an appeal had been lodged timeously. The critical issue in relation to the merits was whether the appellant was a knowing and dishonest participant in a series of fraudulent transactions.

The Court remarked on a further potential appeal point which was not raised by counsel, regarding the status of unsworn evidence given by a Crown witness. The High Court Judge, Heath J, had said that neither counsel required the witness' answers to be verified on oath as neither thought that any credibility issues were likely to arise. However, the Court observed that swearing evidence on oath is a "historical requirement" in a criminal trial and a "fundamental constitutional safeguard" for an accused. Moreover, the oath to tell the truth is the source of the ability to prosecute a perjurer. The point was merely noted, and it was left for counsel to consider when the appeal proceeded.

The Court granted an extension of time for appealing.

Name suppression – jurisdiction – relationship with police diversion scheme

In *Fairfax New Zealand Ltd v C* [2008] 2 NZLR 368, the Court considered whether it had jurisdiction to hear an appeal by Fairfax New Zealand Ltd ("Fairfax") against a decision granting interim name suppression and the relationship between the police diversion scheme and name suppression.

The respondent, C, was charged with intentionally or recklessly making an intimate visual recording. The police granted C diversion and his counsel sought the extension of interim name suppression. This was refused in the District Court but allowed in the High Court. Under s 144 of the Summary Proceedings Act 1957, the High Court Judge gave Fairfax leave to appeal on the "relationship between the Police Diversion

Scheme and the Court's discretion" to prohibit publication under s 140 of the Criminal Justice Act 1985.

The Court held that it did not have jurisdiction to hear an appeal brought by Fairfax. Three possible sources of jurisdiction were advanced by Fairfax. First, that it was a "party" within the meaning of s 144 of the Summary Proceedings Act. That section relevantly provides that "either party" may appeal with the leave of the High Court to the Court of Appeal. The Court held that Fairfax was not a "party" within the meaning of the section. The words "either party" limited the appeal rights to those who have sought suppression and to the informant. Secondly, Fairfax submitted that the proceeding was civil so that there was a right of appeal under s 66 of the Judicature Act 1908. Applying *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 (SC), the Court concluded that in substance the proceeding was criminal and not civil. Thirdly, Fairfax argued that the Court should treat the appeal as an application to discharge the earlier order acting as High Court judges in terms of s 57(4) of the Judicature Act. The Court refused to take this course on the basis that there was no jurisdiction to do so. The order, although interim, was final in the sense of being dispositive of the appeal.

Although there was no jurisdiction to hear the appeal, the Court made some brief observations on the relationship between diversion and suppression orders. The Court observed that the fact of diversion was relevant to the exercise of the discretion under s 140. However, the Court also said diversion, in itself, was not a special circumstance justifying departure from the open justice principle. In each case, the Court said, it will be necessary to be satisfied that there is a basis for name suppression.

Accordingly, the appeal was dismissed for want of jurisdiction.

Name suppression orders – refusal to prohibit publication – severance – ss 138 and 140 Criminal Justice Act 1985

In *R v B (CA459/06)* [2008] NZCA 130, the Court allowed an appeal from the District Court's refusal, upheld in the High Court, to grant name suppression to the appellant pending the determination of the charges against him. The appellant faced charges of sexual offending in relation to four different women, and had successfully applied to have the trials severed.

William Young P, for himself and Robertson J, held that although there can be no immutable rule in circumstances such as this, fair trial rights will usually mean a postponement of the public's ability to know the identity of a person until the issue of severance has been determined. In the present case, there would have been a very substantial risk that, in the absence of interim name suppression, some jurors would have learnt that the appellant was facing or had faced allegations of other sexual offending, and there was a possibility that this might have influenced the decision-making process.

In a separate judgment, Baragwanath J discussed the competition between open justice and freedom of expression on the one hand, and the presumption of innocence,

fair trial considerations, and dignity and privacy on the other. He concluded that each case must turn on its own facts and that the Court is required to undertake a contextualised balancing test to create whatever mix of orders will best meet the demands of the case. Baragwanath J was satisfied that lifting the suppression orders would risk undermining the basis of the severance decision (that is, the exclusion from the trial of each complainant the evidence of the other complainants). He agreed that the appeal should be allowed.

Previous acquittal – effect of discharge under s 347 Crimes Act 1961 – jurisdiction to reinstate counts

In *R v Holt* [2008] NZCA 388, Ms Holt was committed for trial on eleven charges, one of attempting to pervert the course of justice, eight under the Misuse of Drugs Act 1975, and two under the Arms Act 1983. Before a High Court Judge, she entered pleas of guilty to two of the charges, and the Judge then transferred the two Arms Act offences to the District Court for trial and discharged Ms Holt in respect of the other seven charges under s 347 of the Crimes Act 1961 (as the Crown offered no evidence on these seven counts). Ms Holt subsequently changed counsel and sought leave to withdraw her guilty pleas. A second High Court Judge granted leave to withdraw the guilty pleas, but at the same time reinstated the other counts in respect of which Ms Holt had previously been discharged. At the commencement of the trial, Ms Holt applied to a third High Court Judge to have the reinstatement order set aside as a nullity. That Judge declined to set aside the order.

After a trial, Ms Holt was convicted on eight counts and sentenced to an effective term of five years imprisonment. She appealed against her conviction and her sentence on the basis that the s 347 discharges were final orders, and that the Judge did not have jurisdiction to reinstate the counts in respect of which they had been ordered. Section 347(4) of the Crimes Act states that discharges entered under that section are "deemed to be acquittals". She argued that since she had faced trial (and conviction) on more counts than she ought to have, her sentence should be reduced.

Noting *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 (CA), *Butterfield v R* [1997] 3 NZLR 760 (HC), *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA) and *R v Smith* (2002) 20 CRNZ 124 (CA), the Court held that the s 347 discharges were formal orders, and that in the absence of a fundamental procedural error sufficient to render the orders legal "nullities", there was no jurisdiction to revisit them. The Judge had therefore erred in his reinstatement order.

Ms Holt's appeals against conviction on the seven counts in respect of which she had been discharged were allowed, and her effective sentence of five years was quashed and substituted with a reduced effective sentence of four years imprisonment.

Proceeds of crime – meaning of "foreign restraining order" – Mutual Assistance in Criminal Matters Act 1992

In *Solicitor-General v Bujak* [2008] NZCA 334, the Court revised its approach on the question of whether Polish orders made in relation to the respondent's property should be characterised as foreign restraining orders. Departing from its approach in *R v*

Bujak [2007] NZCA 347, the Court held that it was unnecessary for a Court to consider the law of the foreign state beyond the factual issue of whether the conditions of the New Zealand statute are satisfied.

The respondent was suspected of criminal offending in Poland, and there was evidence that he had shifted the proceeds to New Zealand. Under the Mutual Assistance in Criminal Matters Act 1992 ("MACMA"), a "foreign restraining order" can be registered so that it takes effect in the same manner as if it were a domestic restraining order made under the Proceeds of Crime Act 1991 ("PCA"). The Attorney-General sought to have such an order registered. The Court overturned an ex parte order granted by the High Court, and returned the case to the High Court for consideration. The High Court then declined to grant an order, and the Solicitor-General appealed from that decision.

Section 2(1) of the MACMA defines a "foreign restraining order" as an order made by judicial authority in respect of benefits that may have been derived from the commission of an offence that "restrains a particular person, or all persons, from dealing with property". The Court disagreed with the High Court's analysis that the Polish orders freezing the respondent's property were not a "restraint" on dealing with the property. The Court said that it was immaterial that the seizure authorised by the Polish order was more intrusive than a mere restraint. To the extent it constituted a restraint, it could become an order under the PCA; insofar as it exceeded that character, it would not be given effect under New Zealand law.

The Supreme Court has granted leave to appeal.

Reparation payments – whether parental fault a precondition for reparation payments ordered against parents – s 283(f) Children, Young Persons and their Families Act 1989

In *Police v Z (CA400/07)* [2008] 2 NZLR 437, J was a troubled youth, who had a history of offending and behavioural difficulties. From August 2005, he was on bail at his parents' home. It was a condition of the bail that J's parents supervise his curfew. In October 2005, J committed a burglary after his father witnessed him leaving the home in his car with firearms. After J had been convicted and sentenced for the burglary, the owner of the property sought reparation from J's parents under s 283(f) of the Children, Young Persons and Their Families Act 1989 ("CYPFA"). A Youth Court Judge made an order for $10,000 which was overturned by the High Court Judge, who considered that a reparation order could only be made against a parent under s 283(f) if the parent was at fault and there was a causative link between the parent's fault and the child's offending. Leave to appeal was granted on the following question of law: whether the High Court Judge was correct in her finding that those two conditions were necessary preconditions to the making of a reparation order against a parent.

The Court noted that there is nothing in the text or scheme of CYPFA itself to indicate the appropriate circumstances for an order against a parent, but that guidance could be gleaned from ss 4, 5 and 208 of CYPFA which set out the objects of the Act and the principles to be applied in its application. The Court observed that the purpose of

reparations is compensatory, and considered that while parental fault is a relevant consideration in the making of a reparation order, it is not a necessary precondition. The statutory scheme does not make fault, or its causal relationship with the child's offending, preconditions, and the Court considered that there was no justification for fault to be a judicially imposed condition. In some circumstances, a reparation order in the absence of parental fault will be appropriate, and the Court was not persuaded that discretionary (non fault based) reparation orders would necessarily undermine or threaten the importance or stability of the family group. Often parental reparation will be made with consent.

In respect of the order made against J's parents, the Court concluded that although the Judge's precondition approach was erroneous, her decision was not dependent upon that approach. Accordingly, the appeal was dismissed and the order quashing the reparation order was confirmed.

Search warrant – delay in applying for warrant – omission of surveillance details in warrant application

R v Robertson [2008] NZCA 20 was an appeal against a decision upholding the validity of a search warrant. The validity of the warrant was challenged based on the delay in applying for the warrant and the failure to mention that the appellant's house had been under surveillance, information which had not been disclosed for fear of jeopardising a continuing covert operation.

The Court dismissed the appeal, holding that the reasons for the delay could be inferred from the affidavit sworn in support of the search warrant application, although they should have been explicitly set out. The surveillance evidence should also have been contained in the affidavit (with measures such as those set out in *R v Williams* [2007] 3 NZLR 207 at [224](k) (CA) to protect confidentiality), but the failure to set out such evidence was not material. If the surveillance evidence had been disclosed, it would have strengthened the application.

In a separate judgment, Glazebrook J made some comments on the process where excisions are made to the affidavit and a full version is not provided to the accused. In such cases, Glazebrook J said that the Court should be provided with a full version of the affidavit, together with an explanation of the reasons for any excisions in the copy provided to the accused. This would allow the Court to assess the validity of the excisions and to hear from the Crown on whether any other parts of the affidavit should be provided to the accused. Glazebrook J also expressed some concern about the hearing of appeals where the accused does not have a full copy of the affidavit. She said that this curtails the accused's right to be heard and distorts the role of both the Crown and the Court to a degree as both have to endeavour to make sure arguments that could be put for an accused are considered. Glazebrook J mooted the creation of a system whereby independent counsel are appointed to assess the reasons for the excisions, and to consider whether there are any arguments available to the accused on the basis of the excised materials.

Sentencing indications – Solicitor-General appeal - requirement for accused to be present at trial

In *R v Smail* [2008] 2 NZLR 448, the accused was the caregiver of a tetraplegic man whom he killed by cutting his throat. Following a guilty plea as a result of a pre-trial sentencing indication in the High Court, the Judge sentenced the accused to 12 years imprisonment with a minimum non-parole period of seven years. The Solicitor-General appealed on the basis that the circumstances required a sentence of life imprisonment with a lengthier non-parole period. The Court granted leave to appeal, increasing the accused's sentence to life imprisonment with a minimum non-parole period of 13 years. The accused then applied to the Supreme Court for leave to appeal against his sentence. In dismissing the application for leave, the Supreme Court noted that the circumstances of the case might warrant further appellate scrutiny.

In the current proceeding, the accused applied for an extension of time to appeal against conviction and sentence based on two grounds. First, he contended that he pleaded guilty to murder because of erroneous advice from his former counsel concerning the sentence he would receive and when he would become eligible for parole. Secondly, he argued that the Court should have offered him the opportunity to vacate his guilty plea before it increased the sentence imposed in the High Court.

The Court noted the approach to Crown appeals against sentence endorsed by the Supreme Court in *Sipa v R* (2006) 22 CRNZ 978: that where a Court increases a sentence on a Crown appeal, the person who pleaded guilty must be given the opportunity to reconsider their plea. The accused must swear an affidavit attesting to reliance on the sentencing indication in entering a guilty plea and confirming that they will elect to re-plead if the Court increases sentence.

In this case, the Judge had convened a conference in chambers with Crown and defence counsel, which the accused was not present at. The Crown advised that it would be seeking a sentence of life imprisonment with a minimum non-parole period of 17 years, while the Judge suggested the possibility of a finite sentence if the accused were to plead guilty, rather than endorsing s 104 of the Sentencing Act 2002.

The Court discussed the difficulties posed by sentencing indications to the administration of criminal justice in New Zealand, in the absence of an express legislative regime. Sentencing indications could amount to an objectionable form of "plea bargaining" and may pay insufficient attention to the needs of victims. Significant concern was voiced about judges giving sentence indications in chambers conferences where the accused was not present. Section 376(1) of the Crimes Act 1961 secures the accused's presence at the "whole trial" of his or her case, which extends to pre-trial processes and sentencing matters.

In the circumstances of the case, the Court considered there was a sentencing indication such as to attract the application of the rule that an accused must be given an opportunity to re-plead on a successful Solicitor-General appeal in order to avoid prejudice. The Court granted an extension of time, quashed the conviction for murder, set aside the sentence, and remitted the case to the High Court for trial. The accused has deposed that he will plead not guilty.

Severance – use of screens for sexual abuse complainants

The appellant in *R v Shone* [2008] NZCA 313 was a teacher, who was charged with 18 counts of sexual abuse of teenage female pupils, who were also his private music students. In pre-trial rulings, the Judge refused to order that the trials be conducted separately, refused to allow defence counsel to call non-expert evidence, and made an order that the complainants be allowed to give their evidence from behind screens. Mr Shone filed an application for leave to appeal against the rulings. The Court granted the application for leave, but dismissed the substantive appeal.

In respect of the first pre-trial ruling, Mr Shone contended that each of the complainants alleged offending that differed in time, place and circumstance, and that severance was "conducive to the ends of justice" under s 340(3) of the Crimes Act 1961. The Court considered that there was no evidence of a risk of collusion between the complainants, and that this was a "strong case" for the admission of propensity evidence, in light of the many similarities between the complainants' allegations. Any risk of prejudice inherent in a joint trial was appropriately dealt with by judicial direction, rather than pre-trial exclusion. The Court found no fault in the Judge's ruling that the non-expert evidence that Mr Shone sought to adduce was irrelevant, and therefore inadmissible.

Finally, the Court considered that the Judge had properly ordered the use of screens as an alternative mode of giving evidence under s 104 of the Evidence Act 2006, since the complainants may otherwise be inhibited in giving their evidence. A judicial direction on the use of screens would be available to mitigate any claimed prejudice.

Unreasonable verdict – retrial

In *R v Clapham* [2008] NZCA 273 and [2008] NZCA 380, the Court considered whether a jury's verdict was unreasonable or unable to be supported having regard to the evidence and whether it was appropriate to order a retrial.

Mr Clapham was convicted of a number of sexual offences against a young boy. He appealed against a number of his convictions on the basis that the verdicts were unreasonable or unable to be supported having regard to the evidence.

On one charge, the complainant failed to come up to brief when giving evidence. The only evidence in support of the charge was of an admission the appellant was alleged to have made to a licensed private investigator. The Court noted that a conviction can be supported on the basis of a confession alone if it is cogent and satisfactory but must be cautious before accepting confessional evidence. After considering the evidence of the admission and the circumstances in which it was made, the Court concluded that the admission was reliable and not extracted under pressure or improperly. Accordingly, the appeal in relation to this count was dismissed.

In relation to two other counts, the appellant submitted that the evidence could not be interpreted in a way to support them. The count alleged that the offending had occurred between 1 January 1993 and 12 July 1995. But on the complainant's evidence, the offending must have taken place in 1997. Further, it was accepted that

the appellant sold the truck in which the complainant said the offending took place in November 1991. In light of these inconsistencies the Court held that the jury could not reasonably have been satisfied to the required standard in finding the appellant guilty on those counts. Accordingly, the convictions in relation to those counts were quashed and verdicts of acquittal were directed. The Court held that it would not be appropriate to order a retrial because in seeking a further trial the Crown was effectively seeking to improve on its original case.

The conviction appeal was allowed in part but the sentence was not adjusted as the lead count was not disturbed.

Sentencing

Aggravated robbery - ADHD

In *R v Longstaff* [2008] NZCA 223, the appellant appealed his sentence of two years and nine months imprisonment on a charge of aggravated robbery. He had been the driver of a getaway car following the bungled hold-up of a dairy during which 12 packs of cigarettes were stolen.

The Court rejected arguments that the sentence should be reduced to achieve parity with the appellant's co-offenders, and that his Attention Deficit Hyperactivity Disorder ("ADHD") should be recognised as a mitigating factor. However, it appeared from the sentencing notes that the Judge had been under the mistaken assumption that the appellant was subject to a sentence for another offence at the time of the offending. There was therefore the appearance that there was a risk of injustice. Given the appellant's ADHD condition, the Court decided to extend a "modest degree of mercy" by allowing the appeal and reducing the sentence to two years and six months imprisonment.

Aggravated robbery – home detention – sentence disparity between co-offenders

In *R v Hall* [2008] NZCA 207, the Court considered whether a sentence of home detention should have been imposed on Mr Hall, who had been convicted of aggravated robbery. It also considered the issue of sentence disparity between co-offenders.

Mr Hall had acted as the getaway driver while his co-offender, Mr Martin, robbed a video store at knifepoint. Mr Martin pleaded guilty prior to trial and was sentenced to two years and eight months imprisonment.

At sentencing, the Judge adopted a starting point of four years imprisonment. The Judge took into account Mr Hall's lesser role in the offending as well as his youth, absence of prior convictions, expression of remorse, and prospects of rehabilitation. However, in the absence of a guilty plea, the lowest realistic sentence that could be imposed was one of two years and three months imprisonment.

The Court noted that the Judge clearly wanted to impose a sentence of home detention but thought it was not available. *R v Hill* [2008] 2 NZLR 381 (CA), released after Mr Hall was sentenced, showed that the Judge was in error on this point. In all the circumstances, a sentence of home detention would have been proper. *R v Mako* [2000] 2 NZLR 170 (CA) did not prevent non-custodial sentences being imposed for aggravated robberies.

The Court also considered the issue of sentence disparity between the co-offenders, Messrs Hall and Martin. In the Court's opinion the sentence imposed on Mr Martin, given his youth, guilty plea and co-operation with the authorities, was severe. For this reason, the Court expressed reservations about whether Mr Martin's sentence should control that imposed on Mr Hall. The Court then noted that Mr Hall had been on bail before trial for 20 months, had served approximately three months in prison, and had been subject to bail conditions similar to those imposed on home detention for three months pending his appeal.

In this context, the Court allowed the appeal, quashing the sentence of imprisonment and substituting a sentence of eight months home detention, noting that the sanction in its totality would be broadly commensurate to that imposed on Mr Martin.

Assault as a party – home detention

In *R v Bishop* [2008] NZCA 97, the Court allowed a sentence appeal, quashing a sentence of nine months imprisonment on a charge of assault as a party, and substituting a sentence of four and a half months imprisonment.

The appellant was the mother of the 15 year old victim. While the victim was in the car with the appellant and her husband as a passenger, a number of verbal altercations arose, which became the subject of assault charges. Incident 1 involved the appellant punching and slapping her son in the face. For Incident 2, both the appellant and Mr Bishop faced a count of assault as parties for restraining the son by taping his arms and legs together, and forcibly getting him into the car. Incident 3 was a count of assault with intent to injure against Mr Bishop alone. Mr Bishop pleaded guilty to the charges he faced arising from incidents 2 and 3. Mrs Bishop elected trial by jury and was acquitted in respect of incident 1, but was convicted (and sentenced by Judge Crosbie) in respect of incident 2.

In terms of *R v Taueki* [2005] 3 NZLR 372 (CA), the Judge described the aggravating features as being that actual violence was used in which the appellant had participated; that she had the opportunity to intervene and limit the violence; and that she had abused a position of trust. He said there were no mitigating features relating to the offending. The Judge was satisfied that the purposes and principles of sentencing could not be met by a community sentence, which would undermine the need for specific and general deterrence and denunciation. The starting point of nine months imprisonment became the end sentence.

The appellant submitted that the sentence was manifestly excessive and that a non-custodial sentence should have been imposed.

Having regard to the hierarchy of sentences in s 10A of the Sentencing Act 2002, the Court agreed with the Judge that the purposes and principles of sentencing could not be met by a sentence that had the appellant remaining in the community. The Court agreed that home detention was inappropriate, given society's intolerance of violence against children by people who are meant to keep them safe. Thus, the key issue was whether the term of imprisonment imposed was manifestly excessive. Given that she was to be sentenced only in respect of one of the three incidents, and given her limited level of involvement as a party in relation to incident 2 in handing the binding tape to her husband, the Court considered that a sentence of nine months, against a one year maximum, was too high. For those reasons, as well as the need for relativity with the sentence imposed on Mr Bishop, the Court substituted a sentence of four and a half months.

Assault – mitigating factors

In *R v Whata* [2008] NZCA 204, the Court allowed an appeal against a sentence of two years and three months imprisonment on one count of assault with intent to rob and one of common assault. The charges arose from an incident in which the appellant and his co-accused accosted the victim who was out walking his dog, demanding that he hand the dog over. After sustaining several blows, the victim escaped, but he was later pursued and attacked again. The attackers were only deterred when another member of the public intervened.

The Court held that the starting point of three years imprisonment taken by the Judge was properly open to him, on the basis of *R v Mako* [2000] 2 NZLR 170 (CA). However, the Court emphasised that when applying *Mako* to a charge of assault with intent to rob, care must be taken to have regard to any relevant points of distinction. In particular, an assessment of culpability should generally take into account that the actus reus of theft, essential to a charge of aggravated robbery, will be absent.

The Court agreed with the Judge's 25 per cent discount for an early guilty plea, but held that a further discount should be given to account for the appellant's mental illness and remorse. The Court allowed the appeal, substituting a sentence of 18 months imprisonment.

Burglary – recidivism – starting point

In *R v Columbus* [2008] NZCA 192, the Court discussed the proper approach to sentencing recidivist burglars.

Mr Columbus was sentenced to two years and three months imprisonment after pleading guilty to one charge of burglary, two charges of theft and two cannabis-related charges. He had 89 previous convictions, the majority for property related offending, and had been sentenced to imprisonment on 15 occasions since 1989. On this occasion, the burglary charge was treated as the lead charge for sentencing.

The ultimate question for the Court was whether the final sentence imposed was excessive. It began by offering some guidance on the proper approach to setting the

starting point in sentencing for burglary. The Court acknowledged that although a burglar's previous convictions are often regarded as contributing to the starting point adopted, the primary consideration is the intrinsic nature and gravity of the offence charged. The starting point should be set predominantly by reference to the circumstances of the offending. To the extent that prior offending contributes to the offender's culpability within the gravity of the particular offending, it is important to guard against giving undue emphasis to past dishonesty convictions.

The factual circumstances of the burglary in this case justified a sentence of one year imprisonment. Increases of six months for the other offending and one year for Mr Columbus' past dishonesty offending were appropriate. The starting point was therefore two years and six months imprisonment. A maximum of eight months could be deducted for the mitigating factors, primarily his guilty plea, resulting in a final sentence of one year and ten months imprisonment. Home detention was not appropriate, given the need for deterrence and protection of the community. Mr Columbus had also not demonstrated a real commitment to change.

Discharge without conviction – s 107 Sentencing Act 2002

In *R v Hughes* [2008] NZCA 546, the Court granted special leave to appeal the following question: has s 107 of the Sentencing Act 2002 created a threshold for the exercise of the discretion to discharge without conviction that is different from the test expressed in *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) and in *Police v Roberts* [1991] 1 NZLR 205 (CA)? The question arose because *Turner* and *Roberts* were decided under different statutory provisions (s 42 of the Criminal Justice Act 1954 and s 19 of the Criminal Justice Act 1985 respectively) rather than s 107, which is currently in force.

The Court held that the wording of s 107 clearly adopts the test applied in both *Turner* and *Roberts* and said it did not believe s 107 was intended to materially alter the threshold. In considering whether the threshold test in s 107 has been met and in the exercise of the discretion under s 106, judges should focus on the requirements of the Sentencing Act 2002, rather than on cases under statutory provisions that have now been repealed.

In coming to this answer, the Court found that s 107 essentially confirmed the disproportionality test expressed in *Turner* and *Roberts*. Unless the court is satisfied under s 107 that the disproportionality test has been met, the discretionary power of the court conferred by s 106 cannot be invoked. The Court noted that descriptions of the test, such as "very stiff" or "exceptional", were unhelpful: the correct approach is simply to evaluate whether the statutory wording of s 107 is satisfied.

Similarly, previous references to the discretion being unfettered were now inappropriate. Under s 107, the court must take into consideration all relevant circumstances of the offence, the offending and the offender, and the wider interests of the community, including the factors required by the Sentencing Act to be taken into account under ss 7, 8, 9 and 10. Having taken account of those factors, the judge must determine whether the s 107 test is met and whether it is appropriate that he or she make an order under s 106 to deal with the offender. As a result, although the

parameters of the disproportionality principle have not been changed by s 107, the exercise of the discretion is informed by the stated relevant factors; it is not "unfettered".

The Court also approved the approach taken in *"BC" v Police* CRI 2003-485-101 2 June 2004 (HC), which held that s 107 does not require an analysis of onus and standard of proof. Instead, it is for the Court to assess all the relevant evidence and decide whether it is satisfied that s 107 has been made out. That said, it could be expected in the normal run of things that an offender seeking a s 106 discharge would put before the court information, or draw the judge's attention to information in reports before the court, to provide a basis satisfying the judge that the s 107 test was met and that a discharge under s 106 was appropriate.

The appeal was dismissed.

Home detention – jurisdiction – rehabilitation options

In *R v Ford* [2008] NZCA 64, the Court allowed an appeal against sentence, quashing a sentence of two years and three months imprisonment on two charges of attempting to make intimate visual recordings and one charge of burglary, and substituting a sentence of eight months home detention.

The appellant had concealed himself in a cubicle in a ladies' public toilet, and had attempted to take photos of women in the adjacent cubicle. In sentencing the appellant, the Judge identified the main aggravating features as being the proximity of the similar offending to the appellant's release from prison, the breach of a trespass order, and the gross breach of privacy involved. In mitigation, he accepted the guilty plea and the appellant's wish to stop offending in this way. The Judge adopted a starting point of three years imprisonment and made an allowance of nine months imprisonment for the guilty plea, the remorse and the diagnosed psychological condition.

The appellant appealed on the basis that the sentence was manifestly excessive, submitting that the Judge should have imposed a sentence of home detention to enable rehabilitation options to be pursued.

The Court held that jurisdiction to impose a sentence of home detention exists under Parts 2A and 2B of the Sentencing Act 2002 notwithstanding the sentence imposed, following *R v Hill* [2008] 2 NZLR 381 (CA). While the starting point of three years was in the range available to the Judge, the Court considered that a more generous allowance should have been made for mitigating factors, specifically one third of the lead sentence. The resulting sentence of two years imprisonment would fit within the criteria of s 15A of the Sentencing Act, relating to jurisdiction to impose a "short-term sentence". However, for the reasons given in *Hill*, the Court considered whether home detention was appropriate in Mr Ford's circumstances. Notwithstanding his "deplorable record", the Court regarded that appropriate one-on-one psychological treatment was at last being undertaken and that it was in society's interests that the appellant try to break the cycle of offending by serving a sentence of home detention.

The appellant was subject to a set of specific conditions, in addition to the standard home detention conditions.

Home detention – jurisdiction – Sentencing Amendment Act 2007

In *R v Hill* [2008] 2 NZLR 381, the Court had its first opportunity to consider the effect of the Sentencing Amendment Act 2007, and the mechanics of the new regime for home detention.

The appellant had been convicted on one count of possession of methamphetamine for the purpose of supply and sentenced to a term of two years and three months imprisonment. Two grounds of appeal were advanced.

First, it was argued that the Judge had erred in classifying the appellant as falling within the lower end of band 2 of the categories set out in *R v Fatu* [2006] 2 NZLR 72 (CA). Band 1 extends to "low level supply of less than 5 grams". Unfortunately for the appellant, he was found with 6.3 grams of methamphetamine. He had argued at trial that the methamphetamine was all for his own use, although this was clearly rejected by the jury. On appeal, counsel contended that at least some of the methamphetamine may have been for the appellant's own use and that once that was taken into account, the amount for supply should have been treated as being below five grams, so that band 1 was the appropriate band. The Court was unable to find that the Judge erred in his approach, noting that there had clearly been some element of commerciality involved. The starting point of three years and six months imprisonment adopted by the Judge was within the range available, albeit at the upper end.

Secondly, it was submitted that the Judge erred in not sentencing the appellant to 12 months home detention. The Court began by noting that s 15A of the Sentencing Act 2002 enabled the court to impose a sentence of home detention only if two conditions were met. First, the court had to be satisfied that the purposes of sentencing could not be achieved by a less restrictive sentence; and secondly, the court would, in the particular case, otherwise sentence the offender to a "short-term sentence of imprisonment." The words "short-term sentence" were at that time defined to mean "a determinate sentence of 24 months or less". This posed a problem for the appellant, as the Judge had clearly considered a sentence of two years three months imprisonment to be required.

However, the appellant's offending had occurred in October 2006, prior to the commencement of the Sentencing Amendment Act. Thus, s 57 of the Sentencing Amendment Act, dealing with transitional arrangements, applied. That section provided that home detention would be available, where the offender was convicted of an offence committed before the commencement of s 80A (the section introducing home detention as a sentence in itself to be imposed by the court), if three conditions were met. Those conditions did not require that the sentence otherwise applicable was of a "short-term", but merely that imprisonment would have been a sentencing option. The Judge thus had jurisdiction to sentence the appellant to home detention. The question was whether he was wrong as a matter of principle not to have exercised that jurisdiction.

The Court made a series of points in relation to the sentence of home detention and whether it should have been imposed on the appellant. It noted that the amendments were intended to be a mechanism to reduce the number of people sentenced to imprisonment and thereby the prison population. It emphasised that society's interests are better served in some cases by the imposition of restrictions on liberty through home detention rather than through imprisonment. It was clear that the presumption of imprisonment created by s 6(4) of the Misuse of Drugs Act 1975 for offending involving class A drugs should not be overlooked. Further, it recognised that it was well established that home detention is unlikely to be granted where a person is convicted of dealing in a drug from his or her home. However, the Court considered that in a case such as the one before them a sentencing judge "may properly give significant, even decisive, weight to the prospects for rehabilitation."

On the facts, the Court considered that a sentence of home detention was appropriate. The offending had been at the low end of the spectrum and the appellant had made significant progress in the intervening period. He had committed himself to dealing with his drug addiction and his personal issues, and he was able to serve his period of home detention at a place where he had good support. The Court commented that judges should be prepared to sentence to home detention in order to achieve the social and individual benefits that home detention offers.

The Court allowed the appeal, substituting a sentence of 12 months home detention and 200 hours community work.

Home detention or imprisonment – transitional offenders – s 15A(1)(b) Sentencing Act 2002

In *R v D (CA253/2008)* [2008] NZCA 267, the Court allowed a Solicitor-General's appeal against a sentence of 12 months intensive supervision imposed on one count of wounding with intent to injure.

The sentencing Judge had failed to tailor his sentence to the appropriate sentencing goals by imposing a community-based sentence for an offence that required a sentence designed to meet the sentencing purposes at which imprisonment is aimed. The Court therefore decided to sentence afresh.

The Court reviewed the hierarchy of sentences in the Sentencing Act 2002. It held that the seriousness of the offending in this case was increased by the fact that D was subject to a protection order in favour of his former wife at the time, but reduced based on the Judge's finding that there was provocation or excessive self-defence in terms of *R v Taueki* [2005] 3 NZLR 372 (CA). The offending was therefore classed within band 1 of *Taueki*. Taking into account the other relevant factors, the Court arrived at a sentence of two years imprisonment.

Thus, the question of home detention arose. D was a "transitional offender", so s 15A(1)(b) of the Sentencing Act 2002 did not apply to restrict consideration of home detention as a sentence to a case in which a sentence of two years imprisonment or less would otherwise have been imposed: *R v Hill* [2008] 2 NZLR 381 (CA). The

Court considered that home detention would have been an appropriate sentencing option.

The Court decided it was not appropriate to increase the sentence from a community-based one to a custodial one on appeal. However, it was of the view that a sentence of 12 months intensive supervision was manifestly inadequate, and could not respond to the offending or meet D's rehabilitative needs. It imposed a sentence of two years intensive supervision and a term of 250 hours community work, on conditions requiring D to undergo and complete programmes to address his violent offending.

Home detention – status of sentence when appeal filed

In *R v Bisschop* [2008] NZCA 229, the Court examined whether a sentence of home detention should have been imposed for a charge of assault with intent to injure and, if so, whether the term of nine months was manifestly excessive.

Mr Bisschop pleaded guilty to assault. He admitted knocking the complainant to the ground with a blow to the head and then kicking him in the upper body on two or three occasions. At sentencing, the Judge said that a term of imprisonment of around nine months would have been appropriate but for the new sentencing regime. Given this, and Mr Bisschop's previous convictions for violent offending, he was sentenced to nine months home detention.

The Court commenced its discussion by noting that it was not clear what the immediate effect of filing an appeal is on a sentence of home detention, due to an apparent conflict between s 399 of the Crimes Act 1961 and s 80ZB of the Sentencing Act 2002. While the most obvious reading of s 399 is that home detention is automatically suspended once an appeal is filed, the Court observed that it would be better for bail to be sought pending the determination of an appeal.

Counsel for Mr Bisschop argued that the Judge erred in imposing a sentence of home detention. He submitted that a combination of less restrictive sentences was appropriate. The Court disagreed, holding that the only decision open to the Judge was whether to select a sentence of imprisonment or one of home detention. Moreover, given Mr Bisschop's rehabilitative prospects, home detention was the correct option.

The Court then considered whether nine months home detention was manifestly excessive. It rejected any suggestion that the term of home detention should be fixed by way of merely halving the term of imprisonment that would otherwise have been imposed. An evaluative assessment of all the circumstances is required, including the principle that the least restrictive sentence appropriate should be selected. On the facts of this case, the Court held that nine months was manifestly excessive. A term of six months home detention was held to be proper. In allowing the appeal, the case was remitted to the District Court for this sentence to be imposed subject to original conditions, provided that new residential and curfew conditions were imposed.

Immigration fraud – commercial gain as aggravating factor

In *R v Hassan* [2008] NZCA 402, Mr Hassan appealed to the Court on the basis that the sentence imposed in relation to fraud committed in the course of a refugee status application (forging a document, making a false declaration and attempting to pervert the course of justice under ss 257(1), 111 and 117(e) of the Crimes Act 1961 respectively) was manifestly excessive. The Court allowed the appeal, quashing a sentence of two years imprisonment and imposing a sentence of 15 months imprisonment, to bring Mr Hassan's sentence into line with previous cases involving immigration fraud for commercial gain, which had starting points of around two years: *R v Lillandt* HC CHCH A69/01 9 August 2001 and *Department of Labour v Liao* HC AK CRI 2004-404-499 14 April 2005.

Despite the fact that a sentence appeal involving immigration fraud had not come before the Court previously, the Crown accepted that there was insufficient information before the Court to set a tariff. Therefore, the judgment is not to be treated as a tariff judgment. However, the Court commented that in future the starting point adopted in *Hassan v Department of Labour* HC AK CRI 2005-404-356 20 November 2005 of two and a half years imprisonment was more appropriate than those in the earlier cases. Offenders could expect significant uplifts where other persons are brought into New Zealand, where there is a commercial aspect to the fraud or where other aggravating features (such as false evidence to judicial bodies) are present.

Manufacturing methamphetamine – uncertain quantities – starting point

The question for the Court in *R v Smith* [2008] NZCA 175 was whether sentences for charges relating to the manufacturing of methamphetamine were manifestly inadequate.

Mr and Mrs Smith pleaded guilty to a number of charges arising from the discovery of four separate clandestine laboratories over the course of about three months. At sentencing, the Judge adopted a starting point of seven years imprisonment for the lead manufacturing charges. He then deducted one-third for the early guilty pleas, leaving a sentence of four years and eight months imprisonment. Mrs Smith's sentence was further reduced by one-half to reflect her reduced culpability. She received an end sentence of two years and four months imprisonment. The Solicitor-General appealed both sentences.

The only issue on appeal was whether the starting point adopted was manifestly inadequate. From the precursor substances found at the various addresses, a yield of 13 grams of methamphetamine would have been possible. However, based on other evidence, including the admitted consumption of the respondents, the Court concluded that the total amount manufactured probably exceeded 200 grams. This quantity justified a starting point towards the upper end of band 2 (manufacture of up to 250 grams) identified in *R v Fatu* [2006] 2 NZLR 72 (CA). Accordingly, the Court held that the lowest possible starting point was nine years. This reflected the persistent nature of the offending over three months (including while on bail), and the need for deterrence in drug-related offending. The same percentage deductions were then made for the early guilty pleas and Mrs Smith's reduced culpability.

The Court allowed the appeal, substituting sentences of six years and three years imprisonment for Mr and Mrs Smith respectively.

Minimum period of imprisonment – possession of methamphetamine and cannabis – unlawful possession of firearms

R v Henwood [2008] NZCA 248 was a successful Solicitor-General's appeal against a sentence of ten years imprisonment for drug and firearms related offences. The sentence was quashed and a sentence of 12 years imprisonment was substituted.

The respondent was convicted on 21 charges following trials in March and November 2007. At the March trial, the jury convicted him of unlawful possession of a pistol, unlawful possession of a restricted weapon and unlawful possession of a military style semi-automatic firearm. At the November trial, the jury convicted him of two counts of possession of methamphetamine for supply, two of possession of precursor substances, four of possession of equipment and materials, two of possession of cannabis for sale, and eight of receiving.

The sentencing Judge took a lead sentence of eight years on the first set of offending and four years on the second set of offending. He reduced the resulting sentence from twelve to 10 years on the basis of the totality principle. He also declined to impose a minimum period of imprisonment on the basis of a probation officer's assessment that the respondent was at a low risk of re-offending.

The Court agreed with the Crown that the starting point for the first set of offending should have been at least ten years, yielding a total for both sets of 14 years. A reduction on the totality principle would put the final sentence at 12 years. The Court was not convinced by the probation officer's assessment given the recidivism and high level of organisation evident in the respondent's actions. It imposed a minimum period of imprisonment of six years.

Mitigating factors – assistance to police

In *R v Gray* [2008] NZCA 311, the Court allowed an appeal from a sentence of three years and three months imprisonment, imposed in relation to one count of burglary and one of assault with a weapon. The sentences imposed were quashed, and the case was remitted to the District Court for reconsideration in light of information that had not been available at the time of sentencing.

The charges related to an incident in the early hours of the morning when Mr Gray went to his neighbour's house, and succeeded in entering by kicking the door in. The neighbour managed to calm Mr Gray down and persuade him to leave, but Mr Gray returned and threatened him with an axe. Mr Gray then took his neighbour's car, drove off at high speed, and crashed at a nearby intersection.

The Court rejected a submission that the starting point of four years and six months imprisonment was excessive, given the relatively young age of the offender (24 years) and his institutionalised history (he had recently served three years and six months' imprisonment for burglary, taking a motor vehicle, and perverting the course of

justice). However, the Court accepted that the sentencing Judge was unaware that Mr Gray had given assistance to the police in an unrelated matter, a potentially mitigating factor. Reference was made to the discussion of this issue in *R v Hadfield* CA337/06 14 December 2006 (CA). Because Mr Gray was still to give evidence at the trial in question, the Court considered that it was not appropriate to reconsider the sentence to be imposed. Instead, it remitted sentencing to the District Court under the amended s 385(3)(c) of the Crimes Act 1961, leaving appeal rights intact.

Mitigating factors – personal circumstances – battered woman's syndrome – drug offending

In *R v Guthrie* [2008] NZCA 439, the Court allowed an appeal against a sentence of three years and three months imprisonment imposed for drug offending. The sentencing Judge had given no weight to the personal circumstances of the appellant on the basis that such circumstances should generally be given little or no weight in sentencing. The Court recognised ample authority that personal circumstances will normally be subordinated to the statutory purpose of deterrence in the case of drug offenders. However, this did not mean that personal circumstances could never be relevant, as confirmed by the Supreme Court in *Jarden v R* [2008] NZSC 69. The appellant had had a tragic life, involving sexual abuse as a child, the loss of various family members, drug addiction, and physical abuse in several relationships which had caused the appellant to suffer battered woman's syndrome. Although it could not be established that the syndrome contributed materially to the appellant's offending, the Court held that the appellant's circumstances were sufficiently unusual to warrant a modest discount from the starting point.

The Court considered a discount of six to nine months appropriate, substituting a sentence of two years and six months imprisonment for the sentence originally imposed.

Mitigating factors – psychiatric disorder

In *R v Wilson* [2008] NZCA 100, the appellant appealed against his conviction on counts of assaulting and of wilfully ill-treating his two sons, and his sentence of three years imprisonment.

The conviction appeal was taken on two grounds. First, that the Judge had erred in excluding as irrelevant evidence about the legality of the uplifting of the appellant's children by the Child, Youth and Family service. Secondly, that the trial was unfair because of the manner in which evidence was given at trial by a social worker. The Court dismissed the conviction appeal.

The sentence appeal was allowed. The Court reduced Mr Wilson's sentence by six months to recognise that he had diminished moral responsibility as a result of a psychiatric disorder, following *R v Bridger* [2003] 1 NZLR 636 (CA).

Sexual offences – ss 131B and 134 Crimes Act 1961

R v Davidson [2008] NZCA 484 raised issues as to the appropriate level of sentences for sexual offending under ss 131B and 134 of the Crimes Act 1961. The appellant faced charges under s 131B, which concerns sexual grooming, and s 134 in relation to three separate victims under the age of 16, as well as charges of possessing objectionable publications in breach of ss 131(1) and 131A of the Films, Videos and Publications Classification Act 1993. A number of the publications related to images of the victims found on the appellant's laptop. The Solicitor-General submitted that the sentence imposed of five years imprisonment was manifestly inadequate.

The trial Judge adopted the sentencing approach of taking the s 134 offences as the lead offences, and treating the s 131B offences as aggravating factors. The Court approved this approach, although noted that independent offending under s 131B will normally be seen as an aggravating aspect of the s 134 offending leading to a significant uplift in the starting point which would otherwise apply for s 134 offences. The Court considered that the Definitive Guideline published by the Sentencing Guidelines Council on offences under the Sexual Offences Act 2003 (UK) which includes sentencing guidelines for offending under s 15 of that Act, was a useful reference point. Section 15 is in similar terms to s 131B, although the UK provision provides for a higher maximum penalty.

The Court followed the approach to sentencing under s 134 that has been established since the 2005 amendment to the Crimes Act that introduced s 131B: *R v H (CA94/08)* [2008] NZCA 237.

The Judge adopted a starting point of seven and a half years. Given that the nature of the offending was extremely serious, the Court accepted that this starting point did not give sufficient weight to the purposes of punishment, deterrence of others from offending of this kind and protection of the community as contained in the Sentencing Act 2002. As a result, the Court accepted that a starting point of nine years was justified, with the one third discount reducing that to an end sentence of six years. The Court also imposed a minimum period of imprisonment of three years six months, but recorded that it would have been set at or close to two thirds of the sentence if sentencing at first instance.

The appeal was allowed.

Sexual violation by rape

In *R v R* [2008] NZCA 222, the Court reviewed the appropriateness of a sentence of 11 years imprisonment for a charge of sexual violation by rape. An appeal against conviction was dismissed.

Mr R was convicted by a jury of threatening to kill the complainant and then sexually violating her. This offending took place in the home of the complainant, who was Mr R's former partner, and involved threats of violence and the production of a weapon.

The Court relied on a passage from *R v R (CA59/99)* CA59/99 15 June 1999 that reviewed sentencing levels for contested rapes in domestic settings that involved

significant violence, injury or the use of a weapon. This passage revealed a normal sentencing range of between eight and ten years imprisonment. The Court noted that the sentencing Judge had made assumptions, rather than findings of fact, and held that ambiguities in the complainant's evidence had to be resolved in favour of the appellant for sentencing. As the offending fell somewhere in the middle of the culpability range identified, the sentence was manifestly excessive.

The Court allowed the sentence appeal, substituting a sentence of nine years imprisonment.

Totality principle – aggravated robbery

In *R v Anderson* [2008] NZCA 220, the Court considered the application of the totality principle in relation to property offending and an aggravated robbery.

Mr Anderson pleaded guilty to the aggravated robbery of the TAB at Te Rapa and was sentenced to three years imprisonment. This sentence was cumulative on a sentence of four years imprisonment that Mr Anderson had already commenced after pleading guilty to seven burglaries and other property offences. Some of this offending had taken place on the day of the aggravated robbery.

The Court considered that the sentencing Judge was correct to approach the sentencing exercise as if all matters were being dealt with together on the same day. However, it held that the total sentence of seven years imprisonment was manifestly excessive, given the appellant had pleaded guilty to all of the offending. Accordingly, the term of imprisonment imposed on the aggravated robbery charge was reduced from three years to two years, cumulative on the four years imposed for the property offending.

Variation or cancellation – s 68(3)(c) Sentencing Act 2002

In *R v Morgan* [2008] NZCA 232, the Court considered an appeal against sentence on a charge of assault with a weapon. The appellant had originally been sentenced to 150 hours community work; however, he only completed four of those hours before the expiration of the completion date. On application from a probation officer, the Judge cancelled the sentence under s 68(3)(c) of the Sentencing Act 2002, substituting it for one of eight months imprisonment. At this time, the appellant was also charged with breaching his sentence of community work (s 71 of the Sentencing Act) and trespass (which arose out of another incident). The Judge convicted and discharged the appellant on the former, and imposed a concurrent sentence of one month imprisonment on the latter charge.

The appeal was brought on the basis that the sentence of imprisonment was disproportionate to the sentence of community work originally imposed. Counsel submitted that the Judge had effectively punished the appellant for his non-compliance with the original sentence.

The Court agreed that the Judge had erred in his approach. The substituted sentence reflected the Judge's understandable frustration with the appellant, but was wrong in

principle. The Court was clear that when re-sentencing under s 68 the judge is concerned to impose a sentence that could have been imposed on the offender originally. The substituted sentence should not include any element of sanction for the failure to comply with the original sentence. The mechanism by which to sanction a failure to comply was through sentencing on the breach of community work charge.

The Court allowed the appeal, holding that the appropriate sentence was three months imprisonment. On the breach of community work charge, the appellant should have been sentenced to two months imprisonment, and on the trespass charge a further one month period of imprisonment. All sentences were to be served cumulatively, to produce an end sentence of six months imprisonment.

Wounding with intent to cause grievous bodily harm – pre-meditation – mitigating factors

In *R v Buttar* [2008] NZCA 28, the appellants had been convicted and sentenced on a joint charge of wounding with intent to cause grievous bodily harm, to which they had entered guilty pleas. Mr Buttar was the principal offender in an attack by five members of the Sikh community on another member of that community. After a sentence indication hearing, the appellants attended a traditional Sikh conflict-resolution conference (after which they entered guilty pleas), and a restorative justice conference at which all the offenders agreed to pay reparation to the victim and the victim indicated that he did not wish the Court to impose a custodial sentence.

Mr Buttar was sentenced to three and a half years imprisonment. The Judge adopted a starting point for Mr Buttar of seven years imprisonment (band 2 of *R v Taueki* [2005] 3 NZLR 372 (CA)), in light of what he concluded to have been moderate premeditation by Mr Buttar. For mitigating factors, the Judge made a discount of 50%. The other appellants were each sentenced to two and a half years imprisonment

The appellants appealed their sentences, arguing that the Judge had adopted too high a starting point and made insufficient allowance for mitigating factors. The Court considered that the Judge had erred in concluding that there had been premeditation, although noted that prior to the attack Mr Buttar had had in his car a traditional Sikh sword which he had used in the attack. Given the "appalling display of violence" exhibited by Mr Buttar, the Court concluded that the Judge's starting point was wholly justified. In addition, the Court found no fault in the discount made by the Judge, concluding that ample recognition was given to the mitigating impact of the conflict resolution/restorative justice conferences. The Court noted that although the Sentencing Act 2002 recognises the benefits of restorative justice, it also emphasises the importance of denunciation and deterrence.

The appeals were dismissed.

Smoke-free Environments

Definition of "workplace" – Smoke-free Environments Act 1990

In *Progressive Meats Ltd v Ministry of Health* [2008] NZAR 633, the Court considered the definition of "workplace" in the Smoke-free Environments Act 1990 ("the Act").

Progressive Meats Ltd ("Progressive") was charged with an offence in that it breached s 5(1) of the Act in relation to a smoking room which it had set up at its meat processing plant in Hastings. Section 5(1) requires employers to take all reasonably practicable steps to ensure that there is no smoking in a workplace. Progressive set up the smoking room because hygiene requirements made it difficult for employees who wanted to smoke to do so by going to an outside area during their break. Accordingly, Progressive built a hermetically sealed smoking room off the plant cafeteria. The smoking room had its own ventilation systems and was set up so that cigarette smoke could not flow back into the cafeteria.

The charge against Progressive was found proved but prior to entering a conviction, the Judge stated a case for the High Court. The question posed was whether the smoking room came within the definition of "workplace" in the Act. The High Court Judge answered this question in the affirmative and the Court granted special leave to appeal.

Workplace is defined in s 2(1) of the Act as "an internal area, within or on a building or structure occupied by the employer, usually frequented by employees or volunteers during the course of their employment" and "includes a cafeteria, lift, lobby, stairwell, toilet, washroom, or other common internal area attached to, forming part of, or used in conjunction with a workplace". Progressive argued first, that because the smoking room was off an ancillary room, the cafeteria, it was two steps removed from the core working area and so outside the definition of workplace. Secondly, Progressive argued that the smoking room was not a "common" internal area. Thirdly, Progressive maintained that a purposive approach supported its interpretation.

In dismissing the appeal, the Court held, first, that it was immaterial that the smoking room was accessed off the cafeteria and not a core working area. The smoking room was within the core definition, namely an internal area within a building occupied by the employer, usually frequented by employees during the course of their employment. Secondly, the smoking room was a "common" internal area. In this context, "common" means an internal area shared by employees and the smoking room was in this category. Thirdly, the interpretation adopted in the District Court was consistent with the legislative purpose and the legislative history of the Act, which suggested that Parliament rejected the concept of mechanically ventilated rooms as providing a means of compliance with the Act.

Accordingly, the appeal was dismissed.

D OTHER CASES OF INTEREST

The following cases are still subject to suppression orders that prevent public publication of any identifying details or discussion. They are included as a list for ease of reference.

R v B [2008] NZCA 455 – bias and recusal – jurisdiction to hear pre-trial appeal against refusal of Judge to recuse himself.

R v K [2008] NZCA 559 – search warrants – whether informer's identifying particulars must be disclosed.

R v B [2008] NZCA 585 – application of Evidence Act 2006 to retrial – admissibility of trial transcript – waiver of lawyer-client privilege.

R v C [2007] NZCA 564: Evidence – scenario evidence – unreliable statements.

R v C [2008] NZCA 270: Procedure – substituting a conviction for a lesser charge where the appellant pleaded guilty at trial.

R v G [2008] NZCA 2: Evidence – admissibility of medical evidence as to likelihood of injuries being caused by consensual as opposed to non-consensual sexual intercourse.

R v H [2008] NZCA 582: Evidence – admissibility of medical evidence as to likelihood of injuries being caused by consensual as opposed to non-consensual sexual intercourse.

R v L [2008] NZCA 251: Evidence – cross-examination as to previous convictions for dishonesty.

R v M [2008] NZCA 290: Trial errors – prosecutorial misconduct.

R v T [2008] NZCA 155: Elements of offence - exploitative sexual connection with a person with a significant impairment – relevance of accused's belief in consent.

R v M [2008] NZCA 477: Receiving – inducement of Crown witness – sentencing indication.