CONFERENCE OF JUDGES OF
THE SUPREME COURT, COURT OF APPEAL
AND HIGH COURT OF NEW ZEALAND

APRIL 2008

# Court of Appeal Report for 2007

JUSTICE HAMMOND - JOEL HARRISON

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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.

## *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 William (Bill) Wilson was appointed to the Court of Appeal in February 2007. He graduated from Victoria University of Wellington. He was a partner in Bell Gully & Co from 1971 to 1996, before beginning practice as a barrister. He became a Queen's Counsel shortly after. He was a member of the Waitangi Tribunal from 1986 to 1995.

# 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 | 98 | 34 | 62 | 0 | 2 |
| Conviction | 98 | 26 | 71 | 3 | 0 |
| Sentence | 106 | 42 | 64 | 1 | 0 |
| Solicitor-General Appeals | 33 | 30 | 2 | | 0 |
| Pre Trial | 59 | 15 | 44 | | 0 |
| Other | 19 | 5 | 15 | | 0 |
| Sub total | 413 | | | | |
| Abandonments/No jurisdiction | 83 | | | | |
| **Total** | **496** | **152** | **258** | **4** | **2** |

NOTE: The figures above include four decisions reserved from 2006, and there is one reserved case at the end of 2007 with one further case adjourned part heard. Also, there were a further 21 judgments delivered during the year in respect of interlocutory matters including bail, costs, suppression and special leave.

The following table shows comparisons with earlier years

| Year | Appeals or applications for leave filed | Oral Hearing | OTP | Allowed | Dismissed/abandoned/ no jurisdiction |
|---|---|---|---|---|---|
| 2003 | 486 | 370 | 29 | 128 | 324 |
| 2004 | 528 | 392 | 21 | 99 | 396 |
| 2005 | 521 | 384 | 17 | 143 | 339 |
| 2006 | 495 | 438 | 9 | 161 | 351 |
| 2007 | 451 | 407 | 6 | 153 | 343 |

*Disposition of the criminal caseload by panels*

| | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|
| Permanent Court – five judges | 3 | 2 | 5 | 2 | 2 |
| Permanent Court – three judges | 59 | 91 | 32 | 86 | 55 |
| Criminal Appeal Division | 309 | 299 | 345 | 350 | 350 |
| On the papers | 29 | 21 | 17 | 9 | 6 |

## *B Civil appeals*

| | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|
| Motions filed | 247 | 273 | 288 | 285 | 208 |
| Appeals set down | 146 | 129 | 149 | 147 | 154 |
| Appeals heard | 148 | 113 | 125 | 151 | 124 |
| Appeals allowed | 56 | 34 | 53 | 57 | 43 |
| Appeals dismissed | 91 | 69 | 71 | 81 | 101 |

NOTE: the number of cases does not equal the number allowed and dismissed. Judgments in 14 cases were reserved at the end of the year, and 33 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*

| | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|
| Permanent Court – five judges | 14 | 8 | 2 | 2 | 1 |
| Permanent Court – three judges | 92 | 96 | 105 | 120 | 98 |
| Civil Appeal Division | 42 | 8 | 18 | 29 | 25 |
| Discontinued | 77 | 56 | 46 | 88 | 56 |
| Abandonments | 20 | 42 | 21 | 29 | 21 |

*Year end workflow*

| | 2003 | 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|
| Criminal appeals awaiting hearing as at 31 December | 191 | 218 | 266 | 240 | 197 |
| Civil appeals awaiting hearing as at 31 December | 55 | 57 | 65 | 77 | 72 |

## *C Privy Council appeals and petitions for leave to appeal*

| Date PC Judgment | Parties | Result | Whether NZ Judge sat |
|---|---|---|---|
| 10.05.07 | David Cullen Bain v The Queen | Allowed | No |

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

## *D Supreme Court appeals and applications for leave to appeal*

*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 |

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 2007, 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 |

# 4 SIGNIFICANT INSTITUTIONAL DEVELOPMENTS

The most significant restructuring ever undertaken in relation to the appellate court structure in New Zealand is now complete.

Apart from any unusual leave applications to the Privy Council which may be granted from "old" cases, the Supreme Court of New Zealand is now the final appellate court for New Zealand.

The Court of Appeal of New Zealand as the senior intermediate appellate court continues to handle a heavy criminal and civil appellate workload. In 2007, the Court of Appeal heard 124 civil appeals and 413 criminal appeals. Civil sittings were down slightly because the Court made a concerted effort to reduce the criminal backlog.

In broad terms, applications for leave to appeal to the Supreme Court are close to 100 per annum. Statistically, to date, about one third of those applications get leave. This is a greater number, by some margin, than applications for leave to go to the Judicial Committee of the Privy Council. This means that one aspect of the reforms to the appellate structure in New Zealand – greater access to the final court – has clearly been achieved.

The Court of Appeal was greatly assisted in 2007 by the addition of a ninth permanent member of the Court. We were heartened by the arrival of Wilson J in February 2007.

The Court continues to receive significant assistance from High Court judges in both the criminal and civil divisional courts. It could not adequately discharge its appellate responsibilities without that assistance. Regular liaison is now made with High Court judges sitting in the divisional courts to assist them to better appreciate the processes of the Court, and to ensure greater operational uniformity.

We note that the golden jubilee of the Court of Appeal will be reached in February 2008. The permanent Court of Appeal will then have existed for 50 years. During that period, for the vast bulk of civil and criminal appeals in this country, it has been the "final" court of appeal. Certain events are planned to celebrate that jubilee. We will comment on those events in the 2008 Report.

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# 5 IMPORTANT CASES

## A Introduction

The cases summarised below have been collated by Hammond J and the Judges' Clerks of the Court of Appeal.

The summaries have been prepared by the following Judges' Clerks:

> Sarah Cahill, Colin Fife, Catherine Fleming, Joel Harrison, Simon Kellett, Anna Kraack, Jonathan Orpin, James Shaerf, and Jane Standage

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.

Further, the following summaries are only a portion of the Court's decisions for 2007. In particular, 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 and some of the more important cases in this category are noted at page 144.

# B Civil Cases

***Accident Compensation***

*Appeal by way of case stated – causation in medical error – Accident Insurance Act 1998, s 39(2)(b)*

*Accident Compensation Corporation v Ambros* [2007] NZCA 304 arose pursuant to a case stated by Harrison J on the issue of causation under s 39(2)(b) of the Accident Insurance Act 1998 (the 1998 Act). The question was whether, in proving that a medical error caused injury or death, it would be sufficient to prove that the injury or death resulted in close proximity to the medical error in absence of evidence (including evidence that the injury or death was inevitable or was produced by some intervening cause) to the contrary.

The Court discussed whether the conclusion in *Atkinson v Accident Rehabilitation Compensation and Insurance Corporation* [2002] 1 NZLR 374 (CA) that the risk must be realised and that mere risk of injury is not sufficient for cover to exist, was still the governing test. The appellant argued that he was only required to prove that the defendant's conduct was at least capable of causing or aggravating the damage and did in fact materially increase the risk of that damage. The Court considered that this submission could not stand if *Atkinson* was followed.

The Court then examined whether there were grounds for reviewing *Atkinson*. It was found that the 1998 Act gave even clearer indications that causation must be proved than the 1992 Act under which *Atkinson* was decided and further, it was found that *Atkinson* remains consistent with English authority such as *Wilsher v Essex Area Health Authority* [1988] AC 1074 (HL), *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL), and *Barker v Corus UK Ltd* [2006] 2 AC 572 (HL).

The Court touched on the ways in which courts have traditionally dealt with uncertainty: evidential onus, inferences, statistics, and proximity. Regarding the evidential onus, the Court commented that the term burden of proof can be used in two distinct senses: the legal burden of proof and the evidential burden of proof. The Court held that the evidential burden, has, in turn, two distinct notions: first, the burden of adducing evidence on pain of having the trial judge determine the issue in favour of the opponent, and secondly, the burden resting on a party who is at risk of losing on a given issue (tactical burden). It was confirmed that while the legal burden to prove causation in accident compensation cases remains with the claimant, a tactical burden of proof may shift to the Corporation. The Court approved Lord Mansfield's maxim in *Blatch v Archer* (1774) 1 COWP 63 at 65; 98 ER 969 at 970, that all evidence is weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted. When this principle is applied, the legal or ultimate burden remains with the plaintiff, but, in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn. Regarding the use of statistics, although they can contribute to the drawing of robust inferences, the Court included a note of caution that statistical

analysis is hampered by one unknowable fact: how the particular patient would have responded to proper treatment at the right time.

The causation test devised by Mr Gray QC, acting as amicus curiae, was also considered. The Court held that part of his test was effectively a restatement of the High Court proximity test. It was stated that Mr Gray's test would pass the burden of uncertainty onto the Corporation rather than the claimant, which would be difficult to displace. Further, it would be incompatible with *Atkinson* and the 1998 Act. The case was referred back to the High Court to determine the issue of causation.

*Special leave to appeal – application for recall – jurisdiction – abuse of process – Accident Insurance Act 1998, s 166(1)*

In *Ramsay v Accident Compensation Corporation* (2007) 18 PRNZ 584, the issue was whether the Court had jurisdiction to hear an appeal under s 166(1) of the Accident Insurance Act 1998 (the 1998 Act).

The District Court declined leave to appeal to the High Court regarding a decision made by the Accident Compensation Corporation (ACC) to cease compensation. An application for special leave to appeal to the High Court was similarly disposed of. Mr Ramsay then sought to recall the decision refusing special leave to appeal. This was dismissed and Mr Ramsay appealed to this Court against that refusal.

The Court referred to *McCafferty v Accident Compensation Corporation* (2003) 16 PRNZ 843 (CA) where it was held that when special leave to appeal to the High Court under s 165(3) of the 1998 Act is declined, there is no further right of appeal and no ability to challenge the decision. Therefore, since there was no ability to appeal against a refusal to grant special leave, the Court also had no jurisdiction to hear an appeal against the High Court's refusal to recall a judgment declining special leave (at least where the application to recall challenges the correctness of the refusal).

The Court stated that if it was wrong on this first point, the appeal ought to be dismissed as an abuse of process. The Court held that it was an attempt to circumvent the finality of the refusal to grant special leave in the High Court and thus the limited appeal rights in the 1998 Act. The appellant argued that the Court's decision in *Ramsay v Wellington District Court* [2006] NZAR 136 (CA) had altered the circumstances surrounding the decision of whether to grant leave. The Court held that this decision did not make any difference to the correctness of the decision to refuse leave.

Mr Ramsay argued that there had been a miscarriage of justice, which the Court held amounted to an assertion that the legal test used in the High Court was wrong. However, this matter was not grounds for the recall of a decision, particularly in the accident compensation context, and would be more properly dealt with by way of an appeal (if available). The application for leave to appeal was dismissed for want of jurisdiction.

***Administrative Law***

*Judicial review – hearing by Dentists Disciplinary Tribunal following criminal trial – abuse of process – standard of proof*

In *Z v Complaints Assessment Committee* [2008] NZLR 65 the Court considered the standard of proof applicable to disciplinary proceedings in the Dentists Disciplinary Tribunal (the Tribunal) and when a decision to refer a case to the Tribunal would be an abuse of process.

Z was accused of sexual offending against a number of complainants. He was acquitted by a jury of criminal charges arising out of those allegations. Following acquittal, the Complaints Assessment Committee (the CAC) decided that some of the complaints against Z should be heard by the Tribunal. Z brought judicial review proceedings challenging the validity of the CAC's decision. In the High Court Fogarty J dismissed the claim in a judgment now reported at [2006] NZAR 146.

Z appealed against Fogarty J's decision on the grounds that the criminal standard of proof or a standard very close to it applied to proceedings in the Tribunal and that it would be an abuse of process to hear the charges.

With respect to the standard of proof, the Court held that the civil standard of proof applied. The Court said that the civil standard reflected the nature of the proceedings and the procedure applicable to dental disciplinary bodies. The civil standard was also apposite given the purpose of disciplinary proceedings is to protect the public, not to punish misbehaviour. The Court further considered that the civil standard best reflected the statutory regime.

With respect to the abuse of process argument, the Court noted that Z approached the matter on the basis that if the standard of proof was the civil standard then the abuse of process argument failed. Nevertheless the Court reviewed Fogarty J's decision and held that he had carefully evaluated the relevant factors. As the matter was a discretionary one and Fogarty J had applied the correct principles there was no basis for interfering.

Accordingly, the appeal was dismissed.

**The Supreme Court has granted leave to appeal.**

*Judicial review – jurisdiction to determine importation – biosecurity – "new organism" and "passenger"*

Must approval be sought from the Environmental Risk Management Authority for the importation of an organism, known to be new to New Zealand, but arriving as a "passenger" within other goods? This was the question posed by *The National Beekeepers' Association of New Zealand v The Chief Executive of the Ministry of Agriculture and Forestry* [2007] NZCA 556.

In August 2006 the Director-General of the Ministry of Agriculture and Forestry (MAF) issued an import health standard (IHS) under the Biosecurity Act 1993 (the BSA) for the importation of honey and bee products from Australia. About 2000 kgs of honey from Australia was imported, signalling the end of a prohibition that had been ongoing for some years. The National Beekeepers' Associations of New Zealand (the Beekeepers) objected and brought an application for judicial review in the High Court before Simon France J. The Beekeepers contended that bee products from Australia contained a potentially harmful bacterium, *paenibacillus alvei* (*P. alvei*), that was not previously present in New Zealand. On its view, because *P. alvei* was a "new organism", MAF was not authorised to clear the goods for importation without an approval under the Hazardous Substances and New Organisms Act 1996 (HSNO). The Environmental Risk Management Authority (ERMA) had determined that *P. alvei* was a "new organism", having not been in New Zealand before the critical date of 29 July 1998. It was accepted by MAF that with the importation of Australian bee products, the arrival of *P. alvei* into New Zealand was inevitable.

Simon France J considered that approval under HSNO was not required for the importation of bee products from Australia. On his view, *P. alvei* was merely a "passenger" organism, and approval under HSNO was only required when the new organism itself was intended for importation. HSNO, Simon France J reasoned, requires any applicant contending for the importation or release of a new organism to identify that organism's potential use. This, he continued, presupposed a purposeful importation. He further considered that any risks arising from the importation of Australian bee products could be adequately managed under the BSA through the import health standard requirements. The Beekeepers appealed.

The Court began by examining the history of both the BSA and HSNO. It concluded that while there was evidence to suggest that passenger or associated organisms were to be dealt with under the then Biosecurity Bill, HSNO indicates that a precautionary approach is to be taken to the importation of new organisms. The Court then turned to the statutory language. Of particular importance was the process of clearance set out in the BSA. As well as complying with any IHS issued under s 22 of the BSA, an inspector must consider the clearance of risk goods in accordance with ss 25 to 29 of the BSA. Section 28(1) of the BSA provides that an inspector must not give biosecurity clearance for any goods "that are or contain an organism specified in Schedule 2 of [HNSO] or for a new organism". Section 28A further provides inspectors with the power to seize a new organism until its status is determined by ERMA. If ERMA determines that the organism is in fact "new", then the inspector is prohibited from granting clearance.

The Court considered the wording in s 28(1) of the BSA (prohibiting the importation of new organisms) to be plain and indicating an intention that responsibility for such importation lies with ERMA. While MAF may assess the risks of any "risk good" (including the potential of importing unwanted organisms), it must still comply with s 28, making such an assessment largely redundant when a new organism is at issue. Given the strong emphasis on environmental protection in HSNO, the purpose of the legislation would not be met if it could be bypassed for new organisms which are "merely passengers". Section 25 of HSNO expressly (and without limitation) prohibits the importation of new organisms. It was not correct, the Court stated, to characterise the importation of *P. alvei* as "unintentional". The existence of *P. alvei*

was known. In that respect, the issue at stake was different from the accidental importation of (for example) an insect in a traveller's bag. While HSNO provides that the benefits and costs of any organism intended for import must be assessed, it also provides for rapid assessments of risk that do not require this analysis. Finally, the Court stated that there was nothing before it to indicate that New Zealand's international obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures (1995) (in particular, art 2) would be breached by requiring *P. alvei* to be approved in accordance with HSNO.

The Court concluded that the importation of *P. alvei* in bee products must comply with the requirements of both the BSA and HSNO. The appeal was allowed.

*Judicial review – failure to inform of right of election – refusal to withdraw guilty plea*

In *Abraham v District Court at Auckland* [2007] NZCA 598 the Court considered the ambit of the proviso to s 204 of the Summary Proceedings Act 1957 (the SPA) against the background of the District Court's refusal to grant leave to withdraw guilty pleas. Section 204 relevantly provides that no process or proceeding shall be quashed, set aside, or held invalid by reason only of any defect, irregularity, omission, or want of form, unless the court is satisfied that there has been a miscarriage of justice (the miscarriage proviso).

Mr Abraham was prosecuted for filing false tax returns by the Inland Revenue Department (the IRD). Eventually, Mr Abraham received detailed written legal advice to the effect that given the strength of the IRD's case and Mr Abraham's proposed defence, he ought to plead guilty. Mr Abraham considered the advice and assented to it. His counsel entered guilty pleas on his behalf, in his presence, and he was remanded for sentencing. Although three status hearings had taken place up to this point, Mr Abraham had never been advised by the court (or his counsel) of his right to elect a trial by jury pursuant to s 66 of the SPA and s 24(e) of the New Zealand Bill of Rights Act 1990. Just over one month later, Mr Abraham instructed his counsel that he wished to withdraw his guilty pleas. He filed an application to do so. In affidavit evidence accompanying the application, Mr Abraham deposed that had he been aware of his right of election, he would have pleaded not guilty and availed himself of that right and elected trial by jury. He said that if the pleas are able to vacated in the future, he will elect a trial by jury. That evidence was never challenged in cross-examination. Judge Gittos dismissed the application. Judge Gittos considered that Mr Abraham had acted on legal advice in entering his pleas and the failure to put his election rights to him was a matter of form, not substance. Mr Abraham sought judicial review of Judge Gittos' decision. This was declined by Stevens J. Mr Abraham appealed.

The Court allowed the appeal. The Court said that Mr Abraham had to demonstrate that Judge Gittos had acted unlawfully in holding that non-compliance with s 66 did not result in Mr Abraham's guilty pleas being a nullity or occasioning a miscarriage of justice. The Court confirmed that if the process were a nullity, it could not be saved by s 204. The Court held that a failure to inform an accused of his or her right of election was not to be regarded as resulting in a nullity but was rather to be dealt

with by means of the miscarriage proviso. This was so for two reasons. First, an unfair trial is not a nullity (see *R v Condon* [2007] 1 NZLR 300 at [77] (SC)). For example, appeals against conviction on the grounds of unfairness of trial would be allowed on the miscarriage of justice ground in s 385(1)(c) of the Crimes Act 1961, rather than the nullity ground in s 385(1)(d). Secondly, the Court pointed to a "sea change" in English law from the position where a procedural failure was likely to be fatal to a position where the focus is upon the prejudice occasioned by the failure.

The Court considered that a miscarriage of justice had been occasioned. Both Judge Gittos and Stevens J had focused only upon Mr Abraham's informed decision to plead guilty. Neither Judge took account of his unchallenged evidence as to what course he would have taken had he been apprised of his right of election. In the circumstances, that was a relevant consideration. Accordingly, the appeal was allowed, Judge Gittos' decision was quashed, and the District Court was directed to reconsider Mr Abraham's application in light of the Court's judgment.

*Habeas corpus – ex parte orders – Children, Young Persons, and their Families Act 1989, s 78*

The main issue in *E & Ors v Chief Executive of the Ministry of Social Development* [2008] NZFLR 85 was whether the Court would overturn the High Court's decision not to grant a writ of habeas corpus in relation to an eight-week old baby. The baby was taken into the custody of the Chief Executive of the Ministry of Social Development pursuant to an ex parte interim order under s 78 of the Children, Young Persons, and their Families Act 1989 (the CYPF Act).

The Court held that the decision could be made ex parte under s 78 in circumstances set out in r 220 of the Family Court Rules as there was nothing under s 78 which expressly or impliedly prohibited ex parte applications. Although ex parte applications are to be sought and granted only in special circumstances (see *Martin v Ryan* [1990] 2 NZLR 209 (HC)), the Court stated that the overriding purpose should prevail: that the welfare and best interests of the child are the first and paramount consideration – s 6 of the CYPF Act.

The Court held that the High Court was justified in refusing to issue the writ of habeas corpus. It was held that it was open to Asher J to find that the question of whether the order should have been made was not capable of summary determination in the context of a habeas corpus application from which there can be no appeal.

Further, as there had been a full rehearing in the Family Court following the High Court decision, it was found that any defects in allowing both sides to explain their positions in the original hearing were "cured". The Family Court Judge found the interim custody order was necessary to protect the baby. The Court held that the continued detention of the child now depended on the decision following that full hearing.

The Court also made some remarks about the procedure followed by Child, Youth and Family. It was recommended that when an application for interim custody is made without notice, the applicant must provide all relevant information, including an

explanation of why an urgent hearing on notice would not suffice, information on the reliability of the notifier, a consideration of why alternative means of protection would not serve adequately to protect the child, and also information indicating that the application ought not be granted. The Court held that the least intrusive order that satisfied the care and protection needs of the child ought to have been chosen.

**The Supreme Court has refused leave to appeal.**

## *Civil Procedure*

*Apparent bias – reasonable apprehension test – jurisdiction to entertain recusal application*

In *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 the Court considered the test for judicial disqualification on the grounds of bias.

Dr Muir had developed what came to be known as "the Trinity scheme". In essence, the scheme was an attempt to provide a 50 year tax holiday to several investors through immediate tax deductions arising from forestry investments. The Court had previously upheld a decision of Venning J that the scheme was tax avoidance on a large scale (see the summary of *Accent Management Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,323). Dr Muir was a key witness in these proceedings, and Venning J was very critical of his evidence and response to his discovery obligations.

Following the main tax litigation, the Commissioner of Inland Revenue sought non-party costs against Dr Muir. Venning J was again set down to hear the Commissioner's application, but Dr Muir objected to the Judge sitting on three grounds. First, it was argued that Venning J had engaged in a "gratuitous" attack on Dr Muir's credibility and integrity, giving rise to a potential bias. Secondly, Dr Muir argued that Venning J's association with two persons, Messrs Jannett and Hedges, gave rise to the potential of bias, warranting recusal. Thirdly, it was argued that the Judge had a direct pecuniary interest in all the proceedings that were before him (both current and past), warranting automatic disqualification. Venning J rejected each of these arguments and Dr Muir appealed.

The Court took the opportunity to discuss the relevant rules preventing bias or partiality on the behalf of judges. Traditionally, questions of bias have been addressed under two limbs. First, automatic (or presumptive) disqualification where a judge had a pecuniary (or direct) interest in the case (see *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA)). Secondly, a principle of disqualification based on apparent bias. The Court noted that in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, the majority of the High Court of Australia had adopted a single reasonable apprehension of bias test. While the Court did not believe it was necessary to settle this distinction, it did note that the single test held the appeal of simplicity.

Addressing the content of apparent bias, the Court was invited to shift away from the traditional test of "real danger" towards a "reasonable apprehension" standard. The

"real danger" test, deriving from *R v Gough* [1993] AC 646 (HL), had been adopted in Auckland Casino. This test has, however, now been modified (or rejected) in both the United Kingdom (*Porter v Magill* [2002] 2 AC 357 (HL)) and Australia (*Webb v R* (1994) 181 CLR 41). With New Zealand law out of step with the rest of the common law world (including Canada and the United States), the Court considered a shift away from *Gough* was appropriate. A two-stage inquiry was adopted. First, the applicant for recusal will be required to establish the circumstances upon which the issue is raised. The Court stated that this must be a rigorous process, lest bias be claimed frivolously. Secondly, the inquiry then shifts to considering whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. The Court emphasised that such a lens was appropriate because it entailed viewing the matter from the perspective of the public, through the eyes of the informed observer. Finally, the Court then rehearsed the advice of the Council of Chief Justices of Australia as to the process a judge can undertake when considering recusing him or herself.

The Court rejected Dr Muir's argument that Venning J had a direct pecuniary interest in the proceedings, warranting automatic disqualification, on the facts. Venning J's purported direct pecuniary interest arose out of his modest investment in and directorship of Tahakopa Forestry Trust Ltd (Tahakapo), a non-trading entity. Tahakopa is now a bare trustee, holding the land on which the forest was planted on trust for all its investors. In essence, Dr Muir contended that the tax litigation would raise (and had raised) issues that, upon resolution, would have a direct impact on Venning J's investment. The Court concluded that to take the leap from these facts to comparing Venning J's interests to the Trinity scheme was not open.

The Court then turned to Venning J's association with Messrs Jannett and Hedges, and the argument of apparent bias. Messrs Janett and Hedges were shareholders and directors of a company, Southern Forestry Ltd (SFL). SFL had been contracted by a company associated with the Trinity scheme to undertake a report into the value of certain stumpage. There had been a breakdown in relations between SFL and the company. Dr Muir argued that because the agreement had promised a lucrative return to SFL, Messrs Janett and Hedges would have been left with some residual animosity towards, primarily, Dr Muir and his associates. Venning J was then said to be associated with Messrs Janett and Hedges through his investment in Tahakopa. Messrs Janett and Hedges had also been shareholders and directors in this company.

The Court rejected any suggestion that there was an association between Venning J and these two men which had given rise to, or would give rise to, a reasonable apprehension of bias. The argument put forward by Dr Muir was, essentially, that Messrs Janett and Hedges would voice their antipathy and be given the ear of the Judge. Noting that the connection between the three men was tenuous at best, the Court also stated that the reasonable observer would also take into account Venning J hearkening only unto the evidence, as per his judicial oath.

In relation to Venning J's criticism of Dr Muir the Court considered that it was not "gratuitous" and did not give rise to a reasonable apprehension of bias. Generally, judicial disqualification would not be warranted on the basis of an adverse ruling, but there can come a point where unnecessary or gratuitous comments warrant recusal. In

Dr Muir's case however, Venning J's criticisms were directly relevant to the proceedings.

Finally, although the Court had rejected Dr Muir's appeal on the merits, it turned to consider whether it had jurisdiction to entertain this appeal at the pre-hearing stage. Section 66 of the Judicature Act 1908 provides that the Court has "jurisdiction and power to hear and determine appeals from any judgment, decree, or order". Without deciding the issue, the Court referred to the division of opinion in Australia and the United States as to whether the decision not to recuse is a cognisable judgment, order, or decree, or whether any appeal must arise as a substantive ground of appeal post-hearing.

*Name suppression*

In *Dr X v Auckland District Heath Board* [2007] NZCA 193 the Court was asked by Dr X to maintain an interim order for name suppression.

Dr X breached the Auckland District Health Board's (the ADHB) computer policies and was dismissed. The Employment Court found that Dr X was unjustifiably dismissed and reinstated him, but refused to order continued name suppression. In declining name suppression, Chief Judge Colgan focused on open justice considerations associated with Dr X's public position. He also mentioned the pre-interim reinstatement publicity about Dr X's departure from the ADHB, presumably because he thought that anyone who had followed the case would be able to work out Dr X's identity. The Judge recognised that future publicity would "probably" cause Dr X some embarrassment but noted that Dr X had brought this on himself.

The Court had serious reservations with the relevance of pre-interim publicity, and noted that the use of the word "probably" in relation to embarrassment was something of an understatement. Such publicity will have a negative impact on Dr X's ability to gain research funding, and will be painful for his family (a factor not considered by Chief Judge Colgan). Moreover, the ADHB's reaction to Dr X's behaviour has driven the publicity. If Dr X had simply accepted his unjustified dismissal the whole matter would have remained out of the media.

The countervailing considerations were that Dr X's behaviour might have been publicised regardless of the disciplinary proceedings, and the ADHB's inappropriate behaviour was not a reason to shield Dr X from publicity relating to his own actions. The Court also referred to open justice considerations and that the courts should not act as arbiters of what information those that deal with Dr X have access to.

The name suppression order was extended for seven days to allow Dr X to tell friends, family, and colleagues.

**The Supreme Court has refused leave to appeal.**

*Approach to recall – special reasons why justice requires recall*

In *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 the Court considered the approach to be taken to applications for recall.

Unison Networks Ltd (Unison) applied to have the Court recall its judgment in *Unison Networks Ltd v Commerce Commission* CA284/05 19 December 2006. While Unison made particular complaints about the way the Court had treated its submissions overall, it submitted that this was a case where justice required that the judgment be recalled.

The Court observed that the principles governing recall of a judgment are well settled and set out in *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC). In that case Wild CJ held that there are three categories of cases in which a judgment may be recalled. First, where, since the hearing, there has been an amendment to a relevant statute or a new judicial decision of relevance and high authority. Second, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance. Third, where for some other special reason justice requires that the judgment be recalled.

The Court articulated the principles applicable under the third limb of *Horowhenua*. Although in earlier cases judges had recalled judgments under this limb on the basis that they had failed to determine an issue that was properly before them, the Court held that this basis for recall was intended to be a narrow one. It said that a court's reasons and the issues it chooses to address in a judgment are within the discretion of the court. Courts are able to address submissions in the manner they choose. While a decision may be recalled where a material issue properly before it is not addressed, excluding cases of slips and minor errors, the Court held that cases in which justice will require a recall are likely to be rare.

Applying those principles to the present case the Court held that this was not an appropriate occasion for recall. The Court said that if it had misunderstood Unison's arguments that was a basis for an appeal against the judgment, not for recalling it. The other arguments made in favour of recall were based on convenience or related to matters that even if put before the Court at the first hearing would not have changed the result.

Accordingly, the application for recall was declined.

*Security for costs – order outside of High Court Rules, r 60*

In *Smith v Covington Spencer Ltd* [2008] 1 NZLR 75 the Court considered the jurisdiction of the High Court in granting an order for security for costs against all plaintiffs in a global proceeding, where only some of the plaintiffs qualified under r 60 of the High Court Rules to have such an order made against them. In the proceedings 143 plaintiffs sought to sue 12 defendants under various causes of action and for various amounts. Some of those plaintiffs were resident overseas and some could seemingly be classified as impecunious, but the majority could not.

In the High Court Heath J ordered that all the plaintiffs provide cash security totalling $1m. He accepted that orders could have been made against only those plaintiffs who

did meet the r 60 criteria, but considered there were practical problems in this approach from a case management perspective. He was clearly influenced by his perception that the plaintiffs had joined in a global proceeding for their own convenience and benefit. He held that he did not have jurisdiction under r 60 to make such a global order. However, he purported to invoke r 9 of the High Court Rules to fulfil what he saw as a procedural lacuna.

The Court confirmed that Heath J did not have jurisdiction under r 60 to make an order against all plaintiffs in a multi-plaintiff case, simply because some plaintiffs were resident overseas or unable to meet a likely costs award against them. To hold otherwise would have been inconsistent with the underlying philosophy of the rule, that is, that a plaintiff does not, in the ordinary course, have to give security for costs as an incident of bringing proceedings.

The Court dismissed a submission by the respondents that all of the plaintiffs were impecunious in terms of r 60, and thus liable to pay security under r 60. The respondents argued that each would be liable jointly and severally for the full amount of a likely costs award, and that no individual plaintiff had a sufficient net worth to meet any such award. The Court found that it was unlikely that costs would be awarded against the plaintiffs on a joint and several basis given the causes of action differed as between distinct categories of defendant. It was more likely that costs would be dealt with on an aliquot basis, or on the basis that some costs were individual and some common. The assumption underlying the submission was thus unsustainable.

Finally, the Court found that Heath J did not have jurisdiction under r 9 to make the order that he did. The alternative mechanism he created was based on a different philosophy from that underlying r 60 and could not be justified. The Court noted that the Judge's emphasis on the plaintiffs' decision to bring their claims within the context of a global proceeding was misplaced.

*Costs – whether Commerce Commission permitted to recover costs from an unsuccessful appellant – expert witness fees*

In *Air New Zealand Ltd v Commerce Commission* [2007] 2 NZLR 494 the issue was whether the Commerce Commission (the Commission) was entitled to costs in the High Court after being successful on an appeal brought against its determination made under Part 5 of the Commerce Act 1986 (the Act). The Commission declined an application by Air New Zealand Ltd and Qantas Airways Ltd to form a loose alliance. The airlines appealed to the High Court and were unsuccessful. The Commission then sought to recover its costs in the High Court, and Rodney Hansen J ruled that the Commission was entitled to costs in the High Court. The airlines appealed to the Court of Appeal on the question of costs.

The airlines pointed to the principle in *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 (CA) where the Court held that, as a general principle, the Commission should not be exposed to an adverse costs order in the High Court for unsuccessfully opposing an appeal from one of its own determinations under Part 5 of the Act. The airlines contended that symmetry and

fairness dictated that the same policy should apply when the Commission won: that is, the Commission should neither pay costs when it loses nor receive costs when it wins. The airlines said each side should meet their own costs at each stage of an application.

In its discussion the Court reviewed its decision in *Southern Cross*, on which the airlines relied. *Southern Cross* was based on the premise that it is in the public interest to have the Commission taking an active part and assisting an appellate Court when reviewing one of its determinations, where there would otherwise be no opposition to an appeal. That factor will usually justify a refusal to award costs where the Commission is unsuccessful on an appeal to the High Court. But the Court emphasised that the *Southern Cross* reasoning did not help the airlines in this case: a complete ban on the Commission being able to recover its costs in the High Court could be a disincentive to its participation in Part 5 appeals. Nor could the airlines point to a reason which, in terms of r 48D(f) of the High Court Rules, justified the Court refusing costs. Public interest was not a ground for refusing costs in this case. The Court concluded that Rodney Hansen J was correct to award costs to the Commission on its successful defence of the airlines' appeal.

The second issue was the extent to which a successful party in the High Court can recover its expert witness expenses. Must a losing party pay the full cost of experts or simply pay a reasonable contribution to the actual expenses? Rodney Hansen J held that the Commission's experts' fees met the criteria in the new r 48H (substituted in 2002 by the High Court Amendment Rules (No 2) 2002 SR 2002/410) and thus awarded the full amount claimed. The airlines submitted that Rodney Hansen J had erred and pointed to a number of cases in which the courts had awarded only a proportion of the actual experts' costs.

The Court considered that r 48H was clear and that all disbursements including expert witness expenses should generally be treated the same. Provided the criteria in r 48H(2) are met then the winning party is prima facie entitled to recover the actual cost of expenses. The Court noted that the new r 48H means that the Witnesses and Interpreters Fees Regulations 1974 are no longer relevant, and there is no need under the current r 48H to consider an uplift from the scale prescribed in the 1974 regulations. All jurisprudence under the 1974 regulations is now irrelevant, and the so-called "two thirds recovery rule" has no place under r 48H.

The Court emphasised that while legal costs recovery will rarely be concerned with the actual costs incurred by the winning party, disbursements, including for expert witnesses, are always concerned with actual costs, provided these meet the criteria under r 48H(2). For an expert witness a party may only claim in respect of time spent either giving evidence or preparing to give evidence, or in critiquing the expert opinions of the other side in order to understand the issues. Any other claim for expert witness expenses would not generally meet the criteria in r 48H(2). The Court concluded that Rodney Hansen J had correctly permitted the Commission to recover the actual fees incurred by its experts. The appeal was dismissed.

*Third party documents – confidentiality under the Tax Administration Act 1994 – public interest immunity*

In *BNZ Investments Ltd v Commissioner of Inland Revenue* (2007) NZTC 21,589, the Court was asked to decide whether the Commissioner of Inland Revenue (the Commissioner) could discover third party documents, which were in the Commissioner's possession, against BNZ Investments Ltd (BNZ) in tax avoidance litigation. This necessarily involved an analysis of the confidentiality provisions in the Tax Administration Act 1994 (the Act), and the public interest immunity.

The Commissioner suspected that a number of large banks were engaged in illegitimate tax avoidance transactions, known as "repo deals", and had taken the first steps towards litigation. It appeared that the various defendant banks had entered into broadly similar transactions over the period in question. The Commissioner wished to refer to two sets of documents: "other bank documents", being documents relating to repo deals entered into by other banks; and "other transaction documents", being BNZ and counter-party documents generated from transactions similar to the repo deals. The High Court had authorised discovery.

Dismissing the appeals, the Court stated a number of points in relation to discovery, both generally and in relation to tax litigation.

The banks' first complaint was that the Commissioner was over-discovering, swamping them with too many documents. The Court found that in addition to r 305 of the High Court Rules (which penalises over-discovery with costs), an aggrieved party might bring an action for abuse of process. A high threshold must be met before a court will intervene, and intervention must be consistent with party autonomy, the stage of the proceedings, and the long stop provided by r 305. In a case such as this, whether discovery is an abuse of process will largely turn on whether the documents are relevant. Relevance is a relative concept. The Court indicated that low level relevance might not justify discovery of tens of thousands of document. However, on the facts of this case the documents were arguably relevant, the cost of discovery was not disproportionate in the context of the litigation, and there were mechanisms that could be used to deal with the discovery.

The next issue was whether the Commissioner was estopped by s 81 of the Act, which provides that the Commissioner shall maintain the secrecy of taxpayer information unless communication is for the purpose of carrying into effect various Inland Revenue Acts. Previous decisions under s 81 and its predecessors had found that the discovery of third party documents (such as the other bank and other transaction documents) would undermine the integrity of a tax system based on self-reporting, and would be inimical to the purposes of the Inland Revenue Acts: *Commissioner of Inland Revenue v ER Squibb & Sons NZ Ltd* (1992) 6 PRNZ 601 (CA) and *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (CA). The Court thought that *Fay, Richwhite & Co Ltd v Davidson* [1995] 1 NZLR 517 (CA) was distinguishable as turning largely on its particular facts, but noted the judgment of Cooke P, where he opined that *Squibb* was to be read *secundum subjectam materiam*. In *Squibb* the Commissioner was relying on the secrecy provisions to resist discovery. In this case, the discovery of other bank and other transaction documents for the purpose of litigation fell squarely into the s 81 exception. The Court agreed that it would be simplistic to treat the matter as turning on whether the Commissioner was seeking or resisting discovery, but such a consideration is relevant. As a consequence, the secrecy provisions do not stop the Commissioner discovering the documents.

The final issue was whether the Commissioner was allowed to discover the other bank documents, which had been obtained either by notice under s 17 of the Act, or informal requests. As nothing in s 17 prevents the Commissioner using documents requested against third parties, the banks relied on privilege and the public interest immunity. The Court noted a "sea change" in the conduct of tax litigation over the last 20 years, the result of which has been to put the Commissioner in the same position as other commercial litigants. As a consequence the Commissioner would have recourse to the third party discovery and *subpoena duces tecum* procedures. It would be artificial for the Commissioner to be unable to rely on third party documents obtained under s 17 if they could be obtained in any event under the usual rules of discovery.

The Court examined the public interest immunity at length. Section 81 of the Act provides for confidentiality with a number of exceptions, including the "purpose of carrying into effect the Inland Revenue Acts". The breadth of this language could be used by litigants to demand the release of third party taxpayer information as necessary for the relevant litigation. This, it follows, must be carrying into effect the tax legislation. The courts have not accepted this syllogism and withheld the documents by invoking the public interest immunity. However, there is some awkwardness in applying s 81 with a public interest immunity overlay as both address the same underlying concerns.

In applying the public interest immunity, a number of factors are relevant. First, it is not absolute, as demonstrated by *Fay, Richwhite*. Secondly, whether the Commissioner's purpose can be satisfied by anything short of the proposed discovery must be considered. Thirdly, the immunity must be applied in a manner consistent with the statutory scheme. Fourthly, the level of confidentiality associated with the documents in question is relevant. Fifthly, the general practice in relation to commercial and tax litigation must be considered.

Applying these principles to the facts, the Court found that the public interest immunity did not apply. In order to cover off all possible approaches, the Court noted that if its approach to the public interest immunity was wrong, and the usual balancing exercise should be undertaken, the result would be the same.

**The Supreme Court has granted leave to appeal**.

*Arbitration – special leave to appeal to the Court of Appeal – cl 5 of the Second Schedule to the Arbitration Act 1996*

*Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2007] NZCA 355 concerned a leaky homes arbitration. Downer designed and built 65 townhouses in Auckland for Silverfield. Many of the homes started leaking shortly after completion and Silverfield called on Downer to make good the damage. Silverfield relied on a warranty, given by Downer, that the completed homes would be watertight. The matter went to arbitration. The arbitrator found in favour of Silverfield and declared that Downer had breached its obligations under the contract by constructing the houses in such a way that they were not watertight. He considered

that Silverfield was entitled to an order for specific performance, and made a formal order to that effect.

There was then some complex procedural manoeuvring. Silverfield applied to the High Court to have the awards entered as judgments in terms of art 35 of the First Schedule of the Arbitration Act 1996 (the Act). Downer did not oppose the awards' entry as judgments, and on 12 December 2005 Heath J ordered that the awards be so entered. Downer sought special leave to appeal out of time against Heath J's entry of the awards. This was the first appeal (CA65/06). Downer also considered the arbitrator had made a number of errors of law and sought the leave of the High Court to appeal to that Court on that basis. Randerson J granted leave on one question, but Downer was not satisfied and considered that Randerson J had (in its view wrongly) refused to grant leave on the other questions of law. Pursuant to cl 5(6) of the Second Schedule to the Act, Downer appealed Randerson J's purported refusal to grant leave to appeal to the High Court. This was the second decision appealed against (CA156/06). The question on which leave was granted by Randerson J was heard before Harrison J. He found against Downer and held that the arbitrator had not erred in ordering specific performance. Downer then applied to the High Court for leave to appeal Harrison J's decision to this Court. Harrison J dismissed the application. Downer sought special leave to appeal to the Court of Appeal against Harrison J's judgment; this was the third decision appealed against (CA157/06).

On the first issue, the Court was clear that the application for special leave to appeal out of time against Heath J's decision (CA65/06) should be dismissed. The application was well out of time and Downer had initially consented to the entry of the awards as judgments. The proposed appeal also had no reasonable chance of success. On the second issue the Court considered whether Randerson J had in fact refused to grant leave. His decision indicated that when the matter was argued before him the issues narrowed to one, and this was the specific performance question on which Randerson J had in fact granted leave. Evidence indicated that counsel for Downer had attempted to persuade Randerson J to grant leave on other grounds, but, after receiving an unfavourable response from the Judge, he "retreated". It was clear that Randerson J was alive to the requirement to give reasons for refusal of leave (r 893 of the High Court Rules). If he was declining leave on a particular application by Downer, he would undoubtedly have given reasons. The second application (CA156/06) was thus dismissed.

Thirdly the Court considered what the test should be for leave to appeal from the High Court to the Court of Appeal under cl 5(5) and (6) of the Second Schedule to the Act. The Court of Appeal had never before considered the point. The Court referred to the general principles governing second appeals in New Zealand (e.g. *Waller v Hider* [1998] 1 NZLR 412 (CA)). The Court stated that the primary focus under cl 5(5) will be whether the question is worthy of consideration. The test under cl 5(6) is not necessarily different, but the Court will exercise its power sparingly and will always be mindful of why the High Court refused leave to appeal. When this approach was applied none of the questions of law proposed by Downer were deemed to raise questions of suitable importance for the Court's consideration. Downer's final application (CA157/06) was dismissed.

***Company Law***

*Personal Property Securities Act 1999 – whether liquidator of debtor company a party to a security agreement – whether liquidator agent of priority creditor*

Is the liquidator of a debtor a party to a security agreement between the debtor and its creditor, or is the liquidator a third party? This question was addressed by the Court in *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] 3 NZLR 602.

Sleepyhead supplied goods on credit to King Robb. Sleepyhead registered a financing statement in the Personal Property Securities Register, but King Robb never signed the standard security agreement. King Robb had granted in favour of the BNZ a security over all its present and future property. Under the Personal Property Securities Act 1999 (the PPSA) the BNZ security covered the goods supplied by Sleepyhead. King Robb went into liquidation. Sleepyhead attempted to take possession of the goods that remained unsold, the value of which was $26,225, but the liquidators, Mr Dunphy and another, prevented this. The liquidators sold King Robb's assets. They applied the proceeds to discharge King Robb's obligation to the BNZ and to pay the sales commission. Although over $100,000 remained, this was spent in paying preferential creditors, legal fees, and liquidators' fees. Unsecured creditors received nothing. Sleepyhead sought summary judgment in the High Court, claiming that the liquidators had converted its goods and failed to apply the proceeds to discharge the debt to Sleepyhead under the PPSA. Harrison J granted summary judgment and the liquidators appealed. The Court dismissed the appeal.

It was accepted by Sleepyhead that although Sleepyhead's security interest had "attached" in terms of s 40 of the PPSA, meaning the agreement was enforceable as between the parties to it, King Robb's failure to sign meant the security interest had not "perfected" in terms of s 36. This meant it was not enforceable against third parties. Hence it was accepted that BNZ outranked Sleepyhead. The liquidators argued that, as they were not parties to the security agreement, they were third parties and were not subject to the security agreement. The Court rejected this, saying that the liquidator is an agent of the company who is required by the Companies Act 1993 to protect the interests of creditors. Given that liquidators have the power to bind the company, the Court said they occupied a position analogous to that of directors. Accordingly, liquidators effectively were the company and were party to the security agreement.

The Court found on the evidence that the liquidators were not liable in conversion because when they organised the sale of King Robb's goods, they were acting as agents of the BNZ. Nevertheless, because the liquidators were acting as BNZ's agents, they became subject to the BNZ's obligations as a secured party under s 117 of the PPSA. This required them to apply any surplus to discharge King Robb's obligation to Sleepyhead. The Court said that even if the liquidators were not the BNZ's agents, and accordingly that s 117 did not apply, the liquidators were required to pay Sleepyhead by virtue of the attachment of Sleepyhead's security interest in the goods. If they had withheld payment, the liquidators would have converted the goods.

*Liquidation – voidable transaction – disposal of property for no consideration*

In *Effective Fencing Ltd v Chapman* (2007) 10 NZCLC 264,292 the Court considered whether liquidators were entitled to recover from the appellant company a payment which was alleged to have been made to it for no consideration by Upstairs Ltd, a company which subsequently went into liquidation. Upstairs Ltd's liquidators obtained summary judgment against Effective Fencing Ltd in the High Court. Effective Fencing appealed on the basis that the payment had not constituted a "disposition" for the purposes of s 298 of the Companies Act 1993 (the Act).

The directors of Effective Fencing contended that they had received accounting advice to the effect that the management and operational divisions of their business should be separated. A new company, Upstairs, was created to run the management side. The family home was transferred into a trust and re-mortgaged, and the money raised was on-lent to Upstairs. Upstairs then paid a $200,000 "procurement fee" to the appellant. In the High Court Associate Judge Faire held that there was no consideration for this transaction because Upstairs did not receive anything for its payment. Effective Fencing submitted that the Judge erred and had failed to take into account the context of the transaction. The Court agreed with Associate Judge Faire that in the terms of s 298 there was no consideration for the payment. The Court, like Associate Judge Faire, found that Upstairs received no benefit from the payment – in fact, it gained only liabilities.

Effective Fencing also contended that Associate Judge Faire had erred in finding that Upstairs and Effective Fencing were under the same control for the purposes of s 298. Mr and Mrs O'Connor were the directors of both companies. The Court upheld Associate Judge Faire's finding that the definition of "control" in s 7 of the Act was not exhaustive and that in the circumstances there was no doubt that the O'Connors controlled both companies. The appellant was unable to show that the Judge had erred and so the order for summary judgment was upheld.

*Whether directors liable for creditor's losses in a phoenix company situation – nature of relief*

In *Robb v Sojourner and Anor* [2007] NZCA 493, the Court was asked to determine whether directors of a distressed company which transferred its undertakings and the bulk of its assets to a phoenix company could be liable under s 131 of the Companies Act 1993 (the Act) for a breach of the duty of good faith.

Mr and Mrs Robb were the sole shareholders and directors of Aeromarine Ltd ("Aeromarine 1"). Aeromarine 1 ran into financial difficulties when it attempted to build large catamarans. The company lacked expertise and was subjected to a number of unlucky setbacks. Mr Robb set out to re-focus the business on its core activities, which were profitable. Messrs Sojourner and Hiscock, the respondents, had contracted to purchase catamarans. When the boats were not finished by the agreed time, and issues as to cost and quality arose, both purchasers began taking steps towards litigation. Keen to keep the core business running while at the same time ridding it of the threatened litigation, Mr Robb restructured Aeromarine 1, even though at this time there was no cash crisis. The bulk of that company's assets were

sold to Aeromarine Industries Inc ("Aeromarine 2"), the purchase price including $50,000 for goodwill. Aeromarine 2 also took over Aeromarine 1's employees, and the Robbs took positions as directors of the new company. Meanwhile, Aeromarine 1 (now bereft of income and assets) was placed into liquidation very much on the eve of the Sojourner trial. Following restructuring, Aeromarine 2 operated profitably.

The key issue at trial and before the Court was whether the Robbs had breached their duty to act in good faith and in the best interests of Aeromarine 1 when they caused it to enter into the transaction with Aeromarine 2.

The Court noted that any decisions made by the Robbs as shareholders or financial backers (such as placing Aeromarine 1 into liquidation) are immune from challenge under s 131. Therefore the primary complaint must be against their decision as directors to enter the restructuring agreement. As Aeromarine 1 was insolvent following restructuring, the Robbs' obligations to the company extended to the creditors: *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA). It was also clear that shareholders could not ratify breaches of directors duties when the company was insolvent: see *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425.

The Robbs heavy involvement in Aeromarine 2 meant that this was a case of self-dealing. In equity, the Robbs would be liable for an account of profits even if the sale had been for value. However, focussing on s 141 (which limits a director's liability for self-interested transactions if it was for value), the Court found that, although that section could not be used in the present circumstances, the Robbs' liability should nonetheless be determined by whether the sale was for fair value.

Examining the facts, the Court found that the sale was at undervalue. The goodwill figure of $50,000 was far too low, and should have been closer to $700,000. This valuation exercise involved comparing the actual sale price to that which might be obtained from an independent third party. This involved difficult questions about the value of Aeromarine 1 if Mr Robb (who was the brains of the operation) was not involved. Questions of the Robbs providing covenants, and the values of these, loomed large. However, the Court was certain that Aeromarine 2 had gained something of value from Aeromarine 1, even if Aeromarine 1 could not otherwise have realised the value by sale to a third party.

The Court then examined what sort of relief should be granted in favour of the respondents. This involved an examination of s 301(1) of the Act, which allows creditors to pursue claims that a company may have against former directors. The section allows for both compensatory and restitutionary relief: see *Charter plc v City Index Ltd* [2007] 1 WLR 26 (Ch). Moreover, the Robbs' liability to Aeromarine 1 caps the quantum of any award the respondents might be entitled to. However, the respondents should not be left in a worse position than if Aeromarine 1 had sued the Robbs and then distributed the proceeds to the residual creditors.

The relief in this case could have been truly compensatory, although this would require precise calculation of the loss suffered by Aeromarine 1 and the gain derived by the Robbs. In the context of goodwill and supposed covenants of restraint of trade,

such a calculation was difficult. A simpler approach in this situation was to disgorge the Robbs of any gains made, as it was not necessary to calculate Aeromarine 1's loss.

The appellants argued that the assessment of any relief should be controlled by the likely outcome of liquidation at the time of the restructuring. This approach, taking liquidation as a counter-factual, is necessary for calculating compensatory relief, and has been the approach adopted in several phoenix company cases: *Re Welfab Engineers Ltd* [1990] BCLC 833 (Ch) and *Lion Nathan Ltd v Lee* (1997) 8 NZCLC 261,360 (HC). The Court found that it was inappropriate to use liquidation as a counterfactual, predominately because that approach failed to take account of the equitable overlay to the claim against the Robbs.

The appellants also complained that at trial, the onus had shifted to them (as defendants) to show that the sale was for fair value. This Court noted that the onus of proof is more relevant to establishing liability rather than determining the quantification of relief. Moreover, as this case rests on restitutionary principles, issues of loss (and proof of loss) are irrelevant.

Bearing these considerations in mind, the Court found that the Robbs had breached their duties as directors under s 131, and that relief was available under s 301 to the respondents. This took the form of a monetary award in lieu of an account of profits. Although some issue was taken with the High Court Judge's approach to relief (which switched between restitutionary and compensatory approaches), the Court thought that the quantum of relief was correct in the circumstances.

Finally, the Court overturned the High Court's decision to award costs on a 3C basis, largely because there were no "special reasons" to re-categorise costs from the category 2 classification they had originally received: r 48(2) of the High Court Rules. Costs in the High Court were set at 2C.

*Liquidation – transactions having preferential effect – application by liquidator to void transaction*

*Levin v Market Square Trust* [2007] 3 NZLR 591 concerned whether a company's payment of rent arrears to its landlord was a voidable transaction in terms of s 292 of the Companies Act 1993 (the Act).

One Italy Ltd leased its business premises from Market Square Trust. It was often behind with the rent and in February 2004 the trust demanded immediate payment of rent arrears. It threatened to re-enter if One Italy did not pay. One Italy did not pay, but four days later it notified the trust that it had sold its business to Peek Developments Ltd (Peek). It sought the trust's consent to assign the lease to Peek. The trust indicated that consent would be forthcoming if One Italy paid the rent arrears. In March 2004 Peek's solicitors (on behalf of their clients) then direct credited the trust the sum of $35,768.74. For reasons unknown the sale to Peek did not proceed. On 17 June 2004 One Italy went into liquidation and its liquidator, Mr Levin, served a notice on the trust claiming that the payment to the trust by Peek's solicitors was a voidable transaction by One Italy in terms of s 292 of the Act. He

sought recovery of the sum paid. Associate Judge Sargisson held that the transaction was not to be set aside and Mr Levin appealed.

The primary issue on appeal was whether the payment by Peek was a "transaction" for the purposes of s 292. If the liquidator succeeded in showing that it was a transaction within s 292 then the Court also needed to consider whether the criteria in s 292 were made out, and whether relief should be denied under s 296 because the trust received the money in good faith.

The Court examined the circumstances in which Peek had come to make the payment to the trust. Peek had loaned the money to One Italy under a general security agreement on the condition that it be applied immediately to the landlord (i.e. the trust) on account of rent arrears. The sum lent was to be deducted from the purchase price for One Italy's business. If the sale of the business did not proceed, the $35,768.74 was to be immediately refunded to Peek along with its deposit. In either event the loan would be repaid. There was a security agreement and the loan arrangement was recorded in writing. The Court noted that the facts were on all fours with *National Bank of New Zealand v Coyle* (1999) 8 NZCLC 262,100 (HC) in which a payment made on behalf of a company was recoverable from the bank despite the bank arguing it was not a payment by the company. The Court concluded that Associate Judge Sargisson had fallen into error and that the payment was in fact and in law a payment by One Italy in terms of s 292(1).

The Court was then required to consider whether the payment was made at a time when One Italy was "unable to pay its due debts" in terms of s 292. It was clear that this was the case: One Italy owed a large debt to the IRD and was habitually late in paying creditors. The Court then assessed the payment in terms of s 292(2)(b) as to whether the payment enabled the trust to receive more towards the satisfaction of a debt that it would otherwise have received in the liquidation. This wording gave rise to two interpretative questions. First, whether the liquidator had to prove that the general body of creditors has been disadvantaged by the payment. Secondly, whether the test for preference involves a comparison between what the payee received and a hypothetical liquidation at the time of payment, or with what the payee is likely to receive in the actual liquidation. On the first issue the Court concluded that although there is authority to support the view that s 292 only catches payments which disadvantage other creditors, this is an unwarranted gloss on the words. All the liquidator must do is show that the creditor received a greater payment that he or she would otherwise have received in the liquidation. And on the second issue the Court rejected the hypothetical liquidation comparison, because it derived in large part from Australian jurisprudence under a section with different wording to s 292, and because it would impose considerable practical difficulties on the liquidator. The correct comparison is with the actual liquidation.

Finally, having determined that the payment met the criteria under s 292, the Court concluded it had to be set aside unless the trust could show it had a defence under s 296(3) of having received the money in good faith. The Court reviewed the facts and found that the trust could not rely on the good faith defence. The fact that the payment was a (highly unusual) lump sum, made in circumstances where the trust knew One Italy was in financial dire straits, and where the trust's solicitor had been notified in writing that One Italy did not have any cash reserves, meant the trust could

not show it received the payment in good faith. It was not appropriate to deny to the liquidator recovery of the payment. An order was made requiring the trust to pay the sum of $35,768.74.

***Competition Law***

*Substantial lessening of competition by monopolist – competition from reseller – bundling claim and separate markets – striking out, summary judgment*

In *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 the Court considered various matters relating to ss 27 and 36 of the Commerce Act 1986 (the Act).

This case concerned a dispute between Transpower and Todd with respect to the price and the manner in which Transpower charges Todd for connection to the national grid at the Hawera substation. Transpower is the owner of the national grid and the Hawera substation. It provides services necessary to connect energy generators to the grid. Todd is a 50 per cent partner in a joint venture that owns a co-generation plant producing electricity within the dairy factory at Whareroa near Hawera.

Todd alleged that since the mid to late 1990s Transpower had been acting anti-competitively in breach of ss 27, 29, and 33 of the Act, in concert with Powerco Ltd, the owner of the local distribution network in South Taranaki. Todd's basic complaint was that it had to pay long distance transmission charges (to send energy across the national grid) for electricity that was produced at Whareroa. Todd said that it did not need to transmit energy across the national grid because it was sold locally in South Taranaki. As such, Todd complained that it was paying for an unwanted and unused service. Transpower disputed those allegations.

Transpower applied to the High Court for summary judgment on the basis that Todd's claim could not succeed. In the alternative, it applied to strike out Todd's claim. The High Court held that without hearing all the economic evidence at trial it could not say that Todd's claims must necessarily fail. It declined to give summary judgment for Transpower, but it did strike out one of Todd's claims. Transpower appealed against that judgment and Todd cross-appealed against the decision striking out one of its causes of action.

The Court of Appeal unanimously held that Transpower's application for summary judgment could not succeed because at least one of Todd's causes of action had a chance of success. The Court held that the High Court was wrong to strike out the one cause of action that it did, but that three other causes of action should be struck out. Seven causes of action were left to proceed to trial, although for a more limited period than Todd initially claimed for because some of the conduct was now time barred. In addition, the Court held that Todd cannot seek to compel Transpower to change the way it charges, as its pricing methodology is now authorised by the Electricity (Transpower's Pricing Methodology) Regulations 2004. As such, Todd is limited to claiming damages or seeking a declaration.

Much of the decision relates to the particular factual circumstances of the case, but a number of points of wider importance were considered in the judgment and are summarised below.

First, the Court confirmed that a monopolist could breach s 27 of the Act (prohibiting contracts, arrangements, or understandings substantially lessening competition) if, but for its conduct, new competition would emerge. In doing so the Court rejected the submission on behalf of Transpower that no contract, arrangement, or understanding entered into by a monopolist could substantially lessen competition because a substantial lessening of competition equates to an increase in market power or a reduction in constraints on market power.

Secondly, the Court held that merely reselling a product without adding any value does not create competition for the supplier of the product. This is because reselling the services without more does not constrain the supplier's pricing power. If the supplier raises prices, the reseller cannot respond in a way that brings to bear on the supplier the discipline of the market.

Thirdly, the Court confirmed its earlier decision in *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 that where a breach of s 36 of the Act (taking advantage of market power) is alleged on the basis of bundling products or services, it is not necessary for the plaintiff to plead that each service that is bundled is in a separate market. The Court held that there was nothing before it to suggest that in economic terms it is not possible for tying or bundling to take place in the same market.

Fourthly, the Court noted that issues in most Commerce Act claims will be intensely factual, necessitating detailed economic analysis. Almost invariably, before a court can make a decision it will need to have the facts tested and rival economic theories subject to cross-examination. Accordingly, it will be rare for a defendant to show conceptually that a claim is hopelessly flawed and courts will be more than usually cautious in striking out or giving summary judgment in Commerce Act claims. The Court stressed that this did not mean that there are different tests in the Commerce Act context, just that the established tests will be harder to meet.

Fifthly, the Court held that Transpower "may well be right" that there cannot be both a national and a regional market for the same product. This was because if there is a national market, supply and/or demand-side substitution occurs at a national level and prices cannot be raised at a local level independently of prices in other parts of New Zealand.

Sixthly, the Court confirmed its earlier decision in *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 that, under the old version of s 36 of the Act, only one firm can be dominant in a particular aspect of the market at any one time.

The appeal was allowed in part and the cross appeal allowed.

**The Supreme Court has refused leave to appeal.**

***Contract Law***

*Termination – entitlement of one party to procure resignation by another – test for permanent injunction*

In *Shell (Petroleum Mining) Company Ltd v Todd Petroleum Mining Company Ltd* [2007] NZCA 586 the Court of Appeal considered the various multi-party contracts which govern the operation of the Maui gas field.

The field is a joint venture between its owners Shell, OMV New Zealand Ltd, and Todd, and is operated by Shell Todd Oil Services Ltd (STOS). Shell and Todd each hold 50% of the shares in STOS, and each appoints three of its six directors, but the chair is always a Shell appointee and holds a casting vote.

Shell was keen to remove STOS as the operator of Maui and replace it with a Shell subsidiary. In April 2005 the Shell-appointed directors of STOS called a meeting of the STOS board to consider a draft set of resolutions under which, if passed, STOS would resign from its operatorship of Maui. Todd sought an interim injunction to prevent the meeting taking place, which was granted by Goddard J on 28 April 2005. Todd then sued Shell in the High Court. It alleged that Shell's attempt to procure the resolutions was in breach of, or was a wrongful attempt to circumvent, various agreements between Shell and Todd to employ STOS as operator of the Maui joint venture. Todd submitted that Shell could not unilaterally remove STOS as operator of the field.

In the High Court Wild J found in favour of Todd: the draft resolutions which the Shell-nominated STOS directors wished to propose were in breach of various obligations under the Maui joint venture contracts. Wild J made a declaration to this effect and granted a permanent injunction restraining the Shell-appointed STOS directors from passing such resolutions. Shell appealed Wild J's decision.

The Court examined Shell and Todd's respective rights and obligations under the various joint venture agreements. Under these overall arrangements, the Court concluded, Shell was not entitled to encourage its directors on the STOS board to vote in favour of the resolutions to remove STOS as operator. It would have been a breach of the various joint venture contracts were Shell to so act, and would also have amounted to a repudiation of SOTS by its contractual obligations. The approach taken by the Court to the interpretation of the contractual provisions led to the same result as that of Wild J, even though the reasoning of the Court was slightly different. Shell's attempt to procure STOS' resignation by the draft resolutions was wrongful and a breach of contract.

The Court then considered whether Wild J was correct to grant the permanent injunction restraining Shell from procuring STOS (through its nominated directors) to resign from its operatorship of Maui. The Court agreed with Wild J that Shell could not point to its loss of confidence in STOS as a reason that an injunction should not granted. The Court examined the proper approach to be taken to the appellate review of a permanent injunction and reviewed cases such as *Neumegen v Neumegen and Co*

[1998] 3 NZLR 310 (CA). The Court also rejected Shell's argument that a permanent injunction was in effect an order to carry on a business and thus should not be granted (for example, *Co-operative Insurance Society Limited v Argyll Stores (Holdings) Limited* [1998] AC 1). The Court concluded that an injunction was appropriate. The appeal was dismissed.

**Leave to appeal to the Supreme Court has been sought.**

*Damages – whether and how interest losses or gains awardable under remoteness rules*

In *Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590 the Court considered, inter alia, how interest losses or lost opportunities for interest gains could be awarded as part of contractual damages quanta.

Mr Clarkson entered into an agreement to purchase the business of Whangamata Metal Supplies Ltd (WMS). Mr Clarkson nominated Peninsula Metal Supplies Ltd (PMS) as purchaser. WMS did not settle on the settlement date stipulated in the agreement. Mr Clarkson and PMS sought an order of specific performance, which was granted by Salmon J in April 2004. In accordance with Salmon J's order, settlement occurred on 30 May 2004 – approximately seven months later than the settlement date in the agreement. It was common ground that during the seven month period, WMS held the business on constructive trust for PMS. PMS sought damages for breach of contract, including damages arising from the delay in settlement. Venning J awarded damages and interest on the judgment sum at 12% per annum from 31 May 2004 until the date of payment. PMS appealed on two bases: (1) that Venning J erred in not awarding damages representing lost profits arising from the fact that PMS was not able to increase the business's prices (essentially a claim that WMS, as constructive trustee, should have done so); and (2) that PMS was entitled to compound interest. WMS cross-appealed on minor matters of calculation and evidence not traversed in this summary.

The Court dismissed both the appeal and cross-appeal. The Court agreed with Venning J that it was not foreseeable to WMS that PMS intended to increase the business's prices once it obtained possession. WMS's obligation as constructive trustee was only to conserve the business. That obligation required it to cautiously maintain the status quo. If PMS had wanted prices increased prior to settlement, it would have had to instruct WMS to this effect.

The Court held that compound interest was recoverable by way of damages in contract where the plaintiff had, as a result of the defendant's conduct, either: (1) been deprived of money on which it would have earned compound interest; or (2) been forced to pay compound interest on outstanding debts that it would have retired had the contract been performed. The Court expressed approval of the decision of the House of Lords in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] 3 WLR 354. There, the House found damages, reflecting compound interest losses or lost gains, could be awarded under both "limbs" of the rule in *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145, namely: (1) loss reasonably considered to arise naturally from the breach of contract; and (2) loss

that could reasonably be supposed to have been in the parties' contemplation when they contracted. Previously, interest as damages had only been recoverable under the second limb. The Court emphasised that such recovery was dependent upon pleading and proving interest losses; such losses would never be presumed and a generalised claim simply for "interest as damages" would not suffice.

The Court said that PMS had not sufficiently pleaded the extent to which WMS's conduct had occasioned a loss of the opportunity to retire debt upon which compound interest was being charged. PMS's claim for interest was more in the nature of a generic pleading. Further, even if the case been pleaded correctly, PMS had not proved its losses so as to bring the claim within the remoteness rules in *Hadley v Baxendale*.

*Deed of settlement – construction*

In *Dysart Timbers Ltd v Nielsen* [2007] NZCA 198, the Court considered the construction of a deed of settlement said to compromise a debt owed by Castlerock Group Ltd to Dysart Timbers Ltd.

Castlerock Group had obtained building supplies from Dysart Timbers. The directors of Castlerock Group, Gregory and Roderick Nielsen, gave personal guarantees that the debt owing to Dysart Timbers would be paid. A sum of $213,169.39 was outstanding when Castlerock Group went into liquidation. No money was repaid. The Nielsens, when faced with a claim from Dysart Timbers, claimed that the debt had been settled by a deed of purchase entered into by a company called Nidia Enterprises Ltd. Nidia Enterprises had paid Dysart Timbers $340,000 to facilitate the settlement of a debt for companies related to the Nielsens, but not including by specific reference Castlerock Group.

The deed of settlement referred to "Castlerock Property Holdings", and also "the Castlerock … companies or entities". In the context of prior dealings with Castlerock Group, Ellen France J in the High Court considered that this reference included the debt owed by Castlerock Group, meaning the debt had been successfully compromised. The Court disagreed. First, the Court discussed the evidence relevant to the deed's factual matrix. At trial, all that was available to Ellen France J by way of contextual background was the evidence given by Dysart Timbers, emphasising that the settlement compromised specific debts unrelated to Castlerock Group. Evidence for the Nielsens' interests had been adduced on an earlier summary judgment application, but it was not possible to simply carry this evidence over without formal application or consent. Secondly, the Court turned to the words of the deed itself, which formed the sole basis of argument for the Nielsens. The Court considered that the reference to "the Castlerock … companies or entities" could only be a reference to those companies or entities covered by the deed, i.e. those listed in the background to the deed. Clearer words would be needed to bar an admitted liability. The appeal was allowed and the Nielsens were ordered to pay the outstanding sum plus interest to Dysart Timbers.

**The Supreme Court has granted leave to appeal.**

*Deed of settlement – confidentiality clause – in-court proceedings and mediation meeting – privilege and without prejudice*

In *Cooper v van Heeren* [2007] 3 NZLR 783 the Court considered whether statements made in court, alluding to a public decision, could breach a confidentiality clause, and whether statements made in a mediation setting were absolutely privileged.

Mr Cooper was hired by Mr Kidd to recover property and money allegedly owed to Mr Kidd by Mr van Heeren. During his investigations, Mr Cooper was arrested by the New Zealand Police and charged with intimidating and extorting Mr van Heeren. When these proceedings were concluded (by dismissal and diversion), Mr Cooper sued Mr van Heeren and others in a range of torts relating to his arrest. This matter was settled in mediation, with the settlement agreement providing that "all information relating to the Proceedings and relating directly or indirectly to the Proceedings and this Deed shall be absolutely confidential between the parties … and shall not be divulged to any person", save in limited circumstances. This confidentiality included any reference to accusations of extortion or intimidation. Mr Kidd was not a party to this deed. At the same time, he had been pursuing monetary relief against Mr van Heeren. The proceedings had shifted to South Africa. Mr Cooper alleged that during the proceedings in South Africa (between Mr Kidd and Mr van Heeren) Mr van Heeren, through either himself or counsel, breached the deed of settlement in two respects. First, during the hearing before the High Court of South Africa, counsel for Mr van Heeren cited passages from a previous judgment of Smellie J in the High Court of New Zealand ([1998] 1 NZLR 324) that were critical of Mr Cooper and referred to the alleged extortion tactics. Secondly, during a mediation meeting in South Africa, Mr van Heeren again repeated the passages from Smellie J's decision and made further accusations of a similar nature against Mr Cooper.

Harrison J in the High Court then considered, upon the application of Mr van Heeren, that Mr Cooper's action, claiming a breach of the deed, should be struck out. He came to the following conclusions: the actions complained of did not fall under the deed; the statements made by counsel in the South African proceedings were absolutely privileged and Mr van Heeren could not, in any event, be held vicariously liable for them; and the statements made in the mediation meeting were protected because the meeting was held without prejudice.

The Court agreed that the proceedings should be struck out, but differed as to its reasons. Hammond and Ellen France JJ considered that, properly construed, the deed was an attempt to end all the "mud-slinging" that had occurred, which included any attempt to refer to any proceedings related to the incidents between Mr Cooper and Mr van Heeren. As an aside, the Court noted that this could give rise to distinct problems if it were viewed as an attempt to contract out of giving evidence in court: see *Harmony Shipping Co SA v Davis* [1973] 3 All ER 177 at 182 (CA) per Lord Denning MR. However, Hammond and Ellen France JJ continued, although this was an attempt at blanket suppression, counsel in the High Court of South Africa had read from an authorised, published law report that was clearly in the public domain. As such, it could not be said that confidential information had been "divulged". Chambers J differed in his approach to the statements made by counsel, but agreed on

the result. He considered that the details of the "Proceedings" not to be divulged as per the settlement deed referred only to the proceedings brought by Mr Cooper in tort against Mr van Heeren and others. In other words, the deed did not cover the proceedings in which Mr Kidd was suing Mr van Heeren over the breakdown of their commercial relationship. Consequently, on his view, the decision of Smellie J, quite aside from its public nature, was not covered by the deed.

The Court agreed that the statements made in the mediation meeting, conducted without prejudice, were absolutely privileged. Accordingly, Mr Cooper could not rely upon them as a basis for arguing a breach of the deed. Mr Cooper had argued that the privileged status of without prejudice meetings should be restricted to "admissions". The Court agreed with Harrison J, citing the decision of Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783 (CA) with approval, that isolating "admissions" from statements that were preparatory or incidental would be near impossible. While the without prejudice rule was not impregnable, none of the exceptions noted by Robert Walker LJ were applicable. Further, s 57 of the Evidence Act 2006 (not in force at the time of this case) effectively settled the debate for the future. That section effectively makes almost all communications made in connection with an attempt to settle privileged.

The appeal was accordingly dismissed.

### *Employment Law*

*Restraint of trade – consideration – interim injunction*

In *Fuel Espresso Ltd v Hsieh* [2007] 2 NZLR 651 the Court clearly stated that additional consideration over and above consideration for an underlying employment agreement is not required to enforce a restraint of trade provision.

Fuel Espresso Ltd employed Mr Hsieh as a barista in Wellington City, providing him with training as well as a salary. Mr Hsieh's employment agreement relevantly provided that upon termination of the employment, Mr Hsieh could not work in a competing barista bar/café or coffee company within 100 metres of a Fuel operation, or set up a competing business within a five kilometre radius of an existing Fuel operation. This was to last for three months after the end of the employment. When Mr Hsieh resigned he began working as a barista with Beangrinding Ltd. This new cart was within 70 metres of a Fuel coffee cart.

Judge Shaw in the Employment Court considered that the restraint of trade clause was not too wide and that it protected a legitimate proprietary interest. However, she also considered that extra consideration over and above the consideration of the underlying employment agreement was a prerequisite for an enforceable restraint of trade. Accordingly, an urgent restraint of trade was not granted. The Court, having granted Fuel leave to appeal on an urgent basis, considered that the Employment Court had fallen into error. In the present instance all that was needed was consideration for the agreement itself, there being no variation at issue. The issue in this case was not, as Judge Shaw thought, "finely balanced". Consideration had clearly been given, and

the restraint of trade was perfectly reasonable (where there was no issue on the facts as to the possibility that the adequacy of the consideration may affect the reasonableness of the restraint). The Court accordingly granted an interim injunction in favour of Fuel, restraining Mr Hsieh from operating as a barista with Beangrinding in terms of the employment agreement.

*Personal grievance – limitation period – meaning of "exceptional circumstances"*

In *Commissioner of Police v Creedy* (2007) 8 NZELC 98,926 the Court was asked to determine whether Chief Judge Colgan of the Employment Court had adopted the correct test for "exceptional circumstances" when lodging a personal grievance after the 90 day statutory limitation period.

Mr Creedy had been found guilty of misconduct by a tribunal established under the Police Act 1958. The respondent raised a number of personal grievances in relation to the handling and execution of the tribunal and disciplinary processes.

The difficulty was that Mr Creedy had not raised the personal grievances within the 90 day statutory limitation period: s 114(1) of the Employment Relations Act 2000. Grievances can be raised out of time pursuant to s 114(4) provided there are "exceptional circumstances".

In the Employment Court, Chief Judge Colgan considered that there were exceptional circumstances. Both the respondent and his counsel thought that a personal grievance had been raised by a letter, and that no further steps needed to be taken. Further, Mr Creedy was especially dependant on his barrister (who had flown from Australia, was living with Mr Creedy, and had no other clients).

Allowing the appeal from the Commissioner of Police, the Court noted that the reasoning of the Chief Judge fell to be considered under *Wilkins & Field v Fortune* [1998] 2 ERNZ (CA). In that case the Court determined that "it is not exceptional for a party in litigation or prospective litigation to believe mistakenly that he or she need take no further step at that time." *Wilkins* was indistinguishable from the present case. Further, the *Wilkins* test, which was determined under s 33(4) of the Employment Contracts Act 1991, has not been overtaken by legislative change. The current case does not fall within s 115 (which defines certain "exceptional circumstances"), and outside of those it is not clear that the *Wilkins* formulation as to "exceptional circumstances" should not apply.

The Court was also asked to determine whether the police tribunal, established to investigate the respondent's actions, was part of the Commissioner's employment inquiry and therefore a legitimate subject of employment proceedings (which focuses on actions of the employer, that is, the Commissioner). In the Employment Court, Chief Judge Colgan accepted that the tribunal was the Commissioner's agent, and thus its processes could be attributed to the Commissioner. Overturning the conclusion of the Chief Judge, the Court found that the tribunal's processes could not be attributed to the Commissioner. This was because the tribunal was not exercising any of the Commissioner's powers, nor was it under the Commissioner's supervision. There

was no statutory language to support such a conclusion, and, in any event, the tribunal's decision was reviewable in the High Court.

**The Supreme Court has granted leave to appeal.**

*Employment mediation – confidentiality*

The appeal from the Employment Court in *Just Hotel Ltd v Jesudhass* [2007] NZCA 582 concerned the construction and application of s 148(1) of the Employment Relations Act 2000, which provides that any communication made "for the purpose of mediation" must be kept confidential.

Mr Jesudhass (the respondent) and his erstwhile employer Just Hotels (the appellant) had entered into mediation over a personal grievance. Mr Jesudhass alleged that, during the course of the mediation, Just Hotels indicated to him that he would not be permitted to return to work and that he would be dismissed immediately after the mediation. Just Hotels denied this allegation, asserting that a facsimile sent two days later dismissed Mr Jesudhass. The issue in this case was whether Mr Jesudhass could adduce evidence of communication made at the mediation in any litigation over the dismissal.

The Employment Court had decided that this case was an appropriate one in which to review the previous broad interpretation of s 148. It favoured an approach by which communications made at a mediation, but not genuinely for the purpose of settling litigation or potential litigation, would not be privileged. The Employment Court was particularly influenced by the argument that an absolute interpretation of s 148 would exclude evidence of criminal conduct that occurred during a mediation, and this result could not have been intended by Parliament.

The Court disagreed with the Employment Court's interpretation. It held that, in accordance with the ordinary meaning of the word "purpose", that of the intended object of an activity, a communication (written or oral) is privileged unless it is created or made independently of the mediation. This approach reflects the desirability of encouraging the parties to a mediation to speak freely, safe in the knowledge that their words cannot be used against them in any subsequent litigation.

In relation to the Employment Court's concern about evidence of criminal conduct, the Court thought that public policy considerations might require s 148 to be interpreted so as to permit such evidence to be called.

*Bargaining – duty of good faith – direct communications with employees*

In *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] 2 NZLR 614 the issue was whether an employer may directly communicate with their union-member employees during the bargaining process.

Many employees of the appellant council were members of the respondent union (SLGO). During wage negotiations the chief executive of the council sent communications directly to employees. SLGO complained that such communications

were in breach of s 32(1)(d) of the Employment Relations Act 2000 (the Act). The primary issue on appeal was the extent to which s 32(1)(d) restricts communication during bargaining even in situations where the communication does not undermine the bargaining or the union's authority in the bargaining.

The Employment Court found that some of the council's communications had breached s 32(1)(d) of the Act, and that because the council continued to communicate with its employees despite knowing of the breach it had acted in bad faith. However, in the circumstances, the Employment Court considered that only declaratory relief would be appropriate. Between the hearing in the Employment Court and the appeal to the Court of Appeal the Act was amended to provide an express remedy for a breach of the duty of good faith: s 4A.

The first question on the appeal was the extent to which s 32(1)(d) prohibited the council from communicating with its employees during bargaining (and the duration of that bargaining), and the operation of s 4(3) which permits communications of a statement of fact or reasonably held opinion. The second question was whether the test for a party acting in bad faith is subjective.

The Court first noted that the relationship between s 32(1)(d) and s 4(3) is problematic. Section 4 is a general good faith provision, while s 32 is a specific code as to how the good faith obligation operates in a bargaining situation. The Court concluded the Employment Court was correct to hold that s 32 modifies s 4 in cases where there is a conflict between a specific provision in s 32 and the general concept in s 4. The present case was an example of such a conflict. The general power to communicate statements of fact or reasonably held opinions (s 4) is constrained by the restriction in s 32(1)(d)(iii) that the employer must not undermine the authority of the union. An employer's reasonably held belief about the way a union was conducting negotiations might very well seriously undermine the bargaining and constitute a breach of s 32(1)(d).

Secondly, the Court considered the interpretation of s 32(1)(d)(ii), and whether it widened the restrictions on communication during bargaining. Does s 32(1)(d)(ii) catch *all* communications during bargaining or only those communications which undermine the union's authority? The Court reviewed the legislative history of the Act and placed particular weight on a statement by the Minister of Labour to the House of Parliament which indicated that the draft clause (s 32(1)) only applied where the communication undermined the bargaining. The Court concluded that the Employment Court was incorrect to find that s 32(1) imposed a general ban on communications between employers and employees during bargaining. Rather, it only caught communications which breach s 32(1)(d)(ii), such as those which undermined a union's authority.

Finally the Court was required to assess whether the test for a party acting in bad faith is subjective. The council contended that the Employment Court had been wrong to employ an "objective" test. The Court stated that it is not helpful to characterise the obligation of good faith under s 32 as either objective or subjective. Rather, the Court, when assessing such conduct, is directed by the Act to have regard to the factors set out in s 32(3). The appeal was dismissed.

## *Equity*

*Breach of confidence – third party recipient – contempt of court*

Does the law of breach of confidence potentially extend to third parties, and, if so, upon what principle? This was the question at issue in *Hunt v A* (2007) 8 NZBLC 102,048.

Ms Hunt had written a book, "B". The book traversed the real life events of "W" who had made a complaint to the police in 1995 concerning her alleged sexual abuse at the hands of a medical professional, A, while she was his patient. A had been charged with sexual offences, but was found not guilty by a jury. His name was subsequently suppressed. W then complained to A's professional body. Although that body decided to conduct a full disciplinary hearing, that decision was quashed by the High Court for procedural irregularity. A's name remained permanently suppressed. W then brought a civil claim against A for exemplary damages. That proceeding was settled between the parties, who expressed the view that the terms of settlement were to be confidential. Chisolm J in the High Court then filed a minute stating that the file surrounding the settlement was not to be searched without the leave of the court.

Ms Hunt began writing the book after she was introduced to W through W's barrister. W then gave Ms Hunt written permission to access her medical and other records for the purpose of writing the book. The narrative was relayed in the book, with the "actors" not named or identifiable such that no suppression order was breached. Substantial extracts from the criminal trial transcript, police documents, and lawyers' submissions were present, and the nature of the settlement process was described.

Wild J in the High Court determined that the publication of the book was a contempt of court on three grounds. First, by reproducing parts of the criminal trial file without applying to search the court file under the Criminal Proceedings (Search of Court Records) Rules 1974 (the search rules). Secondly, by breaching Chisolm J's minute (again based on the search rules). Thirdly (as a possibility), by a breach of confidence. The Court, allowing the appeal, rejected each point. In relation to the search rules, Wild J had considered that Ms Hunt's "circumventing" of the rules by obtaining information direct from W undermined the court's supervisory power. However, the Court considered the argument that Ms Hunt was subject to the search rules was misconceived. The purpose of the search rules, the Court said, was to enable someone who was not present in court, and who does not have access to the information from another legitimate source (such as a party, as in this instance), to make an application to search the file.

Wild J had also considered Ms Hunt to be in breach of confidence. This was based on two possibilities: a breach of a direct duty of confidence as between W and Ms Hunt, or the breach of confidence as between W and A by Ms Hunt (as a third party). There was no possible duty of confidence as between Ms Hunt and A. The real question was whether there had been a third party breach of confidence, because the direct duty was easily rejected in this case: W had expressly authorised Ms Hunt to engage in the publication. The Court began by emphasising the equitable and *sui generis* nature of

this cause of action: the jurisdiction is based on a broad principle of good faith, rather than the existence of a contractual, property, or fiduciary relationship. The criteria set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (Ch) were repeated: the information must be confidential; it must be imparted in circumstances importing an obligation of confidence; and there must be unauthorised use of the information.

The Court noted that the need for a "relationship" of confidence has given rise to two important, but problematic, areas in this field. First, the deliberate purloining of confidential information (not raised in the present case), and secondly, the use by a third party recipient of information that was the subject of a confidential relationship. After examining the overseas jurisprudence and commentary, the Court concluded that the most satisfactory principle to proceed on is to determine whether a third party recipient of confidential information has acted unconscionably in relation to the acquisition of information or in the way it has been employed. A list of factors to consider included: the nature of the information; the state of knowledge of the acquirer of the confidential information; the extent of any breach; what kind of detriment has or might result to other parties; and the degree of "culpability" of the third party acquirer and discloser.

In the present case, several factors pointed towards a lack of unconscionability on the behalf of Ms Hunt. There was no misappropriation of information, no complaint was made by W, it was not entirely certain that the information conveyed (most importantly, that a settlement had taken place) bore a significant degree of confidentiality, Ms Hunt had endeavoured to bring the book within the boundaries suggested to her by W's barrister, A was not identified, and the concerns raised by the book (did W obtain justice?) were of legitimate public interest. The book was, at most, very limited and non-revelatory. Accordingly, the Court concluded that there had been no breach of confidence and allowed the appeal.

*Assigned causes of action – dealing by assignor without redeeming debenture or obtaining consent*

Can a person who has assigned causes of action to a debenture holder by way of security deal with those assets by suing on them without redeeming the debenture, or obtaining the consent of the debenture holder? This was the issue considered in *Telecom New Zealand Ltd v Sintel-Com Ltd* [2007] NZCA 499.

Telecom contracted with Sintel to provide telecommunication services, facilitating Sintel's adult entertainment telecommunication service. Sintel entered into a US$3.5m facility agreement with the ANZ Banking Group New Zealand Ltd (ANZ). On the same day, ANZ and Sintel entered into a debenture agreement which assigned absolutely, by way of mortgage, all Sintel's present and future choses in action to ANZ. Telecom agreed to pay money owed to Sintel into a specific bank account at ANZ. Allegedly, Telecom then failed to make the required deposits, giving rise to a dispute between Telecom and ANZ. Sintel, who had been placed in liquidation, also disputed the amount owed to it by Telecom under the telecommunications agreement. These disputes were seemingly settled on 15 June 2000 when Telecom agreed to pay ANZ $2.225m and ANZ agreed to execute a deed of assignment of the facility agreement and its debenture to Telecom.

Sintel then brought proceedings in the High Court against Telecom, claiming Telecom had failed to properly account, to the sum of $61m, to Sintel for payments received under the telecommunication agreement. Causes of action in contract, misrepresentation, fiduciary duty, and deceit were identified. While Telecom accepted that Sintel could argue the settlement agreement should be set aside, it argued that it could not proceed with the other causes of action because it had assigned those rights under the debenture agreement. According to Telecom, Sintel required the consent of the debenture holder (i.e. Telecom) to bring the claims.

The Court considered there had clearly been an assignment, but asked whether there is a limited exception that allows Sintel to nevertheless sue in respect of these causes of action. The following question was adopted: Is there an obligation in equity on the debenture holder to act in good faith vis-à-vis the debtor in relation to its dealing with or holding of the secured property, including an affirmative duty to sue, or at least not resist a suit, as may be appropriate? Rodney Hansen J in the High Court considered that there was no reason in principle to prevent an assignor from suing to recover a chose, provided the assignee is a party to the action or is fully protected by other means. On appeal, Telecom contended that to allow Sintel to bring its claim would force upon mortgagees a duty to exercise their rights or effectively surrender them to allow the debtor to deal with the secured property. Sintel argued that Telecom was effectively taking advantage of property rights obtained through misrepresentation, a course which, it contended, equity will not allow.

The Court agreed with Sintel and stated that there must be an ability for a party in Sintel's position to bring proceedings to set aside the underlying agreement. Such an exception to the ordinary operation of property rules would need to operate along the lines of equitable doctrines. Any applicable legal remedies would have to be resorted to first (in this case, this was not a possibility – Sintel was in liquidation and there were limitation issues). Secondly, a party would need to act timeously. Thirdly, regard would have to be had to any third parties. In this case, the only third party, ANZ, would not be affected by the litigation.

The appeal was accordingly dismissed.

*Unconscionable dealing – qualifying disability or disadvantage*

*Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 concerned a claim of unconscionable dealing in the context of a commercial land transaction. The sole director of the appellant company was in the late stages of terminal cancer at the time the contract was confirmed. He later died having paid a large sum towards the deposit. The respondent company cancelled the contract and retained the sum by way of partial deposit. The appellant then commenced the proceedings to recover that amount. It was unsuccessful in the High Court before John Hansen J.

The Court held that the deceased had suffered from a "transactional disability" at the time of confirmation, sufficient to found an unconscionable dealing claim. Although the evidence indicated that in relation to the other developments in which he was involved he continued to demonstrate the qualities that he had prior to his illness, this

did not necessarily mean that he had the capacity to look after his interests properly in relation to the transaction in question. The other developments were nearing completion, were very much less complex, and involved the deceased's advisors as well as other developers. However, there was nothing to indicate that the deceased was not coping or was unrealistic or reckless in his thinking about the transaction. The Court held that to hold the transaction to be unconscionable would be to extend the doctrine of unconscionable dealing further than it had previously been taken and would run the risk of creating unacceptable uncertainty in commercial transactions. The appeal was thus dismissed.

**The Supreme Court has granted leave to appeal.**

***Family Law***

*Family protection – whether "judicial review analogy" appropriate – whether facts subsequent to testator's death relevant*

In *Henry v Henry* [2007] NZFLR 640 the Court clarified the approach that courts should take to claims made under the Family Protection Act 1955 (the Act), particularly the standard of review to be applied in considering challenges to testamentary dispositions.

The testatrix left three quarters of her estate to her son Graham, and one quarter to her son Philip. Graham had been a dutiful son. He had substantial assets of his own, had built up a successful pharmacy business, and had cared for his parents in their old age. Philip, on the other hand, was something of a prodigal son. He initially worked the family farm in partnership with his father, who gifted Philip his share. He also assisted converting the farm into a dairy unit. However, Philip fell out with his parents when he commenced a relationship with a woman his parents disliked. He left New Zealand, drifted in and out of itinerant employment, suffered an industrial accident, and was on frosty terms with the testatrix at the time of her death. He had no assets of substance. Philip challenged the 75/25 split in the Family Court. Judge Strettell reapportioned the split to 50/50. Graham appealed successfully to the High Court where Asher J restored the testatrix's original split. Asher J took the view that the approach of a court hearing a challenge to a testamentary disposition was analogous to that of a court conducting judicial review of the administrative action of a public official.

Philip appealed. On appeal, the Court said that Asher J's judicial review analogy was inapt, given the testator's role is not analogous to that of a public official, nor is the court's role analogous to that of the High Court in judicial review proceedings based on unreasonableness. The testator is not charged with a function. Nor does he or she decide the disposition of his or her estate with reference to the intention of anyone other than him or herself. Judicial review claims involve scrutiny of the process of decision-making, claims under the Act involve scrutiny of the result. This difference was enlivened by the fact that under the Act, the court has a "wide discretion" to adjudicate on testamentary dispositions as "it thinks fit" (in the words of s 4 of the

Act), whereas in judicial review proceedings the court is confined to established grounds of review.

The Court confirmed that courts deciding claims under the Act should adopt a "conservative" approach. The statutory test in s 4 of the Act required the court to repair any breach of testators of their moral duty. Beyond that, it was not appropriate for the judge to adjust the disposition solely because the judge, sitting in the testator's armchair, might have viewed the matter differently. A mere perception of unfairness was not enough. The Court interpreted its previous call for "conservatism" (see *Williams v Aucutt* [2002] 2 NZLR 650) as simply meaning "no more than the minimum necessary to make the adequate provision". The principle was the same whether the claim was based on financial need or not. The Court also confirmed that events subsequent to the death of the testator could be taken into account in assessing the appropriate remedy if the breach of moral duty, as at the date of the testator's death, was established.

On the facts the Court found that Asher J had undervalued Philip's contributions to the farm when he worked it with his father and also certain financial assistance he had provided to his parents in their retirement. The Court said Asher J's view of the facts had been coloured by his reliance on the judicial review analogy. Further, Philip's health deteriorated significantly between the time of the hearings in the lower courts and that in the Court of Appeal. This could, potentially, affect the fulfilment of the moral duty vis-à-vis Philip. Accordingly, the Court allowed the appeal and remitted the case to the Family Court in the light of the new evidence and the legal conclusions set out in the Court's reasons.

*Challenge to mediated settlement agreement*

In *Hildred v Strong* [2007] NZCA 475 the Court considered whether a mediated settlement agreement could be overturned.

Mses Hildred and Strong were in a de facto relationship between 1990 and 2001. They separated shortly before the Property (Relationships) Act 1976 (the Act) came into force. They decided to settle the dispute regarding the division of their joint property by mediation. In June 2002 they entered into a standard LEADR mediation agreement. The agreement recorded that it was to be in full and final settlement of all property and financial issues between the parties, whether pursuant to the Act or any rule of common law or equity. A few days after the mediation Ms Hildred felt that the agreement was unfair and sought to avoid the settlement.

In the High Court, MacKenzie J made an order under s 7(3) of the Contractual Mistakes Act 1977 (the CMA) varying the agreement because of a mistake made by the parties that they had beneficial ownership of some shares. In all other respects the agreement was found to be valid and binding. Ms Hildred appealed, arguing that the agreement should be set aide on the basis that there was unconscionability, duress, misrepresentation, or mistake such that the agreement should be considered a nullity.

The crux of the argument for the appellant was that the mistake regarding the shareholding was so fundamental it infected the rest of the division of property. The Court rejected this argument stating that adult parties, who have access to legal advice, must decide for themselves how much hard information they want before entering mediation. The Court is not available as a means of enabling parties, who wish they had gone about things differently, to have a second go.

The Court rejected an argument that the agreement was unconscionable because Ms Hildred suffered from an inequality of bargaining power due to a lack of information. The Court stated that Ms Hildred was free to check factual matters and to obtain disclosure prior to engaging with the mediation process.

The Court also rejected an argument that Ms Hildred was induced to enter the contract because of misrepresentations made by Ms Strong. The fact that Ms Strong had constantly and consistently maintained her perspective during the mediation did not provide a basis for relief.

The Court held that there was no relevant mistake.

The appeal was dismissed.

*Counsel for the child – intolerable situation defence under the Care of Children Act 2004*

In *B v The Secretary for Justice* [2007] 3 NZLR 447 the Court was asked to consider the "intolerable situation" defence under s 106(1)(c) of the Care of Children Act 2004 (the Act) and when there is a requirement to appoint counsel for the child.

The mother was a New Zealander and the father was an Englishman based in Tenerife. They lived together in Tenerife as a family unit for about one year. The mother then moved back to New Zealand with the child, and told the father the relationship was over. The Secretary for Justice applied under the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) for the return of the child to Tenerife. Panckhurst J in the High Court ordered the child to return to Spain. The mother appealed on two grounds: that counsel should have represented the child and that the Judge had approached the "intolerable situation" defence under the Act incorrectly.

This Court dismissed the application for leave to appeal. In regards to representation, the Court noted that it was arguable that the test from s 7(2) of the Act (that counsel for the child should be appointed unless they would serve no useful purpose) should apply, even though that section is not applicable in Hague Convention cases. This conclusion is supported by international trends: *In re D* [2006] 3 WLR 989 (HL). However, the High Court Judge had considered *re D*, and essentially found that there would be no useful purpose to be served by appointing counsel. There was a factual basis for this conclusion. Moreover, the child was only four years old at the relevant time.

The focus of the argument for the intolerable situation defence was on delay. While accepting that there can be circumstances where delay might contribute to what would be an intolerable situation, the Court noted it was inconsistent with the Hague Convention to take account of delay caused by Convention proceedings and appeals. As such, the decision before the High Court was closely balanced.

The Court noted that the Hague Convention is more often invoked against custodial parents, rather than those few non-custodial parents that abduct children, and which may have been the Convention's primary target. The facts of the case demonstrated some hardship to the child and mother, who might not be able to stay in Spain. However, the Court concluded that no error on the part of Panckhurst J had been shown, and that it was implausible for immigration issues to interfere with any custodial processes in Spain given the Treaty context.

*Relationship property – valuation of debt back from family trust – circumstances in which debt should be ascribed less than face value*

In *W v W* [2007] NZFLR 772 (partially report at [2007] 2 NZLR 261) the Court considered the valuation under the Property (Relationships) Act 1976 of a debt owed to the husband by a family trust.

In 1989 the husband established a company. Both he and his wife owned shares in it. In 1996 they settled a family trust and in 1996 the husband sold his shareholding in the company to the trust for $1.2m. Because the trust had no money or assets it promised to pay the consideration on demand. In 1998 the parties sold a property to another company which formed part of the husband's business. The consideration for this property also ended up being a debt owed by the trust to the husband. Thus the $2.275m debt to the husband represented the sale of two items of relationship property. The wife received nothing at the time of sale of either piece of property other than a share in the debt.

The book value of the debt was $2.275m, but in the Family Court it was valued by Judge Doogue at the date of separation at $875,000. The wife appealed and contended that the debt should have been valued at the date of the hearing in the Family Court and that it was worth $2.275m. Priestley J agreed with the wife and found that the debt was worth its face value of $2.275m. The husband appealed to the Court of Appeal. Two questions arose on the appeal: whether a debt back from a family trust should ever be ascribed less than its face value and whether the High Court was justified in reversing the Family Court decision to value the debt at time of separation rather than date of hearing.

On the first issue the Court stated that it was clear that private debts, such as the debt in this case, are to be valued in exactly the same way as other debts: they are subject to normal valuation principles. A debt will not be worth its face value where it cannot be met or can be met only in part. Rather, it will only be worth what a willing, but not anxious buyer would be prepared to pay for it. Complications in valuation may arise from the fact that it is a private debt, but in some circumstances these can be compensated for by adjusting the parties' interest in the trust. The Court doubted that Priestley J was correct to aver that in a family trust context there are no sound reasons

for the sum of a debt to increase or reduce. The Court said that if Priestley J meant that in a family trust context a private debt's face value is always to be treated as its market value, then the statement was incorrect. The Court affirmed the valuation of the debt as $2.275m.

Secondly, the Court considered whether the High Court was justified in reversing the Family Court's decision to value the debt at the date of separation rather than at the date of hearing. The Court commenced its discussion by noting that under the Act the presumption is that valuation will be at date of hearing. The Court was satisfied that Priestley J was correct to value the debt at the time of the hearing because the source of the debt was relationship property, and because neither party had sought to have the loan called up. If the wife had sought to call her half share of the debt then the husband would have been required to put the trust in funds and pay out her half share at face value, which would have put her in the same position as she was under Priestley J's judgment. Finally the Court noted that it was not just for Judge Doogue to have exercised the s 2G discretion and value the debt at time of separation, as this resulted in the wife receiving a disproportionately small share of what the parties had built up together. The wife had effectively provided free working capital to the business with no prospect of an equity return, and her domestic efforts during the marriage had freed the husband to devote time to managing the company.

Accordingly, the appeal was dismissed.

### *Fisheries*

*Calculation of provisional catch history – jurisdiction of the Catch History Review Committee*

In *Ministry of Fisheries v Brace* [2007] NZCA 410 the Court considered the way in which provisional catch history is calculated under the Fisheries Act 1996 (the Act). In particular, at issue was whether the Catch History Review Committee (the Committee) had jurisdiction to amend a fisherman's catch returns so as to include additional quantities of fish not originally reported in the returns.

Due to confusion the respondent fishermen had not reported the majority of fish caught as bait during the statutory qualifying years, although they had reported an estimate of their catch shortly after in a letter to the Ministry of Fisheries (the Ministry). The Ministry was of the view that their entitlement, when it came to be calculated under the quota management system, was very small as it could only be based on the catch reported in the returns. The fishermen appealed to the Committee who allowed the appeal and purported to amend the relevant catch history returns so as to equate better to the estimate of true catch. In this way the fishermen were awarded a significantly higher quota. The Chief Executive's application to the High Court for a review of the Committee's decision was dismissed by MacKenzie J.

On appeal to this Court the decision of the Committee was quashed. The Court held that the Committee did not have the power to amend the fishermen's catch returns in the way that it did. In the context of the statutory regime it was clear that "lawfully

reported" meant "reported in accordance with the procedures contained in the Act and Regulations." To take any other approach would be to run counter to the scheme of the Act. The legislation did not contemplate "reporting" of the type accepted by the High Court even in relation to bait. Although the result may have seemed harsh on the respondent fishermen, the Court noted that it was inevitable in light of the statutory scheme.

### *Human Rights*

*New Zealand Bill of Rights Act 1990 – retrospective penalty – declarations of inconsistency*

In *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 the Court was asked to find that the extended supervision order (ESO) regime under the Parole (Extended Supervision) Amendment Act 2004 was inconsistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

Mr Belcher had committed a number of sexual offences against children. The timing of his imprisonment meant that he potentially became subject to an ESO. The Court had previously found that the ESO legislation involved the imposition of a retrospective penalty of punishment, contrary to ss 25(g) and 26 of the Bill of Rights. Mr Belcher now sought a declaration that the ESO legislation was incompatible with the Bill of Rights and the International Covenant on Civil and Political Rights.

The Court dismissed the application for want of jurisdiction. As the Court has no originating jurisdiction, a claim for a declaration of inconsistency must be initiated in the High Court. In reaching this conclusion, the Court felt bound to follow *Taunoa v Attorney-General* [2006] NZSC 95.

In *Taunoa* the Supreme Court was invited to grant a declaration of inconsistency between the Bill of Rights and the Prisoners' and Victims' Claims Act 2005 (the Claims Act). A feature of that litigation is that the Claims Act only came into force after this Court had delivered its judgment.

In the course of the judgment, the Supreme Court made a number of comments that this Court felt were not confined to the particular facts, and were of wider (and controlling) import. In discussing whether a declaration claim could be brought, the Supreme Court said: "But, again, as the issue was never before the High Court, the Court of Appeal would have lacked any power to hear it, for it too has no originating jurisdiction." Moreover, "the appropriate place for the proceedings to be commenced is in the High Court which, unlike the appeal courts, has general jurisdiction."

In *Belcher*, a majority of the Court also found that it was necessary to seek a declaration of inconsistency in civil proceedings commenced in the High Court.

Mr Belcher appealed to the Supreme Court: *Belcher v The Chief Executive of the Department of Corrections* [2007] NZSC 54. Declining leave to appeal, the Supreme Court criticised this Court's reliance on *Taunoa*. The language used in that case is

confined to the unusual situation where the asserted cause of action could not have existed when the proceeding was before the High Court, as the relevant legislation was not enacted. In *Belcher* the relevant legislation had been before the High Court, and therefore this Court would not be exercising an originating jurisdiction to make a declaration.

The Supreme Court declined to take a firm view about how declarations proceedings could be brought, assuming (without deciding) that they may be available in criminal proceedings. Moreover, it is appropriate for a court to explain the inconsistency in the reasons for judgment, but make no declaration (as the majority of the Supreme Court had done in *R v Hansen* [2007] 3 NZLR 1).

*New Zealand Bill of Rights Act 1990, s 9 – accidental bite from police dog*

Section 9 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) proscribes torture and "cruel, degrading, or disproportionately severe treatment or punishment". In *Vaihu v Attorney-General* [2007] NZCA 574 the Court considered whether an accidental bite by a police dog gave rise to a breach of s 9.

Mr Vaihu was driving when he suddenly felt ill. He pulled over at a petrol station, purchased some toilet paper, and went into a clump of bushes nearby where he vomited and defecated. At the same time this was happening, a police officer with a police dog in tow was in pursuit of offenders. The police officer was on the other side of the clump of bushes and suspected that the people he was chasing were in the clump. The police officer warned aloud that he had a dog and that the dog would be released if the offenders did not emerge. There was no response and the police officer permitted the dog (who was on a lead) to go into the bushes. The dog found Mr Vaihu and bit his arm. The dog was called off when its handler realised the mistake. Mr Vaihu, who had an artery vein fistula in his arm to facilitate dialysis treatment, lost a large amount of blood as a result of the bite. He brought proceedings in the District Court seeking exemplary damages for battery and compensation for a breach of s 9 of the Bill of Rights. Judge Blackie thought a battery had occurred but that exemplary damages were unavailable. The Judge awarded $10,000 in compensation for a breach of the Bill of Rights. The Attorney-General appealed to the High Court where Ellen France J expressed doubt as to Judge Blackie's conclusion on battery and found that there had been no breach of the Bill of Rights. Mr Vaihu appealed, although he did not pursue the claim for exemplary damages for battery.

The Court dismissed the appeal. The Court found that the police officer had acted lawfully in permitting the dog to go into the bushes. The Court disagreed with the conclusion of Judge Blackie that the dog was analogous to a truncheon and, as such, its actions in biting Mr Vaihu were imputable to its handler. Rather the police officer had acted in accordance with police dog guidelines and the dog had acted in an instinctive and uncontrollable manner. Not only had the police officer not intended to cause intentional harm to Mr Vaihu, but the police officer had not even intended the very action (setting the dog upon Mr Vaihu) which occasioned Mr Vaihu's injury.

The Court said that, in the light of the Supreme Court's decision in *Taunoa v Attorney-General* [2007] NZSC 70, the threshold for establishing a breach of s 9 was

very high. This was an inadvertent attack. The Court said it had occasioned appalling consequences for Mr Vaihu's health, and that he was an innocent member of the public simply going about his business. However, this alone did not transform an unintentional and accidental act, and lawful and prudent behaviour by the police officer, into a breach of the Bill of Rights.

**Leave to appeal to the Supreme Court has been sought.**

***Immigration***

*Whether information obtained through immigration status hearings can be used for prosecution or extradition purposes*

In *Attorney-General v X and Z* [2007] NZCA 388 the Court was asked to determine whether s 129T(3)(b) of the Immigration Act 1987 (the Act) permitted disclosure of information to public servants considering X and Z's possible extradition to Rwanda or trial in New Zealand.

X and Z were from Rwanda. X was seeking refugee status, and Z was resisting the proposed cancellation of his. The Rwandan Government had alleged that both had committed genocide and crimes against humanity in Rwanda in 1994. As the International Criminal Tribunal for Rwanda is seeking to conclude all trials by 2008, it is likely that X and Z will face prosecution under the New Zealand or Rwandan domestic courts.

The 1951 Convention Relating to the Status of Refugees (the Convention) requires, as a precondition to refugee status, that the refugee has a well-founded fear of persecution on relevant grounds. A legitimate prosecution will not usually fulfil this criterion. Furthermore, art 1F(a) provides that the Convention does not apply to any person to whom there are serious reasons for considering that he or she has committed crimes against peace or humanity or war crimes.

Section 129T of the Act provides that confidentiality must be maintained at all times unless certain exceptions outlined in subsection 3 are fulfilled. Three exceptions were potentially relevant. First, where the disclosure is to a person necessarily involved in determining the relevant claim or matters: s 129T(3)(a). Secondly, where disclosure is to some other government or Crown employee whose function in relation to the claimant requires knowledge of those particulars: 129T(3)(b). Thirdly, where disclosure poses no serious possibility that the safety of the claimant or other person would be endangered: 129T(3)(f).

A majority of the Court (William Young P and Chambers J) found that the information disclosed during refugee status hearing must remain confidential. The first issue is whether information could be disclosed under s 129T(3)(f), as disclosure to a public servant would not of itself give rise to the necessary risk. The majority found that s 129T(3)(f) could not be used unless unlimited disclosure of the information would be safe, as recipients of information under s 129T(3)(f) are not themselves subject to confidentially obligations.

Turning to the main issue, the majority first noted that, despite X and Z denying the allegations, information given by them might prove difficult. At the very least their detailed narratives would limit room to manoeuvre at trial and provide a framework for cross-examination. Secondly, the majority found that a number of countervailing factors were relevant to the correct interpretation of s 129T: confidentially is not affected by whether the status application was successful or not; a conclusion that art 1F(a) applies is not a finding that the applicant is guilty; an unsuccessful refugee claimant might nonetheless have a well founded fear of persecution; a finding that the art 1F(a) exclusion applies is not necessarily inconsistent with factors favouring confidentiality; and it is important to look at the situation from the claimant's point of view, and not give them an incentive to withhold information especially in a context where decisions often turn on credibility findings.

A key difficulty for the majority was the apparent "doubling up" between s 129T(3)(a) and (b), and whether it was possible to give a meaningful definition to "persons needing the information to make a decision in the relevant claim", and "public servants whose function in relation to the claimant requires knowledge of the particulars". Examining the legislative scheme, and noting it was drafted on a belt and braces approach, arguments of "doubling up" were of less moment than usual. Moreover, the word "require" in s 129T(3)(b) should be given a literal meaning, and is clear that neither extradition or prosecuting agencies require that information to do their job.

Departing slightly from Baragwanath J in the High Court, the majority found that s 129T(3)(b) permits disclosure to public servants whose functions in relation to the claimant involve due disposal of the claim or matters incidental to or consequential upon that disposal.

Ellen France J dissented. She thought that s 129T(3)(b) clearly contemplated disclosure to persons whose functions are not concerned with the "due disposal" of refugee status claims. There is nothing in s 129T, the Convention, or state practice that warrants reading the section in the way favoured by the majority. An acknowledged war criminal should not be able to protect their position under the guise of confidentiality. We must balance that right with New Zealand's obligations under the Geneva Convention and the Rome Statue of the International Criminal Court. Moreover, the principal focus of s 129T is to protect the identity of the claimant as a refugee claimant, and does not purport to protect everything he or she discloses.

**The Supreme Court has granted leave to appeal.**

## *Insolvency*

### *Liability for goods and services tax incurred before being adjudicated bankrupt*

In *Commissioner of Inland Revenue v Duncan* [2007] 2 NZLR 369 the Court was asked to determine whether Mr Duncan was released from his obligations under the Goods and Services Tax Act 1986 (the GST Act) for output tax on the basis that it was provable in his bankruptcy under s 87(1) of the Insolvency Act 1967.

Mr Duncan was the sole trustee of a family trust that operated as his alter ego. The trust had acquired land for the purposes of development, and subsequently claimed input tax credits on associated outgoings. Mr Duncan was adjudicated bankrupt, but remained a trustee. The trust continued with the development, selling seven units. However, the trust became insolvent and was unable to pay output tax as it fell due. By virtue of s 57(3) of the GST Act, Mr Duncan was personally liable for the unpaid output tax. He sought to avoid this liability be relying on his bankruptcy, a claim that succeeded in the High Court.

Allowing the appeal, the Court found that the output tax was not provable in Mr Duncan's bankruptcy. The Court began by noting that there were three ways that Mr Duncan could have avoided liability: selling the development as a going concern, which is zero-rated for GST; resigning as a trustee before the output tax liability came to charge; or allow the development's financier to exercise a mortgagee sale.

The appeal turned on s 87(1) of the Insolvency Act, which outlines what obligations are covered by the bankruptcy. The section has two limbs. First, "all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the time of his adjudication." This limb must be read with s 98 which requires the Official Assignee to estimate the value of contingent obligations. The second limb covers debts and liabilities to which the bankrupt becomes subject before discharge "by reason of any obligation incurred before the time of his adjudication".

The Court found that at the date of adjudication, the appellant was under no commitment to pay the output tax liabilities that later came to charge, and therefore there was no contingent liability in terms of the first limb of s 87(1): see Lord Reid in *Winter & Others v Inland Revenue Commissioners* [1961] 3 All ER 855 at 858 (HL).

Nor was the second limb of any help to Mr Duncan. Overturning the High Court, the Court held that both limbs must be read together. As a consequence, the appellant could only rely on the second limb if the output tax liabilities were "debts and liabilities" to which he became subject "by reason of any obligation incurred before the time of his adjudication." The Court found that this requires the relevant debt or liability to be to the party to whom the pre-adjudication obligation was owed. No obligation was owed to the IRD at the time of adjudication and therefore the output tax liabilities were not provable.

*Intention to defraud creditors – voluntary alienation by insolvent debtor*

In *Regal Castings Ltd v Lightbody* [2007] NZCA 396 the Court considered what must be established to show an intention to defraud creditors for the purposes of s 60 of the Property Law Act 1952. The appellant argued that the first respondents had transferred their home to a family trust with intention to defraud it as a creditor. The appellant sought an order under s 60 that the transaction be set aside.

In the High Court, Ellen France J refused to grant the order, holding that the appellant had not established that the first respondents had the necessary intention to defraud. Relying on *Freeman v Pope* (1870) LR 5 Ch App 538, the appellant argued that there

was a presumption of intent to defraud in the case of a voluntary alienation by an insolvent debtor. Ellen France J had refused to engage with that submission on the basis that it was not pleaded. The Court held that she was wrong to not do so, but nevertheless, by majority (Glazebrook and Arnold JJ), considered that there was no irrefutable presumption as to intention to defraud. They held that intention to defraud is a matter of fact, to be determined in the circumstances of the particular case.

William Young P, dissenting, was more sympathetic to the submission. However, he accepted that a conclusive presumption of fraud now seems somewhat anomalous and there is a distinct lack of contemporary authority in which that presumption has been applied.

The majority concluded that the transfer in this case was made at undervalue. Although the property had been transferred for consideration of the full value, by way of a term loan agreement of the same amount, the first respondents gradually forgave this amount through a gifting programme. The majority held that although the transfer was not voluntary at the time it was made (given the first respondents were free to modify or abandon the gifting programme in the future), Ellen France J had been wrong to conclude that the transfer was for value. The first step in the gifting programme had occurred either on the day of the transfer or a few days later, and the majority considered it unrealistic not to take that first gift into account in assessing whether the transfer took place at full value. William Young P disagreed with this analysis, arguing that substance rather than form should prevail in this area of the law. In his view, the fact that the voluntary alienation took some time to achieve was irrelevant.

The majority concluded that Ellen France J was entitled to conclude that there was no intention to defraud. Although there were factors pointing to such an intention, equally there were factors pointing to an absence of an intention to defraud. Overall, they did not consider that the circumstances were sufficiently compelling to enable them to say that the Judge's conclusion was wrong. William Young P, however, would have allowed the appeal. He regarded the transaction as fraudulent, given the transfer was voluntary and made by an insolvent debtor who recognised that the transfer would prejudice his creditor. He thus considered that the transaction was properly characterised as dishonest in the context of the relationship between a debtor and a creditor.

**The Supreme Court has granted leave to appeal.**

### *Intellectual Property*

*Trade marks – whether court should on appeal give deference to Commissioner's views*

To what extent should a court, hearing an appeal from the determination of the Commissioner of Trade Marks (the Commissioner) as to whether there is a likelihood of deception or confusion arising from a proposed trade mark, give deference to the

opinion of the Commissioner? This issue was addressed by the Court in *Stichting Lodestar v Austin, Nichols & Co Inc* [2007] NZCA 61.

The appellant wished to register the mark WILD GEESE in the same class (alcoholic beverages) as that in which the appellant held the mark WILD TURKEY. The Commissioner allowed registration of the mark, finding that although the two marks shared a degree of similarity, the components "turkey" and "geese" were distinctive visually and aurally distinguishable from one another. The respondent appealed to the High Court. Gendall J allowed the appeal. He paid no deference to the Commissioner's views, citing a dictum of Hammond J from *VB Distributors v Matsushita Electric Industrial Co Ltd* (1999) 9 TCLR 349 (HC) to the effect that courts should only give deference to the Commissioner's views if what is at issue is a matter of "practice" in trade mark applications. The Judge found that both marks conveyed the concept of a wild, hunted game bird juxtaposed with the word "wild". The overall impression of the marks gave rise to a risk of confusion. The appellant appealed.

The Court allowed the appeal, saying that the greater the number of factors that had to be weighed up in reaching a decision, the more reluctant an appellate court should be to interfere with that decision. This was a case where deference was called for. The Commissioner's decision could not be realistically characterised as wrong. It required an evaluative assessment and the Commissioner had undertaken this in an orthodox manner. The Court said the approach taken in *VB Distributors* represented too narrow a field in which to give deference to the Commissioner's views. The Court indicated that in any event it agreed with the Commissioner's assessment. The concept of wild, hunted game birds was not a strong one. The words "turkey" and "geese" were visually and phonetically dissimilar – one was plural, one was singular. The ideas associated with the two marks were quite different – one with American connotations, one with Irish connotations. Thus the registration of WILD GEESE was unlikely to cause confusion.

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

*Trade mark – registrability of the word PURPLE in relation to non-purple coloured goods – Trade Marks Act 1953, ss 2, 14, 15*

In *Cadbury Limited v Effem Foods Limited* (2007) 8 NZBLC 102, 037, Cadbury had applied to register the word PURPLE as a trade mark in relation to non-purple coloured goods within class 30, which includes certain types of confectionery and snack foods. Effem Foods opposed the application on the basis that the colour purple was not a trade mark within s 2 of the Trade Marks Act 1953 (the TMA) and therefore not eligible for registration under ss 14 or 15 of the TMA.

The Court held that the only circumstance in which the word PURPLE would not be a reference to the character or quality of the goods would be if the trade mark excluded all goods that might be seen as being purple. It was held that it would be difficult to define the range of the colour purple (e.g. would lilac be included?) or the amount of purple necessary to exclude goods from the ambit of the trade mark. The Court said that the word PURPLE was a direct reference to the character of at least some of the

goods specified, even if the exclusion of goods coloured purple was valid. Therefore, the Court found that the word PURPLE was not registrable as a trade mark, and the appeal was dismissed.

Although it was not necessary for determining the appeal, the Court also considered the question of distinctiveness. The Court held that the distinctiveness of the trade mark was a separate though related inquiry to the question of whether the trade mark made direct reference to the characteristics or qualities of the products. It was held that the word PURPLE did not meet either of the limbs of the distinctiveness test under s 14(2) of the TMA. There was no evidence of use of the trade mark PURPLE and the trade mark could not be said to be inherently adapted to distinguish. It was held that the appropriate test was that in *Re W and G Du Cros Ltd's Applications* (1913) 30 RPC 660 (HL). The *Du Cros* test was not satisfied in this case as the word PURPLE could not be divorced from the colour purple. Permitting a trader to register a trade mark for the word PURPLE for non-purple goods would also tend to discourage the use of the colour purple and similar colours in general.

It was held that the distinctiveness inquiry includes the examination of the trade mark in relation to goods outside the trade mark specification sought but within the same market. The Court also held that the distinctiveness inquiry needs to be considered from the point of view of a consumer who is ignorant of the trade mark register but otherwise reasonably well informed.

The issue of whether a registration excluding goods coloured purple is allowable was discussed and the Court held that, in most cases, any exclusion based on the particular characteristics of goods or services covered will be too uncertain to be allowed.

*Copyright in design – "concept" and "expression of design" – objective resemblance – causal connection – role of appellate court*

In *Steelbro NZ Ltd v Tidd Ross Todd Ltd* [2007] NZCA 486 the Court dismissed an appeal from a High Court decision finding that Steelbro had infringed TRT's copyright in a design for a sidelifting container crane.

Steelbro argued that the trial Judge had made material errors of fact and law. It said that the Judge had erred in finding that a substantial part of the work was copied because he failed to properly distinguish between "concept" and "expression of design", that he erred in finding that there was an objective resemblance between the two designs, and that he erred in finding that there was a causal connection between the TRT design and the Steelbro design because he relied on the idea of a "springboard", which has no place in copyright law. Steelbro submitted that the High Court decision struck at fair competition, and would stifle technological progress.

The Court was of the view that resolution of the competing policy arguments depends on the factual findings. If on the facts Steelbro substantially copied the design of TRT, there could be no valid policy reasons for upholding that conduct. Conversely, if Steelbro's design represented an innovative development drawing upon, but further developing existing technology, it should be welcomed and encouraged.

This case therefore came down to a question of fact: was the trial Judge correct in finding that Steelbro had illegitimately crossed the line into copying not only the concept of TRT but also the expression of that concept? This question reflected the position that Steelbro, as the unsuccessful party in the Court below, had the burden of persuading the Court that the trial Judge was wrong.

The Court commented that the line between pure ideas and the expression of them is notoriously undefined. It quoted with approval Lord Scott of Foscote's point that a finding of copying is "particularly the province of the trial judge": *Designers Guild v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 at 718 (HL).

Citing Buxton LJ's dictum in *Norowzian v Arks Ltd (No 2)* [1999] IP & T 223 at 230 – 231 (CA) to the effect that "a party should not come to the Court of Appeal simply in the hope that the impression formed by the judges in this Court, or at least by two of them, will be different from that of the trial judge", the Court commented that Steelbro had not persuaded even one of the judges on this case. To the contrary, the Court said that it was impressed by the careful way in which the trial Judge had analysed the complex factual background and come to well-reasoned conclusions on all the issues which arose.

**Leave to appeal to the Supreme Court has been sought.**

### *International Law*

*Mutual Assistance in Criminal Matters Act 1992 – ex parte application and hearing – whether registering a "foreign restraining order"*

In *R v Bujak* [2007] NZCA 347, the Court considered the appropriate procedure for hearing and determining an application under the Mutual Assistance in Criminal Matters Act 1992 (the Act) for the registering of a "foreign restraining order".

Mr Bujak, who had been residing in New Zealand, was facing various charges in Poland, his country of citizenship. For these charges he faced a maximum penalty of 10 years imprisonment, with a potential fine and also what was called a "repair of damages" award against him. In Poland, the Regional Court in Wloszcowa authorised the freezing of Mr Bujak's property to secure the fines and "repair" damages likely to arise from any conviction. Under s 55 of the Act the Polish authorities asked for the assistance of the Attorney-General of New Zealand in restraining property belonging to Mr Bujak in New Zealand (bank accounts and a property worth some $400,000). Section 55 provides that the Attorney-General, when requested, can apply to the High Court to register a foreign restraining order when satisfied of certain matters. An ex parte application for the registering of the Polish order was made by the Solicitor-General in the High Court and accepted by Clifford J.

Two issues were before the Court. First, whether the application to register the foreign restraining order should have been brought and heard ex parte. Secondly, whether the Polish foreign restraining order fell within the statutory definition of "foreign restraining order" in the Act.

The Court considered that the process adopted by Clifford J, dealing with the matter on an ex parte basis, was inappropriate. The application brought by the Solicitor-General was subject to r 256 of the High Court Rules which sets out the basis upon which an application can properly be dealt with on an ex parte basis. The Court drew an analogy with *Mareva* proceedings, stating that, especially in the context of legislation having the effect of freezing assets, Clifford J could have made the order ex parte but on the terms that Mr Bujak could have a set amount of time in which to apply to have the order set aside.

The Court also accepted Mr Bujak's second argument that the Polish order in this case did not fall within the definition of a "foreign restraining order". A "foreign restraining order" is defined by s 2(1) of the Act as property that is "tainted" by an offence or has arisen as a "benefit" of the offending. "Tainted" property is further defined by the Act as property that has been used to commit or facilitate the offence or is, in effect, the proceeds of an offence. The Court agreed with Mr Bujak that, on its face, the order of the Polish Court was wider than the terms of the legislation because it dealt with, amongst other things, imposing a charge on a person's property for potential fines or compensatory damages. No connection between the alleged offences and the property in question was required. The Court rejected the Solicitor-General's argument that it was for the Attorney-General to determine whether an order met the statutory requirements. Such a view was inherently unattractive and ignored the proper application of the legislation.

The matter was remitted to the High Court and Mr Bujak was given seven days to apply to have the order set aside. It was still open to the Crown to raise any additional argument that would place the Polish order within the statutory definition.

## ***Jurisdiction***

### *Appeal against decision of the High Court granting leave to prosecute*

In *Field v Burgess* [2007] NZCA 547 the Court considered whether it had jurisdiction under s 66 of the Judicature Act 1908 to hear an appeal against a decision granting leave for a member of Parliament to be prosecuted for alleged offences of bribery and corruption under s 103(1) of the Crimes Act 1961.

The police conducted an investigation into alleged offending by Mr Field. As a result of their investigations they desired to prosecute Mr Field for bribery and corruption as a Member of Parliament contrary to s 103(1) of the Crimes Act. In order to initiate such a prosecution, s 103(3) required the police to obtain the leave of a High Court Judge. Randerson J granted leave.

Mr Field wanted to appeal against that judgment. He accepted that there was no ability to bring an appeal under the Crimes Act but argued that the leave decision involved the exercise of the High Court's civil jurisdiction and was accordingly appealable under s 66 of the Judicature Act.

In a joint judgment William Young P and Ellen France J held, applying *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 (SC), that the leave decision was civil. The leave decision was inextricably linked to the criminal process and the interests to be balanced were criminal ones. Mr Field had argued that there was a disjunct between the application for leave and the decision to prosecute. That argument was rejected as being artificial.

Chambers J agreed with the joint judgment but wrote separately explaining why he thought that Parliament should change the law to allow members of Parliament in Mr Field's position to appeal.

Accordingly, the appeal was dismissed.

**The Supreme Court has refused leave to appeal.**

## *Land Law*

*Fraudulent misrepresentation – inadequate pleadings – whether case should be remitted to High Court*

In *Waller v Davies* [2007] 2 NZLR 508 the Court considered whether fraudulent representations of a purchaser of various properties had given rise to an equitable interest in favour of the homeowner vendors.

CH Finance Ltd obtained the transfer of some 48 properties in highly unusual circumstances. Homeowners, usually to discharge an existing mortgage or any other encumbrances, received money from CH Finance that was generally substantially less than the purchase price of the property. The outstanding balance of the purchase price (not negotiated) remained unpaid. Mr Davies, a solicitor in sole practice, acted for all the homeowners and CH Finance on the sale transactions, with a staff solicitor certifying all memoranda as correct for the purposes of the Land Transfer Act 1952 (the LTA). A form of "acknowledgement" was signed by the homeowners, acknowledging that they had not received the full purchase price, and that they were entitled to seek independent advice but elected not to do so. The selling homeowner was to commit the property to CH Finance for a period of not less than three years, and could exercise an "option" to buy the property back if the arrangement was terminated. Once the properties were transferred to CH Finance, they were mortgaged in favour of either several of the respondents (the mortgagees) or Mr Davies' solicitor's nominee company. Mr Davies then acted for CH Finance and the mortgagees on the mortgage transactions. CH Finance collapsed, and the perpetrators of this dubious scheme decamped. Statutory managers were appointed to unravel the mess caused by CH Finance. They brought an action in the High Court to determine the interests of the homeowners in the properties.

Harrison J in the High Court (see [2005] 3 NZLR 814) concluded that CH Finance had made fraudulent misrepresentations to the homeowners, and, in two cases, had forged their signatures to the transfers of the properties. These frauds gave rise to an equitable interest in favour of the homeowners, and thus a right to set aside the

transfers. Mr Davies, Harrison J concluded, was guilty of fraud though wilful blindness, under s 62 of the LTA, because he had registered instruments despite the extant equitable interest. However, his fraud could not be imputed to his principals, the mortgagees, or attributed to his solicitor's nominee company. Further, Harrison J awarded costs in favour of the statutory managers and the lenders (who were not impugned) against Mr Davies.

The statutory managers appealed against the decision to not impute the fraud of Mr Davies to his principals (the mortgagees), while Mr Davies cross-appealed against Harrison J's finding that the homeowners retained an equitable interest in their properties and that Mr Davies had been guilty of LTA fraud. The Court did not consider the two forgery cases.

The question before the Court was what interest, if any, did each homeowner have in his or her property at the time Mr Davies' law firm registered the mortgages over the properties? It was necessary to show that the homeowners had a prior identifiable interest against which the subsequent fraud (the registering of the mortgages over the property) operated. In this case, Harrison J had concluded that the equitable interest in the properties arose from the fraud of CH Finance. However, after examining the pleadings of the statutory managers, it was clear to the Court that no claim of fraudulent misrepresentation (or even undue influence or unconscionable bargain) had been made. All that had been contended on the homeowners' part (represented in essence by the statutory managers) was: they had not signed the documents, the transfers were not understood or had a subsequently different effect to what they understood, and they had not received consideration. Notwithstanding the limited scope of the pleadings, Harrison J had referred to a "concession" made by counsel for Mr Davies to the effect that the homeowners had been "cheated" out of their properties by the fraudulent misrepresentations of CH Finance. Before the Court of Appeal, all counsel agreed that no such concession had been made in the High Court, and that such a concession was contrary to the way the case had been run. Further, the Court continued by undertaking its own examination of the evidence, to see if the requisite evidence to ground a claim of fraud had been led. The Court concluded that there was no established pattern amounting to fraudulent misrepresentation in the case of any of the homeowners. The general pattern of the homeowners' evidence was a failure to understand the effect of the documents being signed, rather than a case of misrepresentation. Consequently, there was no basis to uphold Harrison J's view that the homeowners had an equitable interest based on the fraud of CH Finance.

The statutory managers raised further bases upon which it could be said the homeowners had a prior interest. The Court agreed with Harrison J that no equitable interest arose in the form of a common law mortgage or as a result of any alleged option to repurchase. The owners had denied any intention to create a mortgage, and the alleged options were not accompanied by sufficient memoranda for the purposes of the Contracts Enforcement Act 1956.

Because the fraudulent misrepresentation argument had not been pleaded or argued, the Court considered whether it was appropriate to refer the matter back to the High Court and allow the statutory managers to re-plead. The Court concluded that the case should not be referred back to the High Court. A proper application to amend the pleadings, with argument, should have been raised in the High Court either by counsel

or Harrison J. To remit the case back to the High Court would have entailed a whole new trial, a result that did not sit well with the "strong societal interest in the final determination of concluded litigation" (*Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 2 NZLR 124 at [15] (SC)).

**The Supreme Court has refused leave to appeal**.

*Fraud exception to indefeasibility rule – agency – attribution of forgery – wilful blindness – Land Transfer Act 1952, ss 81, 172 – in personam claim*

The case of *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747 involved a mortgage transaction in favour of Dollars & Sense that took place after the signatures of Mr and Mrs Nathan (the sureties) had been forged by the mortgagor's son, Mr Rodney Nathan (the borrower). When Rodney defaulted, Dollars & Sense took steps to exercise a mortgagee sale and Mrs Nathan sought to invoke the fraud exception to the indefeasibility provisions of the Land Transfer Act 1952 (the LTA). The following issues arose: whether the forgery could be attributed to Dollars & Sense and whether Dollars & Sense was wilfully blind to the possibility that Rodney had forged his mother's signature (his father had died before trial).

The majority (Glazebrook and Robertson JJ) held that Rodney was the agent of Dollars & Sense with regard to the mortgage and associated documentation. William Young P in dissent also concluded that Rodney was the agent of Dollars & Sense for the purpose of securing his parents' signatures to the mortgage. The majority found that under the test in *Assets Co Limited v Mere Roihi* [1905] AC 176 (PC), Rodney's actions were fraudulent in terms of s 62 of the LTA. That was held to be in accordance with the Court's decision in *Ex parte Batham* (1888) 6 NZLR 342. *Batham* was held by the majority to be based on a wide principle that an agent's fraudulent actions are attributed to an innocent principle where the agent is acting within the scope of his or her actual or apparent authority. William Young P, however, distinguished *Batham*.

The majority then turned to the cases of *Shultz v Corwill Properties Ltd* [1969] 2 NSWR 576 (NSWSC) and *Cricklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd* [1992] 1 NZLR 463 (HC), to examine whether the Court ought to resile from *Batham*. The majority declined to overrule *Batham*. First, as *Shultz* and *Cricklewood* were inconsistent with *Assets Co* and since the statement in *Assets Co* was regarded as unambiguous, then unless overturned by the Supreme Court, *Assets Co* was binding on the Court – see *R v Chilton* [2006] 2 NZLR 341 (CA). Secondly, the reasoning in *Schultz* and *Cricklewood* was not soundly grounded in authority. It was based on the decision in *Kennedy v Green* (1834) 3 MY & K 699; 40 ER 266 which was inconsistent with later authorities including *Lloyd v Grace, Smith & Co* [1912] AC 716 (HL). Thirdly, it was stated that the reasoning in *Batham* must be seen as a rejection of the fraud exception in *Kennedy v Green* – see Professor Watts "Imputed Knowledge in Agency Law: Excising the Fraud Exception" (2001) 117 LQR 300. Although William Young P referred to *Duncan v McDonald* [1997] 3 NZLR 669 (CA) as an endorsement of the fraud exception, the majority held that the ratio in *Duncan v McDonald* was only applicable in cases where the fraud is a fraud on the principal.

The majority followed the test regarding the scope of an agent's authority put forward in *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259 by Willes J that there is liability where a master has put his or her agent in a place to do a class of act. The Court held that the very thing that Rodney was asked to do as agent for Dollars & Sense was to obtain a registrable mortgage and therefore he was acting within his actual authority. As a consequence the majority held that the loss ought to be borne by Dollars & Sense rather than Mrs Nathan. Furthermore, the majority did not think that the state should be responsible for Mrs Nathan's losses in circumstances where Dollars & Sense benefited from the fraud of its own agent and had failed to take even the most elementary precautions against sharp dealing.

The majority agreed with the finding of William Young P that there was no evidential basis for a finding that Mr Thomas (Dollars & Sense's solicitor) had shut his eyes to the possibility of forgery. However, the issue of the lack of proper attestation by Ms Ford (Rodney's partner) was held to raise a wilful blindness concern. False attestation was held by the majority to be a fraud on the register.

Even if the fraud exception did not apply, the majority considered that Mrs Nathan would have an in personam claim against Dollars & Sense as the three elements necessary for an in personam claim were held to be satisfied. William Young P disagreed. The Court examined whether the *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL) and *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 (CA) line of cases applied to forgery. The majority, however, held that the *O'Brien/Wilkinson* cases were not cases of imputed notice, but rather cases of courts enforcing standards of conduct on financiers in situations of known risk. The majority saw no reason why the *O'Brien/Wilkinson* rule should not be extended from cases of undue influence to forgery cases, where the financier has been put on inquiry and fails to insulate itself.

The majority held that there was sufficient information to put Dollars & Sense on inquiry (even if forgery was not suspected) and not even the most elementary precautions were taken. Therefore Dollars & Sense could be seen to be wilfully blind and it was irrelevant that the untoward conduct took another form. William Young P held that the *O'Brien*/*Wilkinson* cases did not apply to forgery.

The majority and William Young P agreed that s 81 of the LTA regarding the powers of the Registrar was not of assistance to Mrs Nathan and they also agreed that if Mrs Nathan had not succeeded against Dollars & Sense, compensation under s 172 of the LTA would have been available.

**The Supreme Court has granted leave to appeal.**

*Landlocked land – reasonable access*

In *B A Trustees Ltd v Druskovich* [2007] 3 NZLR 279 the Court considered s 129B of the Property Law Act 1952, which allows the Court to grant reasonable access in cases of landlocked land.

The case concerned a right-of-way over the appellant's property for the benefit of a property owned by the respondent. For many years the right-of-way had also been used to access a second neighbouring property owned by the respondent without dispute, however, the appellant sought to put an end to this. Without access by means of the right-of-way an apartment on the first floor of that property was landlocked. Although there had originally been alternative access, an internal stairway had been removed in the 1960s. The downstairs premises were rented and the lease was due to run for a further ten years, thus it was not possible to reinstate the stairway. In the High Court, Simon France J granted an application for access to the property, ordering that both pedestrian and vehicular access be provided. The appellant appealed against the grant of any access to the property over the right-of-way or, in the alternative, against the extent of the relief granted.

The Court emphasised that given the remedial nature of s 129B it was not appropriate to approach the section on the basis that there is a presumption in favour of non-interference with another's title. It also noted that although inadvertence or historical accident will make it easier to secure relief, successful applications are not limited to such situations. Factors such as changed circumstances may lead to the grant of relief. Further, the Court considered that the structure of the provision created a jurisdictional gate (i.e. an application must be made by the "owner" of a "piece of land" that is "landlocked") that ought to be interpreted broadly so as to avoid elimination of cases deserving of relief.

The Court held that part of a building may constitute a "piece of land" for the purposes of s 129B, at least in some situations. In this case there was a separate and identifiable area (the first floor apartment) to which there would, as a matter of fact, be no access if the fence was completed as planned. The Court held that it was consistent with the remedial purpose of s 129B to treat the apartment as a "piece of land". The Court found no basis for interfering with Simon France J's finding that the apartment was an authorised use of the land. Further, the Court held that Simon France J did not err in exercising his discretion to grant relief. The Judge turned his mind to the relevant statutory factors and there was nothing to justify a departure from his decision in that regard. However, the Court differed from the Judge as to the appropriate type of relief in this case, holding that the relief granted created manifest unfairness in its unlimited scope and duration.

The Court limited the easement to the period during which the apartment was to remain landlocked – i.e. the period for which the downstairs lease was to remain in force, plus an additional period (assessed at one year) to allow the respondents to create an alternative access to the apartment through the ground floor premises. The relief was further limited to the apartment. The downstairs premises were not landlocked and there was no reason why they needed to enjoy the benefit of the easement.

### *Limitation*

*Negligence – question as to when loss or damage was suffered*

In *Davys Burton v Thom* [2008] 1 NZLR 193 the Court considered the question as to when loss or damage is suffered in the case of an invalidly executed prenuptial agreement.

The respondent wished to pursue a negligence action against the firm of solicitors responsible for the agreement. The issue was whether the claim was barred under s 4(1) of the Limitation Act 1950, which states that any such claim must be brought within six years of the date on which the cause of action accrued. A cause of action in tort does not accrue until loss or damage is suffered, the difficult question in this case being when loss or damage was in fact suffered.

The primary purpose of the agreement had been to protect a residential property owned by the respondent by treating it as separate property. Some time after marriage the couple had moved into the property, and thus, in the absence of a valid prenuptial agreement, the Family Court held that it was matrimonial property and the respondent's wife was awarded a share in the house. The respondent commenced negligence proceedings as adverted to above.

In the District Court, Judge McGuire held that the cause of action accrued on the date of the incorrect execution of the agreement (on the basis that the respondent did not obtain a benefit that he expected to receive, namely, a valid prenuptial agreement). Alternatively, the Judge held that loss occurred when the couple moved into the property (at which time the respondent's wife became entitled to a share in the property in the absence of a valid agreement). In either event the action was time-barred.

However, in the High Court, Simon France J held that the respondent suffered loss only when the Family Court refused to give effect to the agreement, so that the action was not time-barred. The Judge reasoned that the agreement was always contingent upon events and upon court decisions as to enforceability, and the overall disposition of property. Its immediate effect was nil, and thus it was incorrect to say that loss had accrued prior to the decision of the Family Court.

The Court embarked on a careful analysis of foreign jurisprudence. It concluded that a cause of action will generally accrue when the negligent advice is acted upon, which will usually be when the claimant executes a document. The rationale for this is that at this time the claimant will have a package of rights that is less than that which he or she sought and should have received. However, there is no such presumption. It will depend on when in the circumstances of the case actual damage occurs, the critical issue being whether the claimant's legal position has been altered to his immediate financial disadvantage. If so, the cause of action accrues immediately even if the full measure of that loss may not become clear until a later point in time.

The Court did not decide whether the cause of action could be said to have arisen, in this case, on the date of the flawed execution. It acknowledged that there were strong arguments on both sides, however, ultimately it was unnecessary to reach a final view as it held that there was no doubt that the cause of action accrued, at the latest, on the date that the couple moved into the respondent's property. At that time, even though it was possible that a court would later validate the agreement, it could fairly be said that the respondent was financially worse off than he would have been had the

agreement been validly executed. The action was thus time-barred in any event. Although this result may have seemed hard on the respondent, the Court emphasised that the Limitation Act represents a balance struck by Parliament between the interests of plaintiffs and defendants that must be respected.

**The Supreme Court has granted leave to appeal.**

***Local Government***

*Bylaws – unreasonable – disproportionate – intensity of review – brothel locations*

In *Conley v Hamilton City Council* [2007] NZCA 543 the Court considered the Hamilton City Council's Prostitution Bylaw 2004 (the bylaw), which regulated the location of brothels within Hamilton.

In 2003, Parliament passed the Prostitution Reform Act 2003 (the PRA), making prostitution and brothel-keeping legal in New Zealand. Section 14 of the PRA provides that a local council can "regulate the location of brothels", with reference to provisions of the Local Government Act 2002. The Hamilton City Council (HCC) consequently undertook a public consultation on the issue, receiving a total of 1,350 submissions (the majority opposing brothels in residential areas). The bylaw was then passed, providing a permitted zone for brothels which encompassed the city centre (including part of Frankton), the commercial service area, and the industrial zone of Hamilton. Brothels were also forbidden from operating within 100 metres of "sensitive sites" – registered places of worship, schools, early childhood centres, or marae. Brothels outside of the permitted zone were given 12 months to shift.

Ms Conley operated a brothel with 12 workers out of a property that had been used for that purpose for 19 years. The brothel fell about 150 metres outside of the permitted zone. The HCC had considered providing Ms Conley with an exemption, but decided against this course of action after receiving a protest from Hamilton Girls' High School (the brothel was down the road and their had been problems with the school).

Ms Conley challenged the bylaw under ss 12 and 17 of the Bylaws Act 1910, arguing that the bylaw was unreasonable or disproportionate, repugnant to the laws of New Zealand, and unlawfully interferes with the rights of sex workers as provided for in the PRA. It was said that the bylaw operated as a prohibition, rather than regulation, in that it prevented all forms of commercial sexual behaviour in residential areas. In particular, Ms Conley focused on small owner-operator brothels. These are brothels with four or less workers, where the worker maintains his or her own earnings (see s 4 of the PRA). Ms Conley argued that the "natural habitat" of small brothels is residential zones. On this basis, she contended that the bylaw would drive workers into large parlour brothels, with consequential increases in rent, reduction in autonomy, and possible "red light zones". No issue was taken with the "sensitive sites" protection. Ellen France J in the High Court rejected these arguments. After asking herself the broad question whether the bylaw was "invalid", she held that it did

not amount to a total prohibition and that there was insufficient evidence to accept Ms Conley's "natural habitat" argument.

The Court first considered the bases upon which a bylaw can be challenged. Simply considering whether a bylaw was "invalid" was, on the terms of s 17 of the Bylaws Act, tautological. Bylaws can be challenged, the Court said, on the basis that it is: ultra vires the empowering statute; uncertain; contrary to other laws; or unreasonable on the basis of manifest arbitrariness, injustice, or impartiality. The Court then considered that proportionality provided another respectable tool for clearer analysis, but that it still left open a question as to the intensity of review.

Turning to the facts of the case, the Court agreed with Ellen France J's conclusions. The bylaw did not amount to a total prohibition. Within the central business district of the permitted zone alone there were 2,596 occupation units. The industrial portion of the permitted zone was several times the size of the CBD, and the Frankton part of the zone was another one fifth of the CBD. Ms Conley's argument that small owner-operator brothels would be excluded was rejected on the evidence. For Ms Conley, a Ms Healy had given evidence to the effect that small owner-operator brothels could continue to work within the permitted zone. The evidence was, at the very least therefore, equivocal and minimalist, providing no sure footing from which to conclude that the bylaw was disproportionate, unreasonable, or discriminatory. The Court also stated that in such a case, where a local council was dealing with a matter of social policy entrusted by Parliament, in the absence of any Bill of Rights concerns, a court should be slow to intervene, or it should adopt a high intensity of review.

### ***Resource Management***

#### *Whether council required to take account of climate change*

In *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569 the Court was asked to determine whether resource consent granting authorities were required to take the effects of climate change into account under s 104E of the Resource Management Act 1991 (the Act).

Genesis Power Ltd (Genesis) had applied for a resource consent associated with a proposed gas-fired electricity generating plant at Rodney. As the power station would discharge greenhouse gases (GHGs), a discharge permit was necessary. The issue was whether the consent authority, when considering the application for this discharge permit, could take into account the impact of the proposed discharge on climate change.

Section 104E provides:

> When considering an application for a discharge permit … a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into the air of [GHGs], either–

(a) in absolute terms; or

(b) relative to … non-renewable energy.

The Environment Court thought that the purpose of the section was to allow consideration of the effects of discharge on climate change only in the context of applications to use renewable energy that will reduce GHGs. In other words, it was a positive factor that would "grease the wheels" of renewable energy applications. The High Court allowed an appeal from that decision, indicating that the exception applies to all applications which then must be evaluated by reference to the possibility of renewable energy. The approach was based on the apparent conflict between ss 104E and 7(i), which requires consent authorities to take climate change into account.

Allowing the appeal, the Court could not see any conflict between ss 104E and 7(i). This conclusion was reached after a careful examination of the Act and the Resource Management (Energy and Climate Change) Amendment Act 2004 (the 2004 Act). The latter introduced s 104E into the Act with the stated purpose of requiring regional authorities to plan for climate change but "not to consider the effects on climate change of discharges into the air of [GHGs]": s 3(b) of the 2004 Act. Moreover, the scheme of the Act indicated that s 104E was designed to operate on a standalone basis, rather than be subject to s 7(i). In addition, s 104E will apply to resource consents other than those for power generation, in which case it was difficult to see how the High Court's approach would operate. Even in the context of power generation applications, the exception in s 104E should not be allowed to overwhelm the prohibition, which was the effect of the High Court judgment. Finally, an examination of the policy behind the Act and the relevant amendments led to the inescapable conclusion that GHGs were to be controlled at a national and not a regional level. As a consequence it would be inconsistent for a regional consent authority to consider the impact of GHG emissions on climate change.

The Court issued a declaration stating that the consent authority must not have regard to the effects of a discharge permit on climate change when considering the application.

Some question arose as to whether the Court should be issuing a declaration. The judgment under appeal had been abandoned by the original appellants, Powerco being an intervener. Furthermore, the declaration would effect a proposed resource consent process rather than review an existing one, and without the benefit of Environment Court and High Court decisions. However, the Court thought it was appropriate to grant a declaration as: the underlying issue was clearly articulated; the application was sufficiently grounded in reality; and it would be irresponsible to allow the parties to proceed through the lower courts acting on a mistaken interpretation of the Act.

**The Supreme Court has granted leave to appeal.**

*Prohibited activity status*

The Resource Management Act 1991 (the Act) mandates six statuses that can be attributed to activities. At one end of the spectrum are permitted activities, at the

other, prohibited activities. No resource consent can be obtained for prohibited activities. In *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* (2007) 13 ELRNZ 279 the Court clarified the meaning of prohibited activity status. The Thames-Coromandel District Council (TCDC) classified mining as a prohibited activity in a number of areas. TCDC contemplated the possibility of mining occurring, but employed prohibited activity status to ensure this did not happen without an approved plan change. The Environment Court, and on appeal Simon France J in the High Court, found this to be an improper use of prohibited activity status. A question of law was stated for the Court, essentially asking whether the Courts below had erred in their approach.

The Court held that Simon France J had erred in holding that prohibited activity status could only be used when a planning authority is satisfied that, within the time span of a district plan, the activity in question should in no circumstances ever be allowed in the relevant area. This "bright line" test ignored the possibility of prohibited activity status in a number of situations: (1) where a local authority had insufficient information about an activity and wanted to consider its likely effects before deciding, by way of plan change, whether or on what terms to permit the activity; (2) where a local authority wished to prevent development in one area until another had been developed; (3) where a local authority wanted to delay development; (4) where it was necessary to delay an activity so as to allow an expression of social or cultural outcomes and expectations; (5) where it was intended to restrict the allocation of resources in a particular area; and (6) where a local authority wished to establish priorities otherwise than on the "first in, first served" basis that usually pertains to resource consent applications. The Court said it was possible that a local authority, after undertaking the careful cost/benefit and risk analyses mandated by the Act in formulating a plan, could determine that prohibited activity status was the most appropriate planning tool to achieve one of these goals. The Court also said that anyone relying on the plan would be on notice that a plan change would be necessary to permit a prohibited activity. If the plan change process were activated, the public would have an opportunity to voice its opinion on the impact of the prohibited activity. The Court accepted however that where a local authority does have sufficient information to evaluate an activity's effects, prohibited activity status would be inappropriate.

Accordingly, the Court remitted the case to the Environment Court for reconsideration in the light of its judgment.

*Scope of existing use rights*

In *Rodney District Council v Eyres Eco-Park Ltd* [2007] NZRMA 320 the Court considered the scope of existing use rights protected under the Resource Management Act 1991 (the Act).

Section 10 of the Act provides that land may be used in a manner that contravenes a rule in a district plan or proposed district plan if: (1) the use was lawfully established before the rule became operative or the proposed plan became notified; and (2) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan became notified.

Where the contravening use is discontinued for 12 months, the existing use right is lost. The case concerned a proposed subdivision of a parcel of land in respect of which three successive rules, adopted in 1988, 1995, and 2000, limited the permitted extent of destruction of native vegetation. The scale of farming activity on the land diminished during this time too. The developer claimed that its existing use right under s 10 was defined with reference to the extent of farming before the 1988 rule was adopted. The Environment Court agreed with this interpretation, as did Allan J in the High Court on appeal. On further appeal, a question of law was stated for the Court.

The Court disagreed with Allan J, saying the existing use right was defined by reference to the extent of farming when the 2000 rule was adopted. The Court said the reference to "rule" in s 10 had to be a reference to an existing rule, rather than one that had been surpassed. The Court also confirmed that for a discontinuation of the existing use right, all that is required is for the effects on the land to have been discontinued, rather than the use itself. In the result, the Court allowed the appeal and reserved leave to the parties to seek an order remitting the case to the Environment Court.

*Negligence*

In *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 the Court considered whether local authorities owed a duty of care to applicants when deciding whether to grant a resource consent.

The Hoffmans, who were the shareholders in the appellant company (Bella Vista), obtained consent on a non-notified basis from the respondent, the Western Bay of Plenty District Council (the Council), to construct a lodge and restaurant. The Hoffmans consulted the Council about building a further stand-alone conference facility. The Council informed them that new consents would not need to be obtained and that approval could be gained by way of variation. The Council granted the variation. Neighbours who consented to the original application were assumed to consent to the conference facility. The neighbours successfully applied for judicial review of the Council's decision on the basis that the Council effectively denied them standing by granting the variation without their permission. As a result, the Council withdrew its consent. Bella Vista did not challenge the judicial review decision or seek further consents. Instead it commenced proceedings against the Council alleging negligence in dealing with the consent process. The High Court struck out the claim. Bella Vista appealed.

Robertson J stated that a consent authority has a duty to act within its power to issue consents in conformity with the purpose of the Resource Management Act 1991 (the RMA), namely the promotion of sustainable management of natural and physical resources (s 5(1)). While the RMA directs the consent authority to consider the need for communities to provide for their economic well-being, this does not mean that authorities are liable for an individual's economic loss. The decision to grant consent is a quasi-judicial function that is not easily susceptible to a corresponding duty of care. Policy considerations, including the fact that such a duty would place

undue burden on authorities and impinge the smooth operation of the consent process, pointed against finding a duty of care.

Robertson J considered that *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 (CA) confirmed that local authorities do not owe a duty of care when granting permission to applicants and that *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA) was distinguishable. William Young P held that *Craig* was not distinguishable, but had been overruled by *Morrison*. Chambers J considered that *Morrison* was the controlling authority.

The Court found that the alleged duty of care was untenable and that the High Court was right to strike out the statement of claim. The appeal was dismissed.

***Tax***

*Russell Template tax avoidance – multiple assessments – amenability – reconstructed income – issue estoppel by res judicata*

The Russell Template tax avoidance scheme (the Template) has been the subject of litigation in New Zealand courts at all levels for almost 15 years. In *Wire Supplies Ltd v Commissioner of Inland Revenue* [2007] 3 NZLR 458 the Court considered the extent of the power of the Commissioner of Inland Revenue (the Commissioner) to adjust assessments made under the Income Tax 1976 (the Act) in respect of taxpayers who bought the Template and the structures they used to implement it. The Court also considered to what extent arguments attacking the assessments were precluded on the basis of issue estoppel.

The Template allowed profitable trading companies to convert their taxable income into tax-free capital in the hands of their shareholders. The shareholders sold their shares to companies with tax losses controlled by Mr J G Russell, with an option to repurchase. The purchase price was left outstanding and secured by a mortgage over the shares. The loss companies became parents to the trading companies. The purpose of the transaction was to create a debt owing from the loss companies to the trading companies. The trading companies then paid their net profits to the loss companies. Mr Russell set the profits off against the loss companies' tax losses and returned the profits to the trading companies, ostensibly as payment of the share mortgage, in the form of tax-free capital (less a fee for use of the scheme). The purchase price for the shares was determined entirely by reference to the amount of tax sought to be avoided.

The Commissioner assessed the trading companies under the general anti-avoidance provision in s 99 of the Act. However, the Commissioner found in seeking to enforce the assessments that the trading companies had been liquidated. The Commissioner therefore assessed the shareholders personally. These two methods of assessment were respectively known as "Track A" and "Track B". Later the Commissioner assessed the loss companies for money they retained, using "Track C". Users of the Template brought objection and judicial review proceedings in respect of the

assessments. This litigation (the *Miller* litigation) progressed to the Privy Council, but was ultimately unsuccessful.

The appeal to this Court was from three judgments of Courtney J. Two were appeals by way of case stated from objection proceedings before the Taxation Review Authority (the TRA). One was in judicial review proceedings seeking the quashing of TRA decisions. The cases before Courtney J were brought by various users of the Template and involved a rehearsal of arguments that had been ventilated and dismissed in the *Miller* litigation. Courtney J accordingly held that issue estoppel precluded the arguments. On appeal the Court disagreed, accepting that commonality of relationships with Mr Russell shared by the Template taxpayers, and their aligned interests in having the assessments quashed, did not give rise to issue estoppel. Only those Template taxpayers that were parties to the *Miller* litigation were precluded from raising arguments advanced in that litigation.

Although the Court dealt with a number of specific factual issues not discussed in this summary, the core arguments pursued by the taxpayers were: (1) the Commissioner, once he had assessed on Track A, exhausted his discretion under s 99 to assess on Track B; (2) alternatively, once the Commissioner made a Track C assessment, the earlier Track B assessment became inconsistent and had to be withdrawn; and (3) changing tracks was an abuse of the Commissioner's power because the sole motivation of switching assessees was to follow the taxable income.

The Court dismissed these arguments and all three appeals. The Commissioner's discretion to assess would be unacceptably hindered if he or she were precluded from changing assessees – the discharge of his function often required amending assessments, for example when settling with an objector. Further such a restriction was said to be inconsistent with the scheme of the Act, particularly ss 19 and 23.

The Court accepted, however, that once the Track A assessment was the subject of a case stated to the TRA, it would not be open to the Commissioner to commence a Track B assessment inconsistent with the Track A assessment under objection. The Court said it was necessary to devise a principle that would determine which assessee would derive the benefit of s 99(4) of the Act. This provides that where income is included in assessable income, then that income is deemed to have been derived by the person subject to the assessment, and deemed not to have been derived by any other person. The Court said that if the Track B had become the subject of a case stated to the TRA, the Track C assessee would get the benefit of s 99(4). If there is no case stated, the Track B assessee can seek the amendment of the Track B assessment to avoid inconsistency with Track C. The Court said this result both protected the interests of taxpayers and ensured the orderly resolution of objection proceedings. The Court relied upon the decision of the High Court in *BASF New Zealand Ltd v Commissioner of Inland Revenue* (1995) 17 NZTC 12,136. This held that where a notice of assessment had been objected to, the Commissioner's attempt to assess the same assessee in respect of the same tax year was invalid.

The Court said it was surprising that the taxpayers contended the Commissioner had abused its power by following the money. It would be odd if the Commissioner was obliged to assess the party that was least likely to be able to pay the outstanding tax. In a situation where more than one party obtains a tax advantage, the Commissioner

was permitted to trace the money to the party most likely to pay, a fortiori where the trading companies' liquidation was an aspect of the very tax avoidance scheme at issue.

*Tax avoidance*

In *Accent Management & Ors v Commission of Inland Revenue* (2007) 23 NZTC 21,323 the Court was asked to determine whether a complicated forestry investment was a tax avoidance arrangement under the Income Tax Act 1994 (the Act).

Messrs Bradbury and Muir developed and implemented a scheme that gave taxpayers the opportunity to invest in a Douglas fir forest. The scheme delivered spectacular tax benefits by taking advantage of timing mismatches between the incurring of obligations (in 1997 and 1998), and when they fell due (2047 and 2048). The most important transactions in the scheme were licence premiums and insurance payments.

Although very complicated, the salient features of the scheme can be described briefly. The stated purpose of the scheme was to run a commercial forestry venture and distribute profits derived from the sale of the trees to investors. Trinity Foundation (Services No 3) Ltd (Trinity 3) owned the land that the forest was to be established on. The taxpayers, many operating behind loss attributing qualifying companies (LAQCs), invested in the scheme via a syndicate, Southern Lakes Forestry Joint Venture Limited (SLFJV). While Trinity 3 owned the land and the trees, the taxpayers were obliged to establish and maintain the forest until it was harvested.

The first major plank of the scheme was the licence premiums. As the outset of the scheme, the taxpayers (via SLFJV) assumed considerable obligations as against Trinity 3. Some payments, like the $1,350 per hectare establishment fee, were due in 1997. The more significant licence premium of some $2m per hectare was not due until 2048. In return the taxpayers received a right to a share of the net stumpage; the right to use the land; and an option to purchase the land at half of its original cost in 2048. In practical terms the taxpayers had agreed to pay (via a licence premium) to use land owed by Trinity 3, the purchase of which had been funded by their own money.

The second plank of the scheme was the insurance payment. The scheme's architects set up an insurance company in the British Virgin Islands (CSI) ostensibly to cover the risk that the net stumpage would not cover the taxpayers' various expenses. The taxpayers assumed obligations to pay CSI on a per hectare basis, the most significant payments being the $40,000 per hectare due in 2047.

In the 1997 tax year the taxpayers claimed deductions for the licence and insurance premiums already paid, including the insurance payment incurred but not due till 2048. They also claimed depreciation on a proportionate part of the licence premium, amortised over 50 years. The depreciation claim was also made in the 1998 tax year. The timing mismatch allowed the taxpayers to make significant tax reductions for very little actual expenditure.

The Court was asked to examine a number of issues, including: whether the insurance arrangements were a sham; whether the insurance payments could be claimed in 1997 or needed to be spread over 50 years; whether the licence premium payable in 2048 was deductible; whether the scheme was a tax avoidance arrangement; and what the appropriate penalties were.

Questioning whether the insurance arrangements were a sham, the Court noted that there were a number of features that were awkward for the taxpayers. For example: documents suggesting the transactions were designed to reduce tax liability; CSI's obligations being largely meaningless in the context of a 2047/2048 wash-up; and a large proportion of the insurance premium being paid to bodies associated with Bradbury and Muir as a "finder's fee". Finding there was no sham (on different grounds to Venning J in the High Court, whose analysis was rejected as incorrect) the Court found that artificiality and lack of commercial purpose were not indicia of sham, and that the documents did create the rights and obligations they purported to. Even if the arrangement could not be considered to provide for "insurance" in the normal sense of the word, a mislabelling was not conclusive of sham. Moreover, even if the taxpayers were indifferent as to whether the wash-up provisions would ever take effect, an obligation could be genuinely entered into even though it is subject to legal or practical defeasance, or entered into on the basis that it might be replaced by another amended obligation.

The second issue was whether the insurance premiums, which fell due in 2047, could be deducted in 1997 or whether those deductions had to be spread across 50 years. Overturning the High Court on this point, the Court found that premiums were "excepted financial arrangements" (s EH 2 of the Act) meaning they fall within the definition of "accrual expenditure" (s OB 1, by virtue of the definition of "financial arrangement") and therefore needed to be spread across the lifetime of the scheme.

The third issue was whether the licence premium, which fell due in 2048, could be deducted in terms of s EG 1 of the Act. This issue turned on whether the premium was paid for the right to use land (a deductible expense), or simply the right to share net stumpage (as the High Court found, largely, it seems, because of timing and economic equivalence arguments). Overturning the High Court, this Court noted that timing issues and economic equivalence arguments were irrelevant, and the fact that the payment was described as a "licence premium" was not a controlling consideration. The fundamental issue was one of statutory and not contractual interpretation. The inescapable conclusion was that the payment was made for the right to use land and therefore was deducible.

With this background in mind, the Court turned to the major issue – whether the scheme was a tax avoidance arrangement.

At the outset the Court noted the difficulty of reconciling the general anti-avoidance provisions relied on by the Commissioner with the specific provisions relied on by the taxpayers. The Court expressed the view that a simple way to resolve this problem would be to give the anti-avoidance provisions primacy unless a clear legislative intention that a particular transaction should be excluded from them can be discerned. However, authority precluded this view and the Court was bound to follow the standard test – the transaction is legitimate unless it falls outside the scheme and

purpose of the provisions relied on by the taxpayers. In saying that, it is clear that room must be left for the general anti-avoidance provisions to operate and the Court warned against too heavy a reliance on English authorities, given the absence of general anti-avoidance provisions in that jurisdiction.

Having reviewed the relevant authorities, the Court considered that a transaction might invoke the general anti-avoidance provisions in the following circumstances: where transactions are technically correct but contrived; where there are elements of pretence; and where tax liability is reduced without incurring the economic consequences Parliament intended (making the economic reality of the situation a material consideration).

The Court said that in order to identify properly the scheme and purpose of the specific tax rules relied on by the taxpayers, a court should consider three things. First, the general anti-avoidance provisions should be kept steadily in mind. On this basis it is usually safe to infer that specific deductibility rules are premised on the assumption that they will incur the economic consequences of the type intended by the legislature when the rules were enacted. Secondly, specific deductibility rules are premised on the legislative assumption that they will only be invoked by those who engage in business activities for the purpose of making a profit. Thirdly, schemes that come within the letter of the specific deductibility rules by means of contrivance or pretence are candidates for avoidance. The result is that any given case comes down to a question of evaluation, or an exercise in "line drawing".

Applying these principles to the facts, the Court concluded that the scheme was clearly a tax avoidance arrangement. The true purpose of the scheme was not to conduct a forestry business for profit, but to generate spectacular tax benefits. The licence premiums and insurance arrangements made no commercial sense. The prospect of profits was remote. The transactions that were set to take place in the 2047/2048 wash-up were largely immaterial to the operation of the scheme.

As to penalties, the Court largely adopted the analysis of the High Court, concluding that the taxpayers had taken both an unacceptable and abusive interpretation. The Court took time to examine whether there was a relevant tax shortfall for the LAQCs who were part of SLFJV. The issue was whether the LAQCs should be liable for the tax deductions made even though they passed those losses on to their shareholders, who were also liable for the illegitimate deductions. Although this had the appearance of a double penalty, the Court felt constrained by the statutory language to conclude that the LAQCs had themselves taken a tax position as to the losses and therefore there was a relevant tax shortfall for the purposes of the penalties regime.

**The Supreme Court has granted leave to appeal.**

*Power of Commissioner to settle disputes on a commercial basis*

In *Accent Management & Ors and Commissioner of Inland Revenue* (2007) 23 NZTC 21,366, the Court was asked to examine when a judgment of the High Court should be recalled, in circumstances where the Commissioner of Inland Revenue (the

Commissioner) had made settlements with parties in the same position as the appellants.

The appellants were involved in a complicated forestry scheme which the High Court, and the Court of Appeal, deemed to be a tax avoidance arrangement (see *Accent Management & Ors v Commission of Inland Revenue* (2007) 23 NZTC 21,323 for further detail). The appellants were part of a larger group of investors who challenged the Commissioner's assessments of the scheme. On the eve of the trial, incriminatory documents surfaced that resulted in many investors withdrawing from the litigation and settling with the Commissioner. Having lost at trial, the appellants applied to the High Court to recall the judgment, relying on the inconsistency between the Commissioner's stance at trial and the terms on which he settled with the other taxpayers. Generally speaking, the other taxpayers received better terms the earlier they settled. Whilst they were aware of the settlements, the appellants claimed to be unaware of the precise terms until 10 months after the High Court judgment was delivered. The recall application was refused and the appellants appealed.

The Court examined aspects of the Commissioner's history and noted that traditionally he or she had little discretion as to the collection of taxes: *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 (CA). However, the enactment of ss 6 and 6A of the Tax Administration Act 1994 (the Act) gave the Commissioner more room to move. Specifically, s 6A(2) had been applied in a way that supports the view that the Commissioner may settle tax litigation on a basis that does not necessarily correspond to the Commissioner's view of the correct tax position: see, for example, *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 406 (CA). *Auckland Gas* represents an undoubted shift in approach from *Bouzaid* and recognised that the Commissioner has limited resources, and the function of collecting over time the highest net revenue that is practicable within the law. Of course, sensible litigation, including settlement decisions, must necessarily allow for litigation risk.

Furthermore, s 89C of the Act allows the Commissioner to issue amended assessments which reflect an agreement with a taxpayer, rather than the Commissioner's own view of the correct tax position.

The Court dismissed the appeal, noting that it was the courts that determine the correctness or otherwise of the assessments affecting the appellants. If the appellants could not attack the specific terms of the assessments, all that remains was an attack on the propriety of the Commissioner treating like taxpayers differently. The Court concluded that there was no impropriety, and that the Commissioner was entitled to settle tax cases in a commercial manner.

*Tax avoidance*

In *Ch'elle Properties (NZ) Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,448, the Court considered what was required before a finding of tax avoidance could be made under s 76 of the Goods and Services Act 1985 (the GST Act). The case focused on whether the test in s 76 was subjective or objective and what was required to defeat the intent and application of the GST Act.

Mr Ashby created 114 companies. These companies each entered into a conditional contract to purchase a lot in a subdivision for $70,000. A deposit of $10 was payable on execution, the remainder within a year. Ch'elle Properties (NZ) Ltd (Ch'elle), a company registered for GST on a monthly invoice basis, entered into conditional contracts with each of the 114 companies to purchase these properties for $700,000 per contract. Settlement was deferred for between 10 and 20 years. Each of the vendor companies issued an invoice to Ch'elle for the total ultimate price. Ch'elle filed a GST return claiming input tax credits for the properties. The Commissioner of Inland Revenue disallowed the claim, as being tax avoidance. This decision was upheld in the High Court. Ch'elle appealed.

The Court found that the s 76 test was an objective test. It held that the intent of the GST Act was to impose a broadly based consumption tax and that the operation of the GST Act was predicated on an overall balance between a person's liability for output tax and entitlement to receive input tax credits. The Court found that the balance between outputs and inputs was grossly distorted by the gap of 10 to 20 years between Ch'elle receiving the input credit and the time at which liability may arise for output tax on Ch'elle's taxable supply. The delay defeated the intent of the Act.

The Court also considered that gross exploitation of the mismatch between different accounting regimes provided for by the GST Act could lead to a finding of tax avoidance.

The appeal was dismissed.

**The Supreme Court has refused leave to appeal.**

*Tax avoidance*

In *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* (2007) NZTC 21,564 the majority of the Court dismissed an appeal against a judgment of the High Court concerning tax avoidance in relation to a claim for input tax credit under the Goods and Services Tax Act 1985 (the GST Act).

Glenharrow Holdings Ltd (Glenharrow) purchased a mining licence from Mr Meates for $45m in 1997 (at a time when there were only approximately three years left on the licence). Glenharrow paid an $80,000 deposit and funded the remainder of the price through vendor finance. Although Glenharrow was registered for GST, Mr Meates was not. Glenharrow claimed a GST input tax credit for the purchase of the mining license. The Commissioner of Inland Revenue allowed the claim for tax credit on the $80,000 deposit, but disallowed the claim on the remaining $44,920,000 because the transaction was either a sham or amounted to tax avoidance. Glenharrow challenged that decision.

In the High Court, Chisholm J found that the arrangement was not a sham but that it did amount to tax avoidance because the purchase price was grossly inflated. He valued the mining licence at $8m. The majority of the Court (Robertson and Ellen France JJ) upheld the decision concerning tax avoidance, but on a different basis.

The majority valued the mining licence at $290,000, being the total of the deposit paid and the total amount repaid off the $44,920,000 loan.

The terms of the finance arrangement were such that Glenharrow did not have to make any repayments for two years and no interest was payable for three years. The mining licence was the only asset owned by Glenharrow, thus Glenharrow's ability to repay was dependent on successfully working the mining licence. Mr Fahey, the owner of Glenharrow, did not guarantee the loan. The mortgage executed over Glenharrow's shares meant that Mr Meates could take back control of the licence if the mining project was not successful.

Robertson and Ellen France JJ found that in economic terms the arrangement was only a conditional obligation to repay the loan and there was no definitive obligation to repay irrespective of the success or failure of the venture. Accordingly, the arrangement amounted to tax avoidance as Glenharrow had not suffered the economic burden intended by Parliament to qualify for a tax credit.

Chambers J disagreed with the majority and would have found that the arrangement did not constitute tax avoidance. He considered Chisholm J's findings as to the genuineness of the parties' intentions and purpose in entering into the transaction precluded a finding that the arrangement was "entered into ... to defeat the intent and application of [the GST] Act", in terms of s 76.

**The Supreme Court has granted leave to appeal.**

***Tort***

*Defamation – whether court allowed to take account of absence of adverse reaction*

In *Salmon v McKinnon* [2007] NZCA 516 the Court was asked to determine whether, in a legal innuendo case, it is appropriate to take account of an absence of adverse reaction to the alleged defamatory statement.

Ms McKinnon was a $2 Shop franchisee, Mr Salmon being the franchisor of the $2 Shop group ($2 Shop). Under the franchise agreement, franchisees are required to pay a levy into an advertising fund, which is then used for group purposes. In 2003, $2 Shop purchased a late model Lamborghini motor vehicle. Mr Salmon announced the purchase to franchisees in a letter explaining that the car's colour scheme and licence plate reflected the $2 Shop brand and would be available for "some promotional purposes". Ms McKinnon took the view that the car had been purchased from the advertising fund, although this was incorrect. At least one other franchisee (Mr Ferrari) thought that advertising funds might have been used and wrote to Mr Salmon inquiring whether this was so.

In 2005 Ms McKinnon sent an email to fellow franchisees expressing the view that the Lamborghini had done nothing for $2 Shop sales and should be sold, thereby releasing those funds into the advertising fund from whence they came. Mr Salmon thought these words were defamatory as alleging he had dishonestly used or at least

misused franchisee funds. In short, that he was either a thief or incompetent. Acrimonious solicitors' correspondence followed with Ms McKinnon accepting her factual mistake and sending an email apology, albeit not in the grovelling tones desired by Mr Salmon. Proceedings were issued in the High Court, Allan J finding that the words did not bear the defamatory meaning alleged.

Dismissing the appeal, the Court took the opportunity to examine the circumstances where evidence of adverse reaction could be admitted, and whether a declaration under s 24 of the Defamation Act 1992 was appropriate.

The first issue for the Court to resolve was whether the statement was defamatory of Ms Salmon, given it referred only to the $2 Shop. Agreeing with Allan J, the Court found that the publication clearly identified Mr Salmon by innuendo, as the recipients (all the franchisees) would be aware of Mr Salmon's close involvement with the business.

The lead issue was whether the statement was defamatory. Reasoning that it was not, Allan J took account of the absence of debate or expression of concern amongst the recipient franchisees in assessing the sense in which they would have read the email. The appellant took issue with this reasoning.

The defamation alleged in this case was grounded in legal innuendo, and it was common ground that in such cases a witness may be asked what they made of the alleged defamatory statement: *Hough v London Express Newspapers Ltd* [1940] 2 KB 507 (CA). Noting that there was no reason to depart from *Hough*, the Court explained that in innuendo cases it might be sensible to ask a witness what he or she made of a statement as a way of testing the materiality of the special circumstances alleged. In the usual run of cases a plaintiff will call such evidence to show that recipients of the statement did in fact attribute a defamatory meaning to it. An alternative approach would be for a defendant to call recipient witnesses to say that they did not attribute a defamatory meaning to the statement.

In the present case the Judge had relied on an absence of adverse reaction, although the Court noted that there was no direct evidence given as to a lack of adverse reaction. However, given the evidence led at trial the Judge was entitled to conclude that there was no adverse reaction. In the particular context of this case the Court found it was far from obvious why an absence of adverse reaction to the email should not be admissible. The course adopted by Allan J was open to him.

Turing to s 24 of the Act, the Court noted that relief is discretionary. Given that Ms McKinnon had already apologised, informed the various recipients of the original email, and promised to pay Mr Salmon's reasonable costs, the Court could not see what additional benefit a declaration would add.

As to costs, the Court examined the way that the litigation had been conducted, Mr Salmon's (or his solicitor's) threatening tone in pre-litigation correspondence, the request for declaration which was designed to "punish" Ms McKinnon to the amount of solicitor and own client costs to be incurred, and Ms McKinnon's conciliatory approach throughout. The Court awarded Ms McKinnon solicitor and own client costs for the appeal.

*Negligence – duty of care owed by builder – reasonable discoverability – limitation period – appeal against strike out decision*

In *Pullar v Secretary of Education* [2007] NZCA 389 there was a dispute about a leaky building.

In August 1995 Mr and Mrs Pullar, through their building contracting firm, agreed to construct a library and administration building for Ruatoki School. The building was completed a year later. In October 1997 the Ministry of Education (the Ministry) wrote to the Pullars requesting repairs to the building, which was leaking. The Pullars replied that they did not consider themselves liable for repair work. In December 1998 the Ministry received a full report detailing the defects in the building and recommending remedial work. However, it did not send the report to the Pullars until October 1999, and again the Pullars denied liability for the complaints outlined in the report. In November 1999 the Ministry retained a firm of quantity surveyors who also recommended remedial work. Contractors were engaged to carry out the work. In May 2005 the Ministry filed a claim against the Pullars in negligence.

The Pullars applied for summary judgment against the Ministry. They said the claim had to fail because they owed no duty of care to the Ministry. Secondly, they said that the claim in negligence was time-barred, just as any claim in contract would have been. Associate Judge Abbott dismissed the Pullars' application. He thought it was arguable that the Pullars did owe a duty of care, and also that the Ministry might be able to show that its cause of action had not accrued until 17 May 1999 (i.e. within the six year limitation period). The Pullars appealed against the decision.

The Court considered the limitation point first. It said that it was now well established that where, through negligent construction, design or inspection, damage occurs to a building, its cause being obvious, any cause of action which may exist accrues when the damage becomes manifest. That is the point at which the economic loss occurs. The Court also referred extensively to the judgment of the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 in which latent causes of damage were considered. The Court doubted that the present case was one of "latent damage": the defects were readily apparent in 1997, and there was no mystery as to the cause of the damage. The building was leaking. There was no doubt whatsoever, the Court held, that the cause of action had accrued by the time of the report in December 1998. Market value would have been affected and time had started running. Accordingly, the claim was time-barred for the purposes of s 4(1) of the Limitation Act 1950. There was no need to consider whether the Pullars owed a duty of care. The Ministry's claim was struck out.

### *Treaty of Waitangi*

*Constitutional law – settlement legislation and former settlement regime – Treaty of Waitangi and fiduciary duty*

In *New Zealand Maori Council v Attorney-General* [2007] NZAR 569 the Court was required to consider the scope of the Crown's obligations under the Treaty of Waitangi (the Treaty) and the Crown Forests Assets Act 1989 (the CFAA) when introducing legislation to effect Treaty settlements.

The case was essentially the latest chapter in the dispute that led to the Court's watershed decision in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case). In that case the Court had held that the transfer of Crown land to state-owned enterprises, without safeguarding potential claims under the Treaty, breached the Treaty's principles and therefore the State-Owned Enterprises Act 1986. The Court reserved leave for the parties to return to court if necessary. In July 1989 the Crown reached an agreement with iwi represented by the New Zealand Maori Council (NZMC) and the Federation of Maori Authorities (FOMA). This provided that the Crown would only dispose of legal title to Crown forest land once the Waitangi Tribunal (the Tribunal) had confirmed that the land was not liable to resumption for the purpose of transfer to Maori ownership. The Crown would only sell cutting rights, with rentals being held on trust by the Crown Forestry Rental Trust (CFRT) for any eventual Maori owner or, if the Tribunal did not find liability for resumption, the Crown. The CFAA was a statutory enactment of the July 1989 agreement.

In the early 1990s the Crown entered into direct negotiations with Te Pumautanga o Te Arawa Trust (TPT), on behalf of Te Arawa iwi/hapu, for a settlement of Treaty grievances. The parties concluded a settlement deed. The Crown promised to introduce legislation (the settlement legislation) to give statutory effect to the deed. The deed (and the settlement legislation) deemed TPT to be a beneficiary of rental payments held on trust by the CFRT, as if the process involving the Tribunal under the CFAA had been undertaken in TPT's favour. TPT was also given the option to purchase further Crown land on a commercial basis. If such an option were exercised the Crown would acquire the rentals as if the Tribunal had decided that the land was not liable to be returned to any Maori claimant. The Tribunal issued a report saying this settlement would thwart the ability of iwi not affiliated with TPT to prosecute historic Treaty grievance claims. NZMC and FOMA considered the deed and the proposed legislation to be a breach by the Crown of its obligations under the July 1989 agreement, the CFRT trust deed, the CFAA, and the Treaty. NZMC and FOMA brought proceedings in the High Court seeking declarations to that effect in addition to declarations that the Crown ought not to take any further steps in implementing the settlement legislation. Gendall J dismissed the applications. However, he said obiter that the Crown's acquisition of rentals following the commercial purchase of land by TPT would breach the fiduciary duty the Crown owed to all Maori. NZMC and FOMA appealed.

The Court dismissed the appeal. It held that the enactment of the settlement legislation would make the settlement deed's provisions lawful, notwithstanding their inconsistency with the CFAA, the CFRT deed, and the July 1989 agreement. The Court considered that everything turned on the legislation – the settlement deed by itself reflected only a commitment to introduce the settlement legislation. It was constitutionally improper to restrain by declaration the introduction by the Government of legislation into Parliament. It would flout the established principle of non-interference by the courts in parliamentary proceedings.

On the question of inconsistency with the Treaty and the Crown's fiduciary obligations, the Court noted that it had been established in the *Lands* case that the Treaty does not form part of the law of New Zealand save to the extent that it is directly incorporated into statute. There was no free-standing cause of action upon the Treaty itself. The Court accepted that the Treaty could have direct impact in judicial review proceedings (as a relevant consideration for a decision-maker) or in statutory interpretation generally. It explained *New Zealand Maori Council v Attorney-General* [1991] 2 NZLR 129 (the *Radio Frequencies* case), the authority upon which Gendall J had relied for his obiter statement, as being at most a case of the Treaty's application in judicial review proceedings.

The Court said the duty owed by the Crown to Maori under the Treaty was *analogous* to fiduciary duties owed in equity. The key characteristics of private law fiduciary duties – good faith, reasonableness, trust, openness, and consultation – informed the content of the Crown's duty to Maori. However, the Court said that if Gendall J intended to say the Crown has a fiduciary duty to Maori in equity in a private law sense, then he was wrong to do so. In particular the Court noted it would be odd if the Crown owed fiduciary duties to one Maori claimant (Te Arawa) which would inevitably place it in breach of its fiduciary duties to others (namely those iwi represented by NZMC and FOMA).

**The Supreme Court has granted leave to appeal.**

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# C Criminal Cases

***Adequacy of directions / summing up***

*Mens rea – stupefying*

In *R v Sturm* [2007] NZCA 175 the Court considered the mens rea requirements for the offence of stupefying with intent to facilitate the commission of a crime contrary to s 191 of the Crimes Act 1961.

Mr Sturm was convicted following a retrial on a number of charges of sexual violation involving three male complainants. With respect to A, Mr Sturm was convicted of stupefying with intent to facilitate sexual violation, and two charges of sexual violation by unlawful sexual connection.

Mr Sturm appealed against the convictions concerning A on the ground that the jury was misdirected as to the requisite mens rea for the stupefying charge.

Applying *R v Tihi* [1989] 2 NZLR 29 (CA), the Court accepted the submission for Mr Sturm that the Crown was required to prove both an intention to stupefy and an intention to facilitate the commission of a crime. Contrary to Mr Sturm's submission, however, the Court accepted the approach in *Tihi* that for the intention to stupefy, subjective recklessness was enough. The Court noted that the approach in *Tihi* was consistent with the general principles applicable to crimes of ulterior intent, where the mens rea includes an intention to produce some further consequence beyond the actus reus of the crime in question.

In the present case the Court held Williams J's directions were sufficient and that the appellant was clearly subjectively reckless. That conclusion made it unnecessary to deal with the argument that the direction on the stupefying charge rendered the other convictions unsafe. The appeal against conviction was dismissed.

**The Supreme Court has refused leave to appeal.**

*Parties to offences – manslaughter – communication of withdrawal*

In *R v Hartley* [2007] 3 NZLR 299 the Court considered whether it was necessary for the Crown to show that an individual charged as a party to manslaughter under s 66(1) of the Crimes Act 1961 knew of the presence of a weapon, where the victim died following injuries inflicted by another offender with that weapon.

Mr Hartley and three other young men were driving around Wanganui late one evening when, over the course of three or four hours, they set upon and assaulted a number of other men. In the course of the second of the assaults one of the co-offenders pulled out a knife and stabbed the victim, who later died.

Mr Hartley was convicted as a party under s 66(1) of the Crimes Act of manslaughter. He appealed against his conviction on the grounds, amongst others, that: Miller J

incorrectly instructed the jury that the Crown need not show that the appellant knew of the presence of the weapon; and that Miller J incorrectly instructed the jury that for Mr Hartley to withdraw from the assault he needed to communicate that withdrawal to the other offenders before the crime was committed.

With respect to the first ground of appeal the Court said that the authorities supported three propositions. First, a defendant who is a party under s 66(1) to an assault of the type that resulted in death is guilty of manslaughter. Second, in a case under s 66(2) where the defendant knew that a weapon (or weapons) were on hand and might be used and that weapon causes death, a verdict of manslaughter will be open. That will be so even if the weapons were on hand only to threaten. Third, a defendant who is a party to an assault under s 66(1) which was not of the type which resulted in death is not guilty of manslaughter unless aware (for the purposes of s 66(2)) that the death of the victim was a probable outcome. The Court said that the third proposition was determinative of the present appeal. On the facts of the case there was no foundation for a manslaughter verdict as the assault that occurred was completely different offending from that which the appellant was assisting in.

With respect to the second ground of appeal, the Court referred to the conditions for withdrawal set out in *R v Pink* [2001] 2 NZLR 860 at [22] (HC) and adopted by the Court of Appeal in *R v Ngawaka* CA111/04 6 October 2004 at [14]. First, there must be notice of withdrawal whether by words or actions. Second, the withdrawal must be unequivocal. Third, the withdrawal must be communicated to the principal offenders. Fourth, for a withdrawal to be sufficient, all reasonable steps to undo the effect of the party's previous actions must be taken. Mr Hartley, relying on English authorities, submitted that communication of withdrawal was not necessary when the violence is spontaneous. The Court held that the present case was not an appropriate vehicle for reconsidering that approach, as the appellant was the initiator of the planned attack on the victim.

Accordingly, the Court quashed the manslaughter conviction, entered a conviction for common assault, quashed the sentence of 11 years imprisonment with a minimum period of seven years, and substituted a sentence of nine years imprisonment with a minimum period of five years.

*Verdict not unreasonable – intoxication and lies directions – use of trial transcript – argument of prosecutor misconduct*

In *R v O* [2007] NZCA 87 the appellant contended that the jury's verdict was unreasonable and that there had been several errors and irregularities at trial giving rise to a miscarriage of justice.

O and the complainant Y were both in their final year of high school. They had been friends for several years. One night, they were both attending separate parties when O sent Y a text message indicating he would pick Y up. O, however, arrived at the party in a taxi. O and Y then began to walk back to the house of Y's friend, Z. At around 1:15am, O booked a motel room for one. Y remained on the street, but eventually she entered the room also. On her version of events she did so to use the bathroom and the phone. O claimed that they had agreed to have sex. Y sat on the bed to use the

phone. O then physically restrained her and sexually violated her over the course of an hour. This consisted of rape, anal penetration, and oral sex. Y fled down the street naked when O fell asleep. Two men observed her in a distressed state and then stayed with her until her parents arrived. Y was taken to the police station where an official complaint was made. She was medically examined and found to have bruising to her upper arms and a tear to her anus. The police found O in the motel room; he claimed the two had engaged in consensual intercourse. There was blood on the bed.

At trial, and on appeal, O relied heavily on text messages sent by Y to her boyfriend. The text message said, "Hey babe just got back to [Z's] going to sleep now love u xxx". The defence argued that this text was a lie, which must have created a reasonable doubt. The Court disagreed. Noting that the law as to the supportability of jury verdicts had been settled since *R v Ramage* [1985] 1 NZLR 392 (CA), the Court considered that it could not be said that this text message must or should have created a reasonable doubt. All the relevant evidence was before the jury and the Crown had a particularly strong case.

O also argued that there had been a miscarriage of justice arising out of a lack of or inadequate directions from the trial Judge and alleged prosecutorial misconduct. It was suggested that, because both O and Y were intoxicated, the Judge should have warned the jury about the effects of intoxication on recollection. The Court considered that this would have been simply stating the obvious. Next, it was argued that the Judge should have given a lies direction. The Court concluded, however, that the Judge had done so, albeit clumsily. The Judge's direction focused on the purported lies of the complainant, and could have been considered exculpatory of any lies she had told. A lies direction is generally for the benefit of the accused. However, the jury could not have been confused as to the weight to be given to any potential lies at trial. The Judge then gave the jury the trial transcript without warning counsel to check its accuracy and without warning the jury that they must consider all the evidence and examinations of witnesses in order. While the Court said that this should have been done, it concluded that no miscarriage could be said to have arisen in this instance.

The prosecutor at trial made explicit reference to sodomy and other acts engaged in by the appellant, using the colloquial terms of the appellant. The Court stated that the word sodomy, because of its negative connotations, should be avoided, but that using the language of the complainant was appropriate. The Court also emphasised that it was paramount that the trial Judge maintain order in the courtroom – extending to possible bad language from defence counsel and unnecessary movements from both counsel. Prosecuting counsel had also made comments that were obliquely an attempt to undermine the accused's right to silence. However, the Judge appropriately and fairly put the matter in his summing up, giving the jury clear guidance on how to treat O's exercise of the right to silence.

The conviction appeal was dismissed.

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

*While committing a crime "has" a firearm*

In *R v Rogers and O'Hara* [2007] NZCA 286 the Court was asked to determine the meaning of the word "has" in s 198B of the Crimes Act 1961. Section 198B(1)(b) provides that the Crown must prove that the accused used a firearm in committing any crime or "while committing any crime, has any firearm with him or her in circumstances that prima facie show an intention to use it in connection with that crime".

Messrs Rogers and O'Hara were involved in the manufacture of methamphetamine on a boat moored in the Howick marina. A loaded handgun was located beneath a blanket adjacent to the main cabin. Both accused had denied knowledge of the pistol that was not found until the second police search.

The High Court Judge explained to the jury that they must be sure the accused were committing a crime; that they "had" a firearm; and the circumstances prima facie showed an intention to use the firearm in connection with a crime. A handout sheet to the jury explained the second issue as whether or not the accused had "possession" of the firearm.

Quashing the conviction, the Court criticised the Judge's failure to explain the meaning of "use in connection with a crime", and for substituting the statutory "has" for the legal concept of "possession". Possession, which ordinarily connotes physical custody or control, is perhaps not enough to fulfil the "has" requirement which requires evidence of a very close physical link and a degree of immediate control: *R v Kelt* [1977] 3 All ER 1099 (CA), cited with approval in *R v Manapouri* [1995] 2 NZLR 407 (CA). The firearm must be at hand while the substantive offence was committed. Neither the element of immediate availability nor the specific intent was explained to the jury.

The High Court Judge also summed up on the basis that the jury might well conclude that the gun was used to protect the manufacturing operation. However, the carriage of a gun in subsequent offences (such as selling the methamphetamine) is a tenable and logical interpretation and it should have been left to the jury.

The sentence was adjusted accordingly.

The accused also questioned the starting point of eight and a half years, given that the quantity of methamphetamine found was at the lower end of band two in *R v Fatu* [2006] 2 NZLR 72 (CA). The Court disagreed, noting that the quantity of drugs seized is not automatically determinative of the appropriate starting point. While it is an important consideration, it is appropriate to take the wider factual circumstances into account.

*Summing up – balance*

In *R v Palmer* [2007] NZCA 113 the Court allowed an appeal on the basis that the Judge's summing up unduly favoured the Crown.

The complainant and three friends had consumed considerable amounts of alcohol while at the beach. They met up with the appellant and some of his friends. More alcohol was consumed before the complainant invited the party back to her house. The complainant's recollection of events from thereafter were relatively hazy, but included falling asleep on a bed and awakening to the appellant pulling the door handle off the door to the room before proceeding to engage in sexual intercourse. She did not consent to this, and, on her account, he discontinued when she vomited. The appellant then alighted from the room through a window.

A Crown witness, Ms A, had attempted at one point to enter the room where the complainant was. Being unsuccessful, Ms A had walked outside to see the appellant leaving through the bedroom window. Another Crown witness, Ms R, was more favourable for the appellant. She indicated that the complainant had been acting flirtatiously towards the appellant for the duration of the day. The appellant claimed that the entire course of conduct was consensual. He was convicted in the District Court.

Two grounds of appeal were advanced. First, that Mr Palmer's counsel had failed to adequately advise him on whether to give evidence. The Court dismissed this ground of appeal, noting that Mr Palmer had freely consented, in an informed manner, to not giving evidence. Secondly, that there were several errors in the summing up of Judge Rollo.

Three points were focused on: Judge Rollo's summing up on inferences and the standard of proof, and a general argument of imbalance. The Court found that there was no issue with Judge Rollo's use of examples from both the defence and prosecution case regarding inferences, indeed this practice was endorsed. Likewise, his summing up on the standard of proof could not be criticised. However, the summing up also engaged in a lengthy summary of the complainant's evidence and that of key Crown witnesses. The length of the summary, and its content, invited acceptance of the complainant's case. He had also provided complimentary commentary on Ms A as a witness, while explaining away evidence in Mr Palmer's favour (such as that of Ms R). The strength of the Crown case did not justify this approach. Further, in the course of the summing up, Judge Rollo had effectively introduced a second recent complaint even though a first recent complaint had been ruled inadmissible.

The convictions were quashed, and a retrial was ordered.

*Attempted sexual violation and sexual violation – consent and reasonable belief – issues sheet error*

In *R v Cassidy* [2007] NZCA 573 the Court allowed an appeal against some of the appellant's convictions on the basis that elements of the offence had not been adequately put before the jury by the trial Judge.

The appellant had been convicted of various sexual indecencies against a boy aged between 12 and 16 years old, spanning a three year period. This included counts of attempted sexual violation and sexual violation.

Several grounds of appeal were raised. Of significance for the purposes of this summary was the Court's discussion of Harrison J's summing up on attempted sexual violation and the use of an issues sheet when directing the jury.

In relation to the charges of attempted sexual violation, Harrison J had not specifically articulated the need to prove beyond reasonable doubt a lack of consent as to the intended act and the lack of a reasonable belief in consent as to the intended act: *R v L* [2006] 3 NZLR 291 (SC). The problem was compounded by an error in the issues sheet given to the jury. The literal effect of the issues sheet, and of Harrison J's subsequent direction on sexual violation, was that if there was a reasonable doubt as to whether the sexual connection had occurred without the complainant's consent, the jury should not acquit but go on to consider whether the appellant had a reasonable belief in consent. Conversely, the issue sheet stated that if the Crown had proved beyond a reasonable doubt that the complainant did not consent, then the jury was to acquit.

The Court considered that the attempted sexual violation counts could not stand, on the basis that they were unsafe. These were quashed. The majority of the Court (Arnold and Ronald Young JJ, with Fogarty J disagreeing) considered that this applied to the counts of sexual violation also. As well as the problematic summing up and issues sheet, the majority was concerned with the manner in which Harrison J expressed the irrelevancy of consent for a charge of indecent assault on a boy under 16. While the Judge had intended to limit this comment to the charge of indecent assault, this qualification was not expressed clearly.

Exercising its power under s 386(2) of the Crimes Act 1961, the Court substituted convictions for indecent assault in place of the sexual violation counts. Given that consent was irrelevant to this charge, the jury must have been satisfied that an indecent assault had still taken place. The Court directed that a further hearing be conducted before it concerning what modification should be made to the appellant's sentence.

*Summing up – sentencing – meaning of "wound" – vulnerability of victim*

In *R v Scott and Lewis* [2007] NZCA 589, the Court considered whether the Judge had correctly directed the jury as to the meaning of "wound" in terms of the charge "wounding with intent to injure" under s 188 of the Crimes Act 1961.

The Court confirmed that the authority referred to by Judge Cooper was correct – that "wound" includes internal or external rupture of tissue as set out in the decision of this Court in *R v Waters* [1979] 1 NZLR 375.

Previously, in English authority, for an injury to amount to a "wound", the breaking of the whole of the skin was held to be necessary. The Court referred to several English cases which supported this: see *R v Wood and McMahon* (1830) 1 Mood 278 at 281; 168 ER 1271 at 1272 and *R v M'Loughlin* (1838) 8 Car & P 635; 173 ER 651 at 652. However, the Court pointed to advances in medical knowledge and overseas cases which have accepted, for example, that rupturing of internal skin, such as that in the

buccal cavity or the vagina, can amount to a "wound". On this basis, it would be illogical not to regard the rupturing of an internal membrane causing bleeding as a "wound".

The Court referred to medical dictionary definitions of the word "wound", none of which limited the definition to laceration of the skin. *Stedman's Medical Dictionary* (5ed 2005) in particular stated that "wound" meant "trauma to any of the tissues of the body, especially that caused by physical means and with interruption of continuity".

Regarding the starting point for sentencing, it was held that the appellants lack of weapons and their lack of awareness of the victim's particular vulnerability (Warfarin effects), combined with their personal circumstances, meant that a lower starting point for sentencing ought to have been selected. The appeals against conviction were dismissed, but the appeals against sentence were allowed. A sentence of two years imprisonment was substituted for that imposed in the District Court (three years), with leave granted to each appellant to apply for home detention.

*Commenting on the defence and cross-examination*

In *R v Webb* [2007] NZCA 443 the Court had to determine whether comments made by the Judge in summing up at the appellant's trial for indecent assault on a girl under 12 effectively took away the defence, so as to result in a miscarriage of justice.

The complainant gave evidence that while she was in a pool at an aquatic centre the appellant had been watching her underwater and had poked his finger inside her anus through her swimming togs. The appellant also bumped into her as she left the pool. The defence case was that the touching was accidental. In cross-examination the complainant accepted that both contacts could have been accidental.

In summing up Judge Moore effectively minimised the apparent concession made by the complainant, referring to counsel's cross examination as "skilfully done" in the context of a young complainant met with a person in a position of authority.

The Court emphasised that a judge is entitled to express his or her own view on issues of fact but it must remain clear that the jury is the sole arbiter of fact. The judge's task in summing up is to put the competing cases fairly before the jury. Provided this is done then a judge is able to express his or her own opinion on issues lying within the jury's sphere.

The Court found that the comments made were without adequate explanation, that they were not legal directions, and that, because they went beyond what was legitimate, the summing up failed to fairly put the defence case.

The appeal against conviction was allowed and a retrial was ordered.

### *Elements of Offences*

*Attempted sexual violation – evidence – elements of offence*

In *R v Yen* [2007] NZCA 203 the Court was faced with a guilty plea to a charge of sexual violation when, in law, the facts upon which he pleaded guilty could not have constituted attempted sexual violation.

The Court referred to the decision of the Supreme Court in *L v R* [2006] 3 NZLR 291 at [21] where it was held that to constitute the offence of attempted sexual violation, there must be an intention to complete the relevant physical act and an intention that this should occur without the consent of the complainant and without the accused believing on reasonable grounds that the complainant was consenting. On the facts of *Yen*, there was nothing to suggest that the appellant intended sexual connection to occur without the consent of the complainant. The Court found that the appropriate charge would have been attempted sexual connection with a child under the age of 12 years, contrary to s 132(2) of the Crimes Act 1961. Under that charge, it is not a defence that the child consented, and thus the issue does not arise. The Court thus amended the indictment accordingly.

The Court was also called upon to consider whether the conduct in question was sufficient to amount to an attempt. The Court expressed stated that this was, without a doubt, the case. Matters had reached the point where nothing more was required on the part of the appellant in order to complete the sexual connection. The appeal against conviction on the amended charge was, therefore, dismissed.

The appellant also appealed against his sentence on the basis that it was manifestly excessive. This aspect of the appeal was allowed, a sentence of 15 months imprisonment being substituted for the original sentence of two years imposed in the District Court.

*Resource Management Act 1991 – offences by unincorporated group of persons*

In *Cometa v Canterbury Regional Council* [2007] NZCA 560 the Court was faced with an argument that an unincorporated body could not be sued under the Resource Management Act 1991 (the Act). The appellant companies were the foreign owners and managers of a foreign ship that discharged contaminants into the coastal marine area, breaching ss 15B(1) and 338(1B) of the Act (both of which refer to a "person" as the offending party). They argued that they could not be convicted under the Act as it did not permit the prosecution of an unincorporated group of persons. In the District Court, before Judge J A Smith, the appellants were convicted and fined. They then appealed to the High Court, where Fogarty J dismissed their claim.

The appellants argued that the common law rule that an unincorporated body could not be prosecuted had not been displaced by the Act. It was submitted that the absence of procedural mechanisms in the Act to deal with unincorporated bodies indicated an intention not to displace the common law rule. Similar arguments were

made with respect to the Summary Proceedings Act 1957, which applies to proceedings under the Act.

In dismissing the appeal the Court placed much weight on the definition of "person" in s 2 of the Act which expressly includes an unincorporated body of persons. It agreed with Fogarty J that in this particular context the Act does provide sufficient procedural mechanisms to deal with the prosecution of unincorporated bodies. The Court further agreed that to adopt the appellant's argument would leave a significant lacuna in the ability to exert control over foreign ships in New Zealand waters. The Court emphasised that in order to come within the definition of s 2, the group would have to be capable of being described as a "body of persons". Groups of individuals that had come together for a temporary purpose would unlikely fit within this category. The group would need to have some form of internal structure that enabled it to take and implement decisions as a collective. Such a group would likely have a similar collective structure to a company and the practical difficulties relied upon by the appellants would thus be more illusory than real.

The Court found that the Act clearly contemplated the prosecution of unincorporated bodies. It held that in the case of unincorporated bodies that constitute "bodies of persons", the courts will, where necessary, adopt processes analogous to those that apply in the case of corporations.

*Supply of drugs – defective indictment – power of Court of Appeal to quash convictions – guilty plea discounts*

*R v Fonotia* [2007] 3 NZLR 338 concerned various charges relating to the possession and supply of controlled drugs. The appellant was searched and in her handbag was found some methamphetamine and a large amount of cash. A later search of her home revealed more methamphetamine and other drug-related paraphernalia. Various charges were laid. Negotiations between the Crown and the appellant's lawyer resulted in an amended indictment of five counts. Ms Fonotia pleaded guilty to each. Ms Fonotia was sentenced to four and half years imprisonment, and the Solicitor-General appealed on the basis that the sentence was manifestly inadequate and wrong in principle.

The first issue on the appeal was counts four and five on the amended indictment. Those counts charged that Ms Fonotia had sold a controlled drug to a person or persons unknown. A marginal note on the indictment indicated that the charges were laid under s 6(1)(c) of the Misuse of Drugs Act 1975. The Court stated that there was no offence of "selling a controlled drug". Rather, the specified class of drug is an essential ingredient of the charge, and the indictment must specify which class of drug is alleged to be involved. The Court explained that the reasoning in *R v Karpavicius* [2001] 3 NZLR 41, which concerned a charge of conspiring to import a controlled drug, was not available for supply cases charged under s 6(1)(c). Thus the Court held that counts four and five were nullities in the sense that they did not disclose a criminal offence.

The Court was then required to consider whether it had the power to quash the convictions. This was not an appeal by Ms Fonotia, but rather a Solicitor-General

appeal against sentence. The Court concluded that it must have inherent power to quash convictions which are nullities because the Court could not sanction a sentence based on a crime which does not exist as a matter of law. The Court quashed the convictions on counts four and five.

The second issue on the appeal was the appropriate discount to be given for guilty pleas. The Court noted that no guideline judgment had been given in respect of guilty pleas, although it had regularly approved discounts of between 10 per cent and 33 per cent. The general rule is that the earlier the plea, the greater the discount. In this case the guilty pleas were not entered at the earliest possible opportunity and thus the maximum discount was not available. Instead, 25 per cent was appropriate in the circumstances of the case. The Solicitor-General's appeal was allowed and a sentence of five years imprisonment was substituted.

*Burglary – meaning of "enclosed yard" – Crimes Act 1961, s 231*

In *R v Dar* [2007] NZCA 140 the appellant pleaded guilty to a charge of burglary which alleged that he had entered an enclosed yard, namely an orchard, with intent to commit a crime therein (steal avocados). The question for the Court was whether the avocado orchard constituted an "enclosed yard" for the purposes of s 231 of the Crimes Act 1961.

The appellant and his co-accused used wire cutters to cut a boundary fence and enter an avocado orchard. They commenced picking avocados and piled them on a sheet in the orchard. The police were called and Mr Dar and his co-offender were apprehended nearby. The appellant accepted counsel's advice that a community-based sentence was likely and pleaded guilty to the charge. Mr Dar then appealed on the basis that the charge had not been made out because the orchard was too large to constitute an "enclosed yard" within the meaning of s 231, and also because the authorities indicate an enclosed yard must be appurtenant to a building.

The Court reviewed the evidence and found that the orchard was not separated from the rest of the farm on which it was situated: there was no fence between the open pasture and the orchard. The Court concluded that the evidence fell well short of establishing that the orchard was in fact and in law an "enclosed yard" for the purposes of s 231. It was thus not necessary to consider whether a yard must be appurtenant to a building for the purposes of s 231.

It is well established that a plea of guilty will not stand if on the facts the accused could not have been convicted of the offence. The appeal was allowed, the conviction quashed, and a verdict of acquittal was entered.

*Examination of reasonable jury – representative counts and specific incidents – sentencing for sexual offending*

In *R v S* [2007] NZCA 243 the Court considered the relevance of expert evidence refined post-trial, the requirements when charging by representative count, and the range of sentences available in serious cases of intra-family sexual offending.

S was convicted of five representative counts of sexual violation against his stepdaughter, X, a teenager, and sentenced to 12 years imprisonment. Over a period of some four years, X was subjected to repeated sexual violations, including rape, anal intercourse, inducement to perform oral sex, and other sexual indecencies. X left the family home to live with her boyfriend, Y. However, she returned at Easter of 2003 and stayed for a brief period during which, according to X, she was subjected to non-consensual sex in the bathroom of the family home. The Crown at trial adduced a series of emails between S and X that indicated a sexual relationship had taken place. S denied any sexual contact with X and claimed that the emails had been fabricated by computer "hacking". An expert witness for the defence stated that he had located on X's computer software and electronic conversations indicating an interest in hacking. Further, the expert was able to identify that a user of X's computer had engaged in internet-based inquiries regarding such things as rape and incest. The defence argued that a stealth Trojan virus had been used to remotely access S's computer and fabricate the emails.

On appeal, S maintained that he had been the victim of hacking, and sought leave for the defence expert to be able to give more detailed evidence. The Court asked itself how a jury might reasonably respond to this "additional" information. While there was greater particularity to the evidence of the defence than there was at trial, the Court emphasised that there were several necessary and difficult requirements before the "hacking" argument, on a technical basis, could be successful. The evidence of the defence expert could not surmount these hurdles. S then argued that defence counsel at trial and Judge Moran in his summing up had mishandled the defence evidence and argument as to "hacking". In relation to trial counsel, S submitted that it was crucial that either (or both) X and her boyfriend were closely challenged as to a possible interest or knowledge of hacking. Trial counsel did not challenge Y in relation to the emails. However, counsel had reasonably assessed Y and noted that there was not enough to connect him to any possible hacking. In this context, vigorous questioning was not likely to be fruitful.

S then argued that Judge Moran had failed to adequately put the defence case. While Judge Moran had stated the central contention (that S was the victim of hacking), it was argued that he should have highlighted X and Y's potential interest in hacking and foreign fantasy websites. The Court considered that, in line with *R v Shipton* [2007] 2 NZLR 218 (CA), the level of detail employed by Judge Moran was a matter for him.

A problem however had arisen with regard to the nature of the indictment. The Court was satisfied that representative counts were appropriate for several of the offences, but in relation to the third count of rape there had been two specific incidents. The indictment had nevertheless framed this count as also representative. The Court stated that, when the offence was specifically identified, two options were available. The two specific incidents can become the subject of separate counts, with a representative count being left for all other non-specific incidents. Alternatively, the judge can make clear that there must be jury unanimity in relation to one or more of the specific incidents forming the basis of a representative count. Neither course was adopted in this case. The conviction on the third count was accordingly quashed, with no order for a retrial.

S also appealed against his sentence on the grounds that it was manifestly excessive. Although the Court was critical of the sentencing Judge's failure to clearly articulate a starting point, it considered that, as matters stood at the close of trial, a sentence of 12 years imprisonment would have been underweight. However, with the quashing of one count of rape, the Court considered whether any change to the sentence was necessary. After examining guidelines from the United Kingdom and appellate cases from New Zealand, the Court emphasised intra-family offending of this nature warranted clear denunciation. The sentence of 12 years, with a minimum term of six years, was left alone.

*Possession of a firearm without "lawful purpose" – discharging firearm – Tuhoe tikanga – endangerment, fear, or annoyance*

In *R v Iti* [2007] NZCA 119 the Court examined whether it was possible to hold Mr Iti accountable for the offence of unlawful possession of a firearm based on the lesser offence of discharging a firearm.

The Waitangi Tribunal had come to the Ruatoki Valley to hear the grievances of Tuhoe dating from the confiscation of land by the Crown in the nineteenth century. The arrival included a re-enactment of Tuhoe's account of what occurred 150 years ago. The Waitangi Tribunal was pulled by horse-drawn dray towards the "confiscation line", at which point the members proceeded past a series of burnt cars. Symbolically, this represented, from Tuhoe's perspective, the Crown's "scorched earth" policy. Mr Iti was present at Reids Road, the road leading to the confiscation line. During this part of the wero (challenge) to members of the Tribunal, Mr Iti discharged a rifle twice, once with live ammunition, at angles directed away from the public. The Tribunal proceeded to the Tauaarau marae of Ngati Rongo. Once there, and upon the atea, Mr Iti discharged a live cartridge from a shotgun into a New Zealand flag lying upon the ground. The atea is regarded as a sacred ground abutting the wharenui (meeting house). 500 to 600 people were present. Charges were brought against Mr Iti under s 51(1) of the Arms Act 1983 (the Act). That section prohibits "without lawful purpose" carrying in a public place a firearm. The burden of proving a "lawful purpose" lay on Mr Iti (s 51(2) of the Act). Mr Iti was tried by Judge McGuire alone in the District Court and found guilty on two counts of breaching s 51 of the Act.

The first argument considered by the Court was whether the atea was a "public place" for the purposes of the offence. Mr Iti argued that it was not, on the basis that within tikanga Maori it was necessary to keep the atea, a sacred place, clear at all times. The Court disagreed. "Public place" is defined broadly by s 2 of the Summary Offences Act 1981 as being "open to or … being used by the public". The evidence adduced from Tuhoe experts did not establish that the atea could be considered "separate". Further, the Court concluded that the idea of a private space within a public area, for the purposes of the law, was problematic. The event must be seen to have taken place within the total area of the marae, in the presence of hundreds of people.

The second issue before the Court was whether Mr Iti had a "lawful purpose" for possessing the firearms. In Judge McGuire's view, by discharging live ammunition,

Mr Iti went beyond a lawful purpose for possession. The Crown's argument was that Mr Iti possessed the firearms for the purpose of breaching s 48 of the Act. Section 48 prohibits the discharging of a firearm without reasonable cause in a public place so as to endanger, frighten, or annoy. The Court agreed that the discharge of live ammunition would not have been lawful under s 48 of the Act. Considering Mr Iti's argument that Tuhoe custom provided the lawful basis for the discharging and possession of a firearm, the Court stated the Act, as "the lawful exercise of the sovereign power" (*Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [34] (CA) per Elias CJ) limited any claim to a customary right. In this context, the possession of a firearm for the purposes of discharging it in accordance with Tuhoe tikanga was not a "reasonable cause". However, s 48 of the Act, as well as requiring "reasonable cause", requires an intention to endanger, frighten, or annoy. The evidence on this point was scant and unsatisfactory. The Crown case had been misdirected and the attention of witnesses was not directed to this question. Although the discharge of the firearms was "foolhardy", the Court quashed Mr Iti's convictions. No re-trial was ordered.

*Abduction of a person under 16 years of age – good faith right to possession*

In *R v Lichtwark* [2007] NZCA 542 the Court raised, without deciding, whether a good faith claim to a right to possess a person under 16 years of age required an honest and reasonable belief in such a right, or simply an honest belief.

Mr Lichtwark, his wife, and his wife's parents attempted to take a child from his paternal grandparents' house. A care plan implemented under the Children, Young Persons, and Their Families Act 1989 had given custody of the child to Child, Youth, and Family Services (CYFS). The Lichtwarks were given care of the child in this context. However, the child was later given over to his grandparents by CYFS, and the Lichtwarks were made aware that legal custody did not rest with them. Despite this, the Lichtwarks and Mrs Lichtwark's parents attempted to forcibly take the child. Mr Lichtwark was found guilty by a jury in the District Court on counts of abduction, assault, and male assaults female.

The case, on appeal, raised one point of interest. Section 210A of the Crimes Act 1961 provides that any person who "claims in good faith a right to the possession" of a child cannot be convicted of abduction. At trial, the Judge had directed the jury that "good faith" means "genuineness or honesty of purpose". The Court raised a question as to whether the belief has to be both honest and reasonable, or simply honest. In the absence of full argument, the Court stated that there is some authority for the view that the belief only needed to be honest. In any event, in Mr Lichtwark's case, he had the benefit of only needing to raise an honest belief. The appeal was dismissed.

*Disorderly conduct – violence in arrest*

In *R v Ali'imatafitafi* [2007] NZCA 329, the Court was asked to determine what behaviour would attract liability under s 3 of the Summary Offences Act 1981 (the Act).

The appellant and his son were the subject of complaints about excessive noise, resulting in noise control officers being called. When the son produced a machete, police officers were called as backup. A meat cleaver was also present. A fracas ensued, and the appellant retrieved the weapons. He was ordered to drop them by the police, but instead walked towards his house. Despite being pepper sprayed, the appellant continued to walk towards his house and threw the weapons on his driveway.

The appellant was charged and convicted of disorderly conduct, pursuant to s 3 of the Act. Liability under s 3 attaches to riotous behaviour, in view of a public place, that is likely in the circumstances to cause violence against persons or property to start or continue.

The question for the Court was whether the phrase "likely in the circumstances to cause violence against persons … to start or continue" includes the likelihood of a forceful response by members of the police against the person alleged to have behaved in a disorderly manner.

Allowing the appeal and quashing the conviction, the Court concluded that forceful responses by members of the police were outside conduct that constitutes "violence against persons" for the purposes of the offence.

Having traversed the legislative history of the provision, the Court noted that s 3 was enacted to cover the more serious offence of behaving in a manner that is likely to cause violence against persons or property. The Court then looked to modern decisions under s 3 and found that there had never been a conviction when the violent behaviour, in response to the disorderly conduct, was that of the police. Moreover, a comparable offence from the United Kingdom was applied in such a way that no offence could be committed where only police officers were present: *Marsh v Arscott* (1982) 75 Cr App R 211 (CA). The relevant offence focused on actions which incited a breach of the peace, which was seen as analogous to inciting violence.

The appeal was allowed, and the conviction quashed.

*Reasonable grounds for belief in consent*

In *R v Can* [2007] NZCA 291 the Court was asked to assess whether the model jury direction for reasonable belief in consent in *R v Gutuama* CA275/01 13 December 2001 was incorrect.

Mr Can was convicted of raping two complainants, one who had significant intellectual disabilities. His defence at trial was consent.

Section 128 of the Crimes Act 1961 provides that sexual violation is only committed if the offender has the sexual connection without the victim's consent and without believing on reasonable grounds that the victim is consenting. This amendment was made to displace the approach of the House of Lords in *R v Morgan* [1976] AC 182 which held that an honest, yet unreasonable, belief was sufficient.

The Judge directed the jury in accordance with the model direction in *Gutuama*. That is, the Crown must prove that either the defendant did not believe the victim was consenting, or that no reasonable person in the shoes of the defendant could have thought she was consenting.

The Court was asked to reassess the *Gutuama* formulation on the grounds that it wrongly adopted a purely objective test, and was inconsistent with the statutory language.

In relation to the first complaint, the Court thought that the *Gutuama* formulation did adopt a mixed subjective/objective approach. If the Crown can show that the defendant did not belief the victim consented, he will be found guilty. That is the subjective component of the test. If the Crown cannot exclude the possibility that the defendant had an honest belief, the objective component of the test comes into play.

Turning to the second complaint, the Court noted that the statutory language requires a focus on the defendant's state of mind and the reasonableness of the grounds for any belief that the defendant has in consent. The appellant argued that the *Gutuama* formulation shifts the focus from the reasonableness of the grounds to the reasonableness of the belief itself. The approach argued for by the appellant carries with it the likely prospect that personal characteristics of the defendant would become relevant when determining the reasonableness of the belief and would likely make the test more favourable to the accused.

The Court pointed to a number of pragmatic reasons that told against the appellant's argument. First, the greater the focus on a postulated erroneous belief, the greater the chance the trial judge will reverse the onus of proof in summing up. Second, the primary focus in these cases is usually actual consent and it would be artificial to examine closely a possible erroneous belief. Third, where (as is usually the case) the postulated erroneous belief and the reasonable grounds have not been articulated, it is sensible to examine the circumstances as they presented themselves to the defendant and assess whether there is a reasonable possibility that the defendant believed in consent on reasonable grounds. Reference to a reasonable person in the defendant's position is a relatively easy way of articulating this concept. The Court also noted that in the vast majority of cases, there will be no practical difference between the *Gutuama* formulation and one that adheres more closely to the statutory language.

The Court also rejected the argument that the trials relating to the two complainants should have been severed, as their evidence was indeed self-supporting. Further, the Court concluded that no miscarriage of justice had been occasioned in the way the Crown and the Judge had dealt with mental impairment. Any suggestion that the complaint did not have the capacity to consent seems to have been a throwaway line, and not part of the Crown case. Moreover, a mistake made by an expert witness was not material in the context of the Crown case as a whole.

**The Supreme Court has refused leave to appeal.**

*Forgery – making a false document with intention of using it to obtain a benefit – use by another person*

In *R v Li* [2007] NZCA 402 the Court considered the application of s 256 of the Crimes Act 1961. The Crown case was that the appellant had been forging certificates, degrees, and diplomas of a number of tertiary institutions. The forgeries appeared to have been done "to order" because there were often the names of particular persons inserted in the documents. The Crown laid various forgery charges, including a number under s 256(1), and the appellant was convicted in the District Court.

Ms Li appealed on the basis that she had been wrongly convicted of various charges under s 256(1). She contended that, because she intended to sell the false documents to purchasers who knew the documents to be false, she was not "using" the document to obtain a benefit for the purposes of s 256(1). The purchasers knew the documents to be false, and thus the appellant submitted she had not "used" them within the terms of s 256(1). For this reason she contended that an alternative charge under s 256(2) should have been left to the jury on each count.

Section 256(1) was inserted by the Crimes Amendment Act 2003. The Court reviewed the statutory history of the provision and concluded that s 256 creates two separate offences. Where the false document is made with the intention of using it to obtain property or some other form of gain then s 256(1) will apply and the maximum penalty is 10 years imprisonment. The Court stated that s 256(2) largely re-enacted the old forgery provision (s 264) but with the maximum penalty reduced from 10 years to three years.

The Court rejected the appellant's argument that "intention of using" under s 256(1) does not encompass a situation, such as Ms Li's, where the intention of the maker of the documents was to sell them to purchasers who knew them to be fake. The Court was satisfied that "with the intention of using" under s 256(1) was broad enough to encompass such a situation. It would be illogical, the Court said, if Ms Li as the maker of the document were only liable to three years imprisonment while the users of the forged documents were potentially liable to 10 years. There was no obligation on the trial Judge to leave an alternative under s 256(2) to the jury.

Secondly, Ms Li submitted that some of the documents found in her possession were so defective that they could not possibly have been acted upon as being genuine. The Court examined the documents and agreed that the defects (for example, upside-down university crests) were such that a reasonable jury could not have concluded that they were intended to be used for gain or acted upon "as if they were genuine". The appeal against conviction was allowed to the extent that the convictions on the counts relating to the defective documents were quashed.

**Leave to appeal to the Supreme Court has been sought.**

*Inferences – Crimes Act 1961, ss 66(1) and 366 – parties*

In *R v Hunt* [2007] NZCA 179 the Court considered whether Mr Hunt was a party to aggravated robbery and the trial Judge's directions to the jury relating to s 66(1) of the Crimes Act 1961.

The appellant's evidence at trial was that he did not take the victim's jacket or shoes (and therefore was not a principal) and knew nothing about the robbery (and therefore not a party). On this basis, the only way the Crown could have presented their case was that the appellant was a party pursuant to s 66(1). The Crown acknowledged that the trial Judge had not dealt explicitly with s 66(1), but submitted that there was no miscarriage of justice because the Crown and counsel for the co-accused (Mr Feterika) and the appellant focused their closing address on the need for the Crown to prove the appellant was acting with an intention to rob.

The Court, however, held that the summing up did not deal adequately with the law as to parties as it affected Mr Hunt. The Judge should have distinguished for the jury the difference between a principal and a party. The Crown needed to prove that Mr Hunt knew that Mr Feterika or Jack (another individual present) intended to rob the victim of his clothes; that Mr Hunt actively assisted in the robbery by punching, kicking, and/or holding the victim to facilitate the robbery; and that Mr Hunt intended his actions to aid the robbery. It ought to have been made clear that even if the appellant assaulted the victim during the fracas that was not of itself sufficient to make Mr Hunt a party to the robbery. Both knowledge and intention on Mr Hunt's behalf were required. Therefore, a miscarriage of justice had occurred.

The Court also held that Crown counsel's comment regarding the fact that the accused refrained from giving evidence was in breach of s 366, which prohibits anyone but the Judge from discussing this. This also prohibits remarks not intended to be adverse to the defendant: see *R v Ngatai* [1999] 1 NZLR 446. Of itself, however, this did not give rise to a miscarriage of justice as what the prosecutor had said merely reflected what Judges typically tell jurors when summing up.

*Aggravated robbery – Crimes Act 1961, s 235(1)(b) – being together with other person or persons – whether direction on parties required*

Section 235(1)(b) of the Crimes Act 1961 provides that where a person, "being together with any other person or persons", robs another person, the first person has committed the offence of aggravated robbery. In *R v Feterika* [2007] NZCA 526 the Court decided the appeal of the co-offender of the appellant in *R v Hunt* [2007] NZCA 179. In doing so it considered whether the law of parties is relevant to the analysis under s 235(1)(b). Mr Feterika contended that, as in the case of Mr Hunt, he joined the imbroglio as a party, not a principal. Accordingly, the trial judge ought to have directed the jury on the law of parties. The judge did not do this. Mr Feterika therefore argued there had been a miscarriage of justice.

The Court disagreed with its decision in *Hunt*, effectively saying that *Hunt* was wrongly decided (or at least decided *per incuriam*). The Court said that the primary issue for the jury, whenever an aggravated robbery is alleged under s 235(1)(b) is whether each accused, and there must always be more than one, is complicit in the joint enterprise. It was not relevant whether under s 66 of the Crimes Act one may be

a principal and another a party. That distinction had no part in the analysis. The Court said that where two or more persons share an intent to rob and play a definite part towards the accomplishment of a common design, all of those persons are principals under s 235(1)(b). If only one of the persons actually takes part in the robbery, whilst the others are merely present, the actual offender will be guilty of robbery (or perhaps some other offence) whilst the bystanders could potentially be parties under s 66.

The Court concluded that Mr Feterika's conviction should stand – his part in the offending was plain and, even if Mr Hunt was not a principal, the unidentified third assailant's part in the offending had been confirmed. Therefore, Mr Feterika had robbed someone "being together with any other person or persons". The appeal was accordingly dismissed.

*Recent possession – burglary or receiving*

In *R v Cruden* [2007] NZCA 537 the first issue was whether the doctrine of recent possession was rightly invoked. Under the doctrine, possession of property recently stolen is, in the absence of an explanation that might be true and would negative guilt, sufficient evidence to justify a finding that the possessor is either the thief or a dishonest receiver. The Court held that in directing the jury on the doctrine, the judge should make it clear that it is up to the jury to decide whether to make such an inference or not.

The accused had been found in possession of US$1,300. The Court held that the jury was entitled to infer that the currency in Mr Cruden's possession was the same currency stolen from a hotel hours earlier. It was in similar denominations.

On the second issue, that the jury had to be satisfied beyond reasonable doubt that Mr Cruden was a burglar and not a receiver (burglary was the only charge), the Court held that the Judge had erred as this had not been put before the jury. The Court commented that theft and receiving are true alternative charges and as such a New Zealand jury must acquit on both charges unless one or other can be proved beyond reasonable doubt to the exclusion of the other. It was held that, unlike the Australian jurisprudence, it was not sufficient for the jury to be satisfied beyond reasonable doubt that one of the two offences had been committed without being able to be sure which.

The Court held that since the evidence at the second trial was not sufficient to allow the jury to be satisfied that the accused was a burglar, and not a receiver, it was not appropriate to order a third trial. The Crown should not be given an opportunity to improve its case even if it could do so. The appeal was allowed, the conviction was quashed, and no retrial was ordered.

***Evidence***

*Propensity evidence – approach to interpretation of Evidence Act 2006, s 43 – "collusion and suggestibility"*

In *R v Wyatt* [2007] NZCA 436 the Court considered the application of s 43 of the Evidence Act 2006 dealing with propensity evidence offered by the prosecution. The result and reasons for judgment in this case are subject to a suppression order. This summary accordingly only discusses the law stated by the Court. In particular two issues of general importance that were discussed in the case are considered.

First, counsel made submissions concerning the extent to which the common law will assist in the application of ss 40 and 43. The Court noted this was a matter that would be addressed in more detail as the jurisprudence develops and said that the present case could simply be dealt with by the application of the statutory framework to the facts.

Second, the Court considered the approach to be taken to s 43(3)(e), which provides that in assessing the probative value of propensity evidence the Judge may consider whether the allegations made against the defendant may be the result of "collusion or suggestibility". Applying this provision the Court held that where there is evidence of collusion or suggestibility on the face of the record that is a matter to be considered by the Judge along with the other factors listed in s 43(3). As to the meaning of "suggestibility", the Court considered that the term referred to the type of situation where, for example, the way in which a question was put may have influenced the response.

*Propensity evidence – Evidence Act 2006, s 43 – whether reference should be made to old law*

In *R v Taea* [2007] NZCA 472 the Court dealt with an appeal from a decision excluding proposed propensity evidence. The Court suppressed its reasons for judgment until the conclusion of the trial. Accordingly, this summary does not address the facts of the case. However, the Court noted that it did not need to consult pre-Evidence Act 2006 law to decide cases on s 43, the new propensity provision. Rather, said the Court, s 43 gives adequate guidance on the approach to be taken.

*Unreasonable search and seizure – breach and remedy – bad faith – "standing" – downstream evidence – search warrants*

Section 21 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) provides that everyone has the right to be secure against unreasonable searches or seizures. *R v Williams* [2007] 3 NZLR 207 concerned the nature of this right and what happens when it is breached.

The police had received information that methamphetamine manufacturing was being conducted in an industrial unit in Patiki Road, Albany. There was not enough

information to obtain a warrant, so two plain-clothes officers undertook a preliminary reconnaissance of the area. Before being "warned off" by individuals, they noted the registration of cars parked in the area. One of the cars turned out to be stolen. The police then obtained a search warrant in relation to the stolen vehicle and the adjoining unit. An extensive search was mounted (the Patiki Road search) and evidence indicating methamphetamine manufacture was found. This led to the issuing of further search warrants and interception warrants (the downstream searches), resulting in evidence of further offending at several addresses.

In the High Court, Heath J considered there had been a breach of s 21 of the Bill of Rights and he excluded the evidence obtained from the Patiki Road search. He regarded the warrant as having been obtained upon a pretext – the search relating to the stolen vehicle – when the real purpose was to discover evidence of methamphetamine manufacturing. He further excluded the evidence obtained from the downstream searches as this was connected to the original breach of s 21 of the Bill of Rights. The Solicitor-General appealed, giving rise to several issues.

The Court first considered when a breach of s 21 would arise. It concluded that when a search or seizure is conducted unlawfully then it will be unreasonable, and therefore a breach of s 21 of the Bill of Rights, unless the unlawfulness was technical or minor. Technical unlawfulness included, for instance, the failure to file a report after the exercise of a warrantless search under s 18(2) of the Misuse of Drugs Act 1975. Further, a search can be lawful, but still unreasonable (see *R v Pratt* [1994] 3 NZLR 21 (CA)). This was a shift away from the previous approach of the Court in *R v Grayson and Taylor* [1997] 1 NZLR 399. In *Grayson* the Court had concluded that the existence of a breach of s 21 of the Bill of Rights could only be determined in light of all the factors indicating the reasonableness or otherwise of a search, with lawfulness simply one factor. The Court in *Williams* relied on the majority decision in *R v Shaheed* [2002] NZLR 377 (CA) which had concluded that it was preferable to mark the breach of s 21 by a statement to that effect from the court, followed by a principled balancing exercise when considering whether or not to exclude the evidence obtained. With the support of *Shaheed*, the Court considered it was appropriate to shift many of the "reasonableness" factors from *Grayson* to the remedy balancing exercise.

The Court then discussed a distinct question of "bad faith". If a warrant is obtained for purpose A, but investigating officers intend to use the warrant to also investigate undisclosed purpose B (for which a warrant could not be obtained), has such a warrant been obtained in bad faith? The Court concluded that merely having a dual purpose for a search is not enough to render an otherwise lawful search unreasonable for the purposes of s 21 of the Bill of Rights. This was so even when there were insufficient grounds for applying for a warrant for one of the purposes. The Court noted that, ideally, a strong collateral purpose should be brought to the attention of the issuing officer, but so long as the search was conducted pursuant to the lawful scope of the warrant, the lawful invocation of additional search powers was reasonable. Examining United States authority to the contrary, the Court also considered that the use of a lawful search power must not be a "mere ruse" facilitating the exercise of the collateral purpose.

The third issue discussed was who can complain about a breach of s 21 of the Bill of Rights. The Crown had argued that several of the persons present at the Patiki Road search could not raise a breach of s 21 because they were not the occupants or owners of the property. The Court emphasised that the touchstone of s 21 is a person's reasonable expectations of privacy. The issue was therefore in what circumstances an individual's privacy interest arose. The Court examined the doctrine of "standing" that has developed in Canada and the United States. In those jurisdictions, a restrictive approach has been adopted, focusing on concepts of property ownership as the basis of raising a claim of unreasonable search or seizure. The New Zealand case law on this question was inconsistent, however the Court concluded by endorsing *R v Anderson* (2005) 21 CRNZ 393 (CA) and stated that the universal protection of s 21 of the Bill of Rights should not be narrowed by a focus on formal notions of property. Everyone actually present at premises which are the subject of a search must be taken to have a reasonable expectation of privacy if they can be seen to be there with the acquiescence of anyone having any sort of licence to be present at the property. Further, any type of licence to occupy the premises, however bare, and any type of possessory or proprietary interest in property seized or searched would give rise to an expectation of privacy. The strength of any connection to property would, however, be considered at the *Shaheed* balancing stage. For those who could not raise a personal expectation of privacy, the Court emphasised that the breach of a third party's right under s 21 of the Bill of Rights could be relevant to the exercise of the discretion at common law (and under the new Evidence Act 2006) to exclude evidence.

The fourth issue before the Court, the effect of a breach of s 21 of the Bill of Rights on evidence obtained "downstream", was a question of causation. The Court examined the different judgments in *Shaheed* and concluded that a majority of the Court in that case had adopted an attenuated "but for" test. Under this test, subsequent evidence that would not have been obtained but for the breach must be considered to have a real and substantial connection to that breach. This would not apply, however, where the evidence is obtained independently of the breach (such as where a witness gives evidence without the advantage of the breach) or where the connection is so remote that it can not be said the breach was causative of the discovery. However, the strength of the connection between the downstream evidence and the breach, the Court stated, should be considered at the *Shaheed* balancing stage. This would include evaluating whether there had been any breaks in the causation through attenuated time or intervening events, whether the downstream evidence depended on the earlier breach for its cogency, and whether the accused had engaged in further acts of illegality warranting heightened police focus.

Finally, the Court gave guidance on how to undertake, in a structured manner, the balancing exercise for exclusion of evidence. The balancing test entails an assessment of whether exclusion of evidence in the circumstances is a balanced and proportionate response to the breach of a quasi-constitutional right. The Court noted that its guidance on this issue would be relevant to the exercise of s 30 of the Evidence Act, which substantially enacted the majority decision in *Shaheed*.

The starting point is the nature of the right in question. For example, the Court noted the paramount importance of upholding the right to be free from torture under s 9 of the Bill of Rights, in the context of confessional evidence (which can lead to issues of

unreliability and self-incrimination). Next, a court must assess the seriousness of the breach. In search and seizure cases this meant first assessing the extent of the illegality. For example, merely deficient warrant applications will be considered less serious than applications that are misleading and could have, if complete, led to the denial of a warrant. Equally, a warrant that was deficient, but could have been remedied by further available information, will be considered less serious. The second component when assessing the seriousness of the breach is the nature of the privacy interest at stake. For example, searches of the body are accorded the highest expectation of privacy. In terms of property, residential property will have the highest expectation of privacy, but there will be some gradation within the property itself in terms of the more public areas (e.g. front lawns) as against areas of particular privacy (e.g. a chest of draws).

After assessing the extent of the illegality and the expectation of privacy, a court must examine whether there are any aggravating or mitigating factors. Aggravating factors increasing the seriousness of the breach are: non-compliance with a statutory code (such as in *Shaheed*), conducting a search in an unreasonable manner (e.g. over the rightful objection of the accused), and police misconduct. Police misconduct includes gross recklessness and indifference as to the adequacy of a warrant application, and entails an assessment of the police as a whole body. It can also be a very weighty factor in favour of exclusion. Mitigating factors are: the search took place in circumstances of urgency, a weak connection between the person and property searched, an attenuation of the link between the breach and the evidence, and the inevitability of discovery. The good faith of police, which had been considered relevant in previous cases, was labelled neutral.

The seriousness of a breach must then be balanced against public interest factors: the seriousness of an offence, the nature and quality of the evidence, and the importance of the evidence to the Crown's case. The Court stated that the seriousness of an offence can be assessed in light of a potential starting point of four years imprisonment, as based on the Crown's case. Further, offences involving threats to public safety would be considered particularly serious. In terms of importance to the Crown's case, the Court noted that while this factor had been removed from s 30 of the Evidence Act, it will continue to have relevance to the nature and quality of the evidence.

Turning to the facts of the case, the Court acknowledged the Solicitor-General's concession that the search warrant for Patiki Road was unlawful. All that was apparent from the officer's original inspection was the theft of one vehicle. There was no basis for believing there was a type of car ring operation (as the warrant application had set out). While a warrant could legitimately extend to an adjoining unit when investigating the theft of a motor vehicle, in the present case the warrant application did not articulate a clear connection between the two. Further aspects of the search gave the Court concern. Upon arriving at the Patiki road premises the occupants were marshalled outside where they were subjected to pat down searches. In New Zealand, no power of search consequent on investigative detention has been recognised, and it was unlikely the search was consensual. The scene was then closed down, using the Hazardous Substances and New Organisms Act 1996. The Court doubted whether this Act provided justification for the actions of the police. There

was, however, no bad faith on the part of the police. The police were still clearly interested in the stolen vehicle. It was not a "mere ruse".

The evidence obtained from the Patiki Road search was excluded. It was an unlawful search preceded by a minimalist warrant application and compounded by the pat-down searches. There was a high expectation of privacy, in that some of the accused occupied the premises.

The evidence obtained in the downstream searches was also connected to the Patiki Road search, and so had been obtained in breach of s 21. The evidence from these searches was, however, ruled admissible. The accused had engaged in subsequent acts of criminality, the search of Patiki Road itself could have been remedied with further care, and there was further informant evidence. The evidence itself was also highly probative of a serious crime.

The Court also took the opportunity to provide general guidance on the drafting of search warrant applications, noting that its exhortations had fallen on deaf ears in past cases. Common errors were identified, and a summary of what applications should provide was given.

Hammond J wrote a brief concurring judgment. Agreeing with the principles stated by Glazebrook J for the Court, and the result, he confined his remarks to a discussion of the importance of judicial pre-authorisation. The route of judicial pre-authorisation of searches, entailing an application for a warrant made before a neutral and objective judge, was said to be preferable to warrantless searches. In this context, Hammond J emphasised that more errors were being made than was necessary. He then gave advice on possible ways forward, such as restricting the range of personnel who can issue general search warrants and developing a degree of specialisation. Finally, Hammond J emphasised that the ability to exclude evidence was not a tool for punishing the police; rather, it was concerned with vindicating the individual's privacy rights.

*Right to counsel – free legal advice*

In *R v Alo* [2008] 1 NZLR 168 the Court was asked to determine the extent of s 23(1)(b) of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). In particular, whether the obligation to be informed of your right to consult and instruct counsel extended to an oblation to be informed that free counsel could be provided.

The appellant was involved in an altercation in inner city Wellington. Having been questioned, he was arrested and taken back to the Police station. The interviewing officer gave the usual warnings, and the appellant opted to contact a lawyer. Unfortunately his preferred choice of counsel was not available, and he did not want any other counsel from the proffered list. The interviewing officer did not recall if he had informed the appellant that counsel could be provided free of charge, as was his custom, nor did the appellant show any concern that he could not meet the costs of counsel. The appellant's interview confirmed that he had punched the victim, and kicked him while he was lying on the ground.

A majority of the Court (William Young P and Arnold J) found that there was no right to be informed about free legal advice. The majority noted that the Police Detention Legal Assistance Scheme (PDLA), which became part of the Legal Services Act 1991, was not developed until after the enactment of the Bill of Rights, and that neither piece of legislation explicitly requires police to advice suspects of the existence of free legal advice.

Having examined the current position in New Zealand and elsewhere, the majority determined that it was best to follow the approach adopted in *R v Mallinson* [1993] 1 NZLR 528 (CA), but with some minor alterations. The majority found that there is no absolute requirement for the police to advise suspects of the existence of the PDLA scheme. However, a failure to give such advice will breach s 23 of the Bill of Rights if the circumstances at the time of the interview (including the suspect's age, experience, and remarks) provide a substantial basis for believing that the suspect might not have appreciated that he or she had a practical ability to obtain legal advice. The defendant would need to provide an evidential basis for the contention that he or she chose not to take legal advice because of cost considerations, and the Crown would then be required to disprove that contention on the balance of probabilities.

Chambers J dissented. He did not find the reasoning in *Mallinson* compelling, as it was decided before the PDLA scheme was enacted. Moreover, restrictive language (like that found in s 23) has not stopped Canadian and United States courts from reading in an informational component to the right: *R v Brydges* [1990] 1 SCR 190 and *Miranda v Arizona* 384 US 426 (1966). Chambers J thought there is a fundamental flaw in requiring a "trigger" before police must provide information. The majority's formulation primarily hinges on whether the suspect expresses their thought process in deciding whether or not to see a lawyer (which could include cost considerations). Whether this is so expressed is a matter of chance.

*Adequate evidential basis*

In *R v Su'a and Mankelow* [2007] NZCA 136 the Court considered whether there was an adequate evidential basis for Mr Su'a's conviction for the manufacture of methamphetamine.

It was common ground that a Mr Gilpin was manufacturing methamphetamine in a partitioned off section of his garage in mid-November 2004. Arriving at the scene, police officers found Mr Su'a outside the garage carrying a "shopping list" (in Mr Su'a's handwriting), which listed items associated with the manufacture of methamphetamine. Mr Su'a explained that he had stopped at Mr Gilpin's home for a cup of coffee and to allow the traffic to die down. At trial, the case against Mr Su'a very much turned on the possession of the shopping list.

The Court examined the evidence and found that it was open for the jury to conclude that the list contained items to be used in the manufacture of methamphetamine. However, his role in the acquisition of such items (which may have been for future use) did not establish that he had an actual role in the manufacturing operation.

The appeal was allowed, Mr Su'a's convictions for manufacturing methamphetamine were quashed, and an acquittal verdict was entered.

*Inadmissible statements – used for impeaching purposes during cross-examination – position at common law and under Evidence Act 2006*

In *R v Ram* [2007] 3 NZLR 322 the Court considered whether the Crown can use an inadmissible out of court statement to impeach the evidence of a defendant who elects to give evidence at his or her trial. The case is subject to a suppression order and so this summary reflects only the legal discussion appearing in the judgment.

The Court examined the development of the rule in *R v Treacy* [1944] 2 All ER 229 (CA) that when a statement is inadmissible "nothing more ought to be heard of it" (at 236). The proposition in *Treacy* has arisen often in the voir dire context, with the Privy Council and the House of Lords concluding that voir dire evidence cannot be used to impeach a defendant's subsequent evidence (see *Wong Kam-Ming v R* [1980] AC 247 (PC) and *R v Brophy* [1982] AC 476 (HL)). Similarly, the Supreme Court of Canada has held by majority that the use of inadmissible evidence for the limited purpose of cross-examination as to credibility is an impermissible "admission" under s 24(2) of the Charter of Fundamental Rights and Freedoms. This position was contrasted with the law in the United States. In that jurisdiction, the Supreme Court has held by majority that statements obtained in breach of constitutional rights are still admissible for impeachment purposes (see *Harris v New York* 401 US 222 (1971)).

With this backdrop in mind, the Court turned to the unsettled New Zealand position. First, the Court noted that the decision in *Wong Kam-Ming* will be displaced by s 15 of the Evidence Act 2006 (the Act). Section 15 provides that evidence given at a voir dire hearing to establish the admissibility of any contested evidence can be admitted at trial to impeach a defendant. However, under s 90 of the Act, documents excluded for reasons of oppression (under s 29) or on the basis of having been improperly obtained (under s 30) cannot be used while questioning a witness.

Because the Act was not in force at the time of judgment, the Court also considered what the position at common law should be. The Court emphasised that evidence is only ever excluded after a searching examination of all the relevant factors. Under the balancing exercise mandated by *R v Shaheed* [2002] 2 NZLR 377 (CA), a court must have already considered the costs to society of excluding evidence. Further, exclusion, when granted, effectively recognises the right of the defendant to be restored to a pre-breach position. As such, the *Treacy* rule was maintained for all statements whether identifiably inculpatory or exculpatory.

*Onus of proof under the Summary Proceedings Act 1957, s 67(8) – wilful damage – "without lawful justification or claim of right"*

Section 11 of the Summary Offences Act 1981 provides that it is an offence to wilfully damage property. Intention is defined in s 11 as meaning, inter alia, "without lawful justification or claim of right". In *R v Gorrie* [2007] NZCA 144 the Court considered whether s 11 created an "exception, exemption, proviso, or qualification" in terms of s 67(8) of the Summary Proceedings Act 1957 (the SPA), such that the

onus of proof shifted to the defendant to prove that he or she acted with lawful justification or claim of right.

Mr Gorrie had engaged contractors to spread shingle across a hill on his neighbour's property. This caused scarring on the hill, leading to a charge under s 11. Mr Gorrie's defence was that he had a claim of right, believing that he was acting within his rights pursuant to a water easement in his favour. In the District Court, Judge Ryan held that s 11 of the Summary Offences Act fell within s 67(8) of the SPA such that the onus of proof of claim of right lay on Mr Gorrie. On appeal to the High Court, Panckhurst J agreed, relying on the High Court's decision in *Sheehan v Police* [1994] 3 NZLR 592.

On appeal, the Court disagreed and overruled *Sheehan*. The Court said that the definition of intention in s 11 was not an "exception, exemption, proviso, or qualification", but rather simply the mental element of the offence. This could be contrasted with a case where the "exception, exemption, proviso, or qualification" was created by a different provision, raising an issue severable from that of whether the elements of the offence have been proved. Accordingly, it was wrong to say that Mr Gorrie had to demonstrate his claim of right – rather the Crown had an onus to disprove it. The Court therefore allowed the appeal and remitted the case to the District Court for rehearing.

*Mode of evidence – complainant in sexual violation case*

In *R v Raj & Ors* [2007] NZCA 10 the Court considered a pre-trial appeal brought by the Crown against a ruling under s 23D of the Evidence Act 1908 that a complainant in a sexual violation trial give viva voce evidence without using a pre-recorded evidential interview.

Upon leaving the company of the accused, the complainant (13 and a half years old, 15 at the time of the trial) had informed her parents that various sexual indecencies had taken place. She was then taken to hospital, where she remained for three days. The examining paediatrician had stated that the complainant had presented with the worst injuries relating to sexual offending in some 15 years of practice. Over the following two days she was video interviewed by a specialist interviewer.

The Crown applied to have the majority of the complainant's evidence given by way of the video interview, with the balance given by closed circuit television. There was evidence that the complainant was suffering from post-traumatic stress disorder and that she would react poorly to the courtroom environment. Judge Johns in the District Court ruled that all the complainant's evidence should be given viva voce by closed circuit television.

The s 23D regime was created to minimise the potential for young complainants in sexual cases being re-traumatised by the court process. There is no presumption for or against its use. Making a determination under s 23D requires a balancing of the particular circumstances relating to an individual case. The Court held that the regime is aimed at protecting the vulnerable and that the age of a complainant is not determinative. Age is a factor to be weighed when determining whether the section

applies, but much more rigorous analysis is required than any presumption that the older a person is the less likely it is that something other than traditional means of giving evidence should be adopted.

In the present case, the evidence of the expert psychiatrists was unchallenged. The Court stated that it was not in the interests of justice to have the complainant entirely freeze and say nothing at trial. There was nothing to indicate that the accused would be impeded in any relevant questioning, or that their fair trial rights would be imperilled. The Court consequently ruled that the video interview be played, with consequential evidence being given by closed circuit television.

*Cross-examination on previous acquittal*

In *R v Potter* [2007] NZCA 156 the Court considered whether cross-examination on the fact that the appellant had been previously acquitted of a charge ought to have been allowed.

Mr Potter was charged and convicted, at the third trial, with kidnapping, wounding, and threatening to kill. At the third trial a Crown witness gave evidence that Mr Potter had been charged with blackmail. The defence, on cross-examination, sought to elicit the fact that the appellant had been acquitted on the blackmail charge. Crown counsel objected to the question, relying on a ruling at the second trial that whether the appellant had been convicted or acquitted was irrelevant. The Judge made a similar ruling.

The Court held that the fact of acquittal was not irrelevant. Evidence of acquittal, while not a proclamation of innocence, is relevant as, when coupled with an appropriate direction, it allows the jury to make an assessment of the complainant's credibility relating to the other charges alleged.

One Judge thought that the Crown should not have led the blackmail evidence at all as it was irrelevant.

The appeal was allowed and a new trial ordered.

*Leading questions*

In *R v Henderson* [2007] NZCA 524 the appellant had been convicted of six charges relating to sexual offending against a teenage girl. The appellant argued that there had been a miscarriage of justice because of misconduct by Crown counsel, errors on the part of the trial Judge, and the admission of inadmissible evidence.

The Court dismissed all the grounds of appeal except one. It accepted that the conviction on one particular count was only supported by the passage of evidence which followed the prosecutor's leading questions. This required a strong direction from the trial Judge, which was not forthcoming. The conviction on that count could therefore not stand, and the Court directed that no new trial take place. The sentence was accordingly reduced.

### *Land Transport*

*Preliminary hearing under Land Transport Act 1998, s 334A – chain of custody issue*

In *R v L* [2007] NZCA 533 the appellant was charged with two excess blood alcohol offences. The case is subject to an order suppressing the results and reasons for judgment.

Two points should be noted for ease of reference. First, in the course of its decision, the Court discussed the relevance of s 64(2) of the Land Transport Act 1998, which provides that it is no defence that a provision has not been strictly complied with if there was reasonable compliance. Secondly, the Court considered the relevance of the procedure set out in s 79 of the Land Transport Act and when issues should not be determined at a preliminary hearing.

### *Procedure*

*Leave to appeal – pretrial applications – admissibility of evidence*

In *R v Leonard* [2007] NZCA 452, the Court discussed the procedure for assessing leave applications under s 379A of the Crimes Act 1961.

The Court signalled that from 3 March 2008 the leave application and appeal arguments will only be heard together where, on the basis of documents filed, it is likely that the leave criteria are met. In other cases, a separate hearing for leave will be held and, if leave is granted, a fixture for the hearing of the substantive appeal will then be allocated.

The Court stated that factors pointing for and against granting leave are to be assessed in the round. The factors pointing towards granting leave include: that the argument is based on a novel point or is of significance for other cases; conflicting authority on the issue; the application relates to an identified error of law; the application involves admissibility of evidence that is important to one of the parties; the matter cannot be dealt with adequately in any appeal post-trial or there are only limited post-trial appeal rights; and the proposed grounds of appeal are arguable. The factors pointing towards refusing leave include: the application involves admissibility of evidence that would not make a significant difference to the course of the trial and is unlikely to lead to post-conviction success; the issue will need to be revisited at trial or is best dealt with during the trial; the issue is best dealt with in a post-conviction appeal; the application challenges a factual finding (especially where the finding rests on credibility); the application challenges the exercise of a discretion; the proposed appeal would cause unnecessary delay; and where the proposed appeal is without merit.

The Court discussed the information that will be required for the new notice of application for leave to appeal commencing on 3 March 2008. Adequate information must be provided in the notice of application for leave to appeal, both with regard to

the leave criteria and the grounds of appeal. Where admissibility of evidence is challenged, a summary of the evidence and its relevance to the trial must be provided. Where the exercise of a discretion is challenged a reason why the appeal meets the criteria for challenging the exercise of a discretion must be articulated. Where a factual finding is challenged, evidence indicating that the finding was made in error must be outlined. Also, reasons why leave should be granted, specific grounds of the proposed appeal (including authorities relied on), the likely trial date, and a copy of the lower court's ruling (if available) must be included. Provision is to be made for a reply notice to be filed by the respondent.

In the substantive appeal, the appellant argued that evidence ought to have been excluded as it was improperly obtained. The Court confirmed that *R v Williams* [2007] 3 NZLR 207 (CA) remains applicable under the Evidence Act 2006. In this case the balancing exercise under s 21 of the Bill of Rights Act 1990 (the Bill of Rights) had been correctly undertaken by the lower court Judge. Further, no breach of s 23(3) of the Bill of Rights was found as there was no causative link between the breach (failing to arrange to take the appellant to court as soon as practicable) and the evidence found at the appellant's home and workplace. The Court held that s 30(5)(a) of the Evidence Act 2006 and *Williams* required a causative link.

*Jurisdiction – conviction appeal – pre-sentencing*

In *R v Rata* [2007] NZCA 431 the Court considered whether it had jurisdiction to hear an appeal against conviction before the appellant had been sentenced.

Mr Rata was tried on two charges, namely, assault with intent to rob whilst armed with a firearm, and assault with a firearm. The jury returned a verdict of guilty on the first charge and not guilty on the second. Wild J then convicted Mr Rata of the assault with intent to rob charge. At that point the appellant's counsel indicated that he considered the verdicts were inconsistent and applied for a discharge under s 347 of the Crimes Act 1961. Wild J dismissed the application on the basis that there was no jurisdiction to discharge because the appellant had been convicted in open court. He did not sentence Mr Rata, however, as he considered that the verdicts were inconsistent and it would be anomalous to do so.

Mr Rata appealed against his conviction on the grounds that the verdicts were inconsistent and the conviction was unreasonable.

The Court held that the verdicts were inconsistent because they involved rejecting the basis on which the Crown said the appellant used a gun in one charge, but then accepting that the gun had been used in that way on another. The issue then arose as to whether the Court could hear an appeal against conviction before the appellant had been sentenced. In that respect the Court accepted that there were sound policy reasons for not encouraging successive appeals and said that it envisaged that the situation in which there would be two appeals would be the exception. The present appeal was such an exceptional case.

Accordingly, the Court allowed the appeal, but did not order a retrial.

*Recall of judgment – alternative counts*

In *R v Lualua* [2007] NZCA 114 the Court was asked to determine whether the trial Judge had the power to recall a verdict on an alternative count to clear the way for a retrial on the primary count.

Mr Lualua had been charged with various sexual offending. The indictment included count 4 (rape) and, in the alternative, count 5 (assault with intent to sexually violate by rape). The jury was unable to reach a unanimous verdict on count 4, but returned guilty verdicts on the other counts. The prosecutor consented to the taking of a verdict on count 5 on the assumption that he would be able to retry the appellant on count 4. When it became clear that a conviction on count 5 might prove difficult in relation to a retrial, the Crown applied to have it set aside. The trial Judge approved the recall on the basis that she should not have entered the verdict on count 5 unless the jury had first returned a not guilty verdict on count 4.

Upholding the verdict on count 5, and overturning the minute purporting to recall it, this Court examined the meaning of a "conviction on indictment" in terms of s 3 of the Crimes Act 1961 (the Act). The Court noted that a trial Judge had some flexibility whether to accept a verdict or not, and that tactical pleas of guilty to alternative counts do not preclude trial on any primary count. However, here it was clear that the verdict on count 5 had been accepted.

The Court also found that verdicts on an alternative count could be accepted even when there has been no verdict on the primary count, as is the approach in the United Kingdom: *R v Saunders* [1988] AC 148 (HL). The Court did not think that the concerns raised by Cooke P in *R v Dwight* [1990] 1 NZLR 160 (CA) were controlling. Further, s 374(6) of the Act (which on one approach requires a new trial when a jury is discharged from giving a verdict) did not cover this case. The Court's power to give relief from s 374(6) must be wider than that identified by Henry J in *R v Barlow* [1998] 2 NZLR 477 (CA). In sum, it is appropriate to take a guilty verdict on an alternative count, but it would only be in exceptional circumstances that such a verdict could be taken without the Crown's consent.

The Court also found that count 5 was an insuperable obstacle to a retrial on count 4. The appellant had been charged under s 129(2), assault to commit sexual violation, but could equally have been charged under s 129(1), attempt to commit sexual violation. Section 338, which rests on very particular double jeopardy considerations, precludes a trial of the full crime where there has been a conviction for the attempt. While the word "attempt" in s 338 must be read strictly, and therefore does not technically apply to convictions under s 129(2), the Court thought that the policy underlying s 338 nonetheless applied in this case. As a consequence a retrial would be an abuse of process.

The matter arising by way of case stated, the issue was resolved in the appellant's favour. The conviction on count 5 was affirmed and a retrial on count 4 was prohibited.

*Recall of judgment ordering retrial – sexual violation by rape of a child*

In *R v E (CA308/06)* [2007] NZCA 403 the Court recalled its judgment dated 21 November 2006 (*R v E (CA308/06)* CA308/06 21 November 2006) and the reasons judgment of 12 June 2007 (*R v E (CA308/06)* [2007] NZCA 234).

The appellant had been convicted of sexual violation by rape of a child. In the 21 November judgment the Court had allowed an appeal against conviction, and a retrial had been ordered. Counsel was not given the opportunity to make submissions on whether a retrial was required as further submissions on the substantive appeal were yet to be filed. In the course of those further submissions, counsel for the appellant asked the Court to reconsider its order for retrial.

The Crown accepted, on the authority of *R v Smith* [2002] 3 NZLR 617 (CA), that this Court has inherent power to revisit its decisions in criminal matters in exceptional circumstances when required by the interests of justice (and there is no other effective remedy). The Court commented that the appeal took an unusual form as a number of grounds of appeal emerged during the hearing and some after the hearing. Neither party had a full opportunity to provide submissions on a number of grounds. Due to these unusual circumstances there was no proper consideration of whether a retrial should be ordered. The fact that the decision to order a retrial was taken prematurely without hearing from the parties and without full consideration of the relevant factors meant that there were exceptional circumstances in terms of the *Smith* test. Therefore, there was jurisdiction to recall the 21 November judgment and the reasons judgment.

The Court held that there could be no remedy in the District Court as the trial court may lack jurisdiction to prevent a retrial taking place. The possibility of applying for leave to the Supreme Court was discounted because if leave was granted, it would probably be remitted to this Court for proper consideration, wasting judges' and counsel's time and resources.

The Court held that in the circumstances, the correct course on 21 November 2006 would have been to allow the appeal and to reserve the decision as to whether to order a retrial. Given the concerns associated with a retrial (such as the difficulties with the complainant's evidence), the Court held that the appropriate response was to recall the judgment.

*Sexual violation by rape of a child – recalled and reissued judgment – verdict of acquittal entered – order for retrial withdrawn*

Following the Court's decision in *R v E (CA 308/06)* [2007] NZCA 403 (discussed above), the Court in *R v E* (CA308/06) [2007] NZCA 404 reissued the reasons judgment and reconsidered the order for retrial made in the judgment dated 21 November 2006.

At trial there had been difficulties with the complainant's evidence such as her inability to remember details of the alleged offending. She had given scant detail of the allegations at the beginning of an evidential video interview, which was just sufficient to sustain charges. Virtually no further detail was elicited following the

video interview or at trial (discounting the answers to leading questions). The complainant's admission in cross-examination that she could not remember what had happened also caused difficulties. The trial had been fraught with many other problems, some springing from the prosecution's litigation style. The trial Judge's directions did not cure most of these problems.

First, in relation to the use of leading questions, the Court reiterated that it was unacceptable to ask leading questions in examination-in-chief or re-examination except by consent or on non-controversial matters. In the context of a child complainant leading questions may not be objectionable in an evidential interview if they merely repeat what the child has previously said, are not used excessively, and are solely employed to permit the child to clarify, correct, or elucidate. The questions asked by the interviewer in this case did not exceed these bounds. However, the leading questions asked by the prosecutor in examination-in-chief and re-examination went to the heart of the prosecution's case, particularly against the background of an evidential video interview where the complainant was unable to remember many aspects of the alleged incidents. The leading questions included the following: " … But the stuff you have told us about [Mr E's] penis going into your vagina and it being heaps of times and it really hurting, can you remember that clearly …". The Court held that this point alone would have been sufficient for the appeal to have been allowed. In particular, the Court pointed out that using leading questions in examination-in-chief, and even more so in re-examination after the effective recantation, to elicit a wholesale repetition of the complainant's video evidence was inappropriate. The Court commented that there was even a risk that the leading questions had contaminated the child's evidence. The Court held that the complainant's recantation in cross-examination was not cured in re-examination, and the evidence remaining, after discounting the evidence elicited by leading questions, was not sufficient to sustain the charges.

The second matter of concern was the possibility of coaching that arose from the manner of disclosure in the complainant's video interview and the complainant's apparent susceptibility to suggestion at trial. The Court observed that, if a retrial was ordered, there may be justification for further inquiry before the retrial into what interaction the child had had with the police, her parents, and perhaps her brother, before the evidential interview.

A third matter which captured the Court's attention was the issue of motive to lie. The Court stated that it was permissible to ask the accused whether he or she knew of any reason for the complainant to fabricate his or her account, and for the prosecutor to use the absence of any credible reason in closing as an argument in favour of the complainant's credibility. However, the question of why the complainant should lie must be confined to the eliciting of facts known to the accused, not speculation as to motives. The prosecutor's questioning in this instance far exceeded these bounds. The Court held that the trial Judge ought to have limited the prosecution's line of questioning on this topic and stopped him from continuing after the defendant said he knew of no motive. The Judge had given no specific direction that it was not for the accused to prove motive, but instead repeated the Crown's submission that there was no motive for the complainant to lie.

The Court also remarked on the improper submission made by the prosecutor that the appellant had a motive to lie in order to avoid a guilty verdict. Making such a submission was held to be tantamount to suggesting that an accused's evidence should be scrutinised more carefully than that of a complainant or other Crown witness, simply because he or she is the accused. The situation could have been saved by a strong direction by the Judge, but none was given.

Other difficulties with the prosecution were: accusing the appellant's mother of lying to protect her son, inviting the jury to speculate, and submitting without an evidential basis that the complaint was naïve and had no other means of knowing about sexual matters.

The Court identified several other factors which would have led to the appeal being allowed: replaying of the videotape without cross-examination being repeated, the Judge's directions that the appellant's character witnesses could not attest to his moral values even if they had personal knowledge on the subject, the leading of evidence relating to the appellant's arrest and his failure to make a statement, the misdirection relating to assessing evidence from a child complainant, and the Judge's failure to give a standard direction on expert medical evidence.

The test in *Reid v R* [1980] AC 343 (PC) was identified as the applicable authority relating to retrials. The Court held that a retrial would be inappropriate due to problems with the complainant's evidence. Absent the leading questions in re-examination, the Court found that a reasonable jury would not have convicted. The Crown should not have the opportunity of improving its case on retrial where there was insufficient evidence at the original trial.

The Court quashed the conviction and entered a verdict of acquittal.

*Late filing of indictment – discharge – applicability of New Zealand Bill of Rights Act 1990 – Crimes Act 1961, ss 345B and 346*

In *R v Rolleston* [2007] NZCA 165 the issue was whether the late filing of an indictment was cause for the discharge of the accused.

The Crown's failure to file on time was discovered on the day Ms Rolleston was due to appear in Court for a call-over. The indictment, an application to amend the indictment, and an application for an extension of time for filing the indictment were all filed on that same day. The District Court granted the Crown's application for an extension of time to file the indictment. Ms Rolleston then applied for leave to appeal against that decision.

The Court held that s 346(1) of the Crimes Act 1961 (which provides that failure by the prosecution to file an indictment within the prescribed period *may* result in a direction that the accused be discharged) shows that a judge is under no obligation to discharge the accused even where the 42 day time limit is exceeded.

The appellant then challenged the decision in *R v B* [1999] DCR 235, but the Court held that the challenge was unsustainable because in *R v B*, the Judge correctly

considered the discretionary nature of a judge's power under s 345B of the Crimes Act. The Court also disposed of the appellant's argument based on s 25(b) of the New Zealand Bill of Rights Act 1990 (the right to trial without undue delay) by saying that it was not engaged. Section 345B of the Crimes Act is essentially a case management provision. The Court also observed that the 19 day delay between the date on which the indictment should have been filed and the date of the application for extension of time could not amount to undue delay.

The Court held that mere administrative oversight did not equate to Crown misconduct. It also noted that any prejudice or misconduct must outweigh the public interest in prosecuting the alleged offending and the more serious the offending, the more likely it is that the public interest will outweigh prejudice. In this case, there was no misconduct or prejudice arising from the delay. Leave to appeal was granted but the appeal was dismissed.

*Youth justice – procedure to be followed where adult and young person charged jointly with an offence*

In *R v Hudson* [2007] NZCA 363 the Court considered the provisions in the Children, Young Persons, and Their Families Act 1989 (the Act), which deal with the procedure to be followed when a young person and an adult are charged jointly with an offence. Mr Hudson was 31 years old and jointly charged with a 16 year old girl, S, for an indictable offence other than murder or manslaughter. Depositions were taken in the Youth Court, but Mr Hudson was committed to the High Court for trial, whereas S was offered the opportunity to be dealt with in the Youth Court. Mr Hudson was convicted. Some time later, he applied for judicial review of the decision to commit him to the High Court on the basis that it did not comply with the Act. Ronald Young J dismissed that application. Although Mr Hudson's appeal was treated as an appeal against conviction out of time, it was essentially an appeal against Ronald Young J's reasons for declining relief.

The relevant provisions are ss 272 – 277 of the Act whereby when a young person is charged with a purely indictable offence other than murder or manslaughter, and elects a trial by jury pursuant to s 66 of the Summary Proceedings Act 1957 (the SPA), the preliminary hearing will be in the Youth Court and the trial in the High Court (s 274). The Act offers two procedural protections to young persons in ss 275 – 276 ("the protections"): (1) the Youth Court, in its discretion, may permit the young person to forego the right to a jury trial and be dealt with by the Youth Court; or (2) the young person can plead guilty and be dealt with by the Youth Court. Under s 277, where a young person is jointly charged with an adult, the Youth Court has the jurisdiction to direct that the proceedings be heard in the Youth Court or elsewhere, as the Youth Court thinks fit. Section 277 also provides that an adult convicted in the Youth Court can only be subject to penalties that could be imposed by the District Court in its summary jurisdiction. Accordingly, s 277 curtails procedural protections offered to both adults and young persons. Section 277 was not subject to the protections, and divested young persons of them. Similarly, if a Youth Court judge directed that the proceedings be held in the Youth Court, the adult would lose his or her right to elect trial by jury pursuant to the SPA. Section 277 also created an

incentive for adults to commit crimes in concert with young persons on the basis that adults might receive the benefit of lower penalties in the Youth Court as a result.

The Court held that s 277 was to be read subject to s 274. The upshot was that where an adult and a young person were jointly charged with a purely indictable offence or an indictable offence in respect of which the young person elects trial by jury, the depositions hearings for both defendants would be in the Youth Court. After that, the adult was subject to the normal rules and procedural protections in ss 66 – 168AA of the SPA. In reaching this result, the Court approved the reasoning of Judge Bisphan in *Police v Manuel* (1998) 16 CRNZ 62 (YC). The result ensures that young persons receive the protections created by the Act, and that adults receive their fundamental right to trial by jury. The Court accepted that this result involved some tinkering with the statutory wording. However, as the appellant conceded, the statutory scheme would otherwise be unworkable. The Court said that once the statutory purpose was clear, it was not controversial to read in words to make the provisions work – particularly where fundamental rights would otherwise be endangered.

***Sentencing***

*Mentally disordered or intellectually disabled offenders – compulsory care orders*

In *R v Satherley* [2007] NZCA 381 the Court considered the appropriateness of an order made under s 34(1)(b)(ii) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act) that the appellant be cared for as a care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act).

Mr Satherley was convicted of raping a 16 year old girl. As a result of an accident as a child, he is permanently incapacitated and prone to anti-social behaviour. In light of his mental impairment Judge McKegg directed that he be assessed before sentence under s 38 of the CPMIP Act. The health assessors who assessed Mr Satherley were divided over whether he had an intellectual disability. That issue was considered at a hearing convened for that purpose before Judge Zohrab. Judge Zohrab found Mr Satherley suffered from an intellectual disability and Judge McKegg adopted that finding when sentencing the appellant. The Judge made an order under s 34(1)(b)(ii) of the CPMIP Act that Mr Satherley be cared for as a care recipient under the IDCCR Act.

The Solicitor-General sought leave to appeal against that order on the basis that the finding of intellectual disability was wrong and that the compulsory care order was not appropriate given the seriousness of the offending and the risk posed by the respondent to the public.

The Court granted the Solicitor-General leave to appeal. In terms of the finding that Mr Satherley had an intellectual disability, the Court noted the differences of opinion among the assessors and expressed considerable reservations about the finding. In doing so the Court expressed the provisional view that, except to the extent that they impacted on a person's intellectual function, cognitive abilities should be ignored in assessing general intelligence. The Court saw the issue of intellectual disability as

one of statutory interpretation and not a matter of expert opinion. It was unnecessary, however, to determine whether Mr Satherley suffered from an intellectual disability because the Court was satisfied that even if the powers under s 34 of the CPMIP Act were available to the Judge, he should not have exercised them. That was because such orders should be reserved for less serious offending, where deterrence and protection of the public are not imperative. In the present case, Mr Satherley had been found guilty of a serious crime made worse by aggravating features.

Accordingly, the Court allowed the Solicitor-General's appeal. While a sentence of imprisonment would have been substituted if the appeal had come to the Court promptly following conviction and sentence, a sentence of supervision with special conditions was imposed given the passage of time and the change in circumstances since sentencing.

*Minimum period of imprisonment*

In *R v Wirangi* [2007] NZCA 25 the Court identified the correct approach to imposing a minimum period of imprisonment under as 86(2) of the Sentencing Act 2002 (the Act).

Mr Wirangi was convicted of rape and sentenced to eight years imprisonment with a minimum period of imprisonment of five years and four months. The victim was 16 years old at the time and residing at her grandmother's house. Mr Wirangi, 38, was visiting the house and made sexual advances towards the victim which were rebuffed. He then followed the victim when she went to bed and raped her. Having examined the facts, the Court accepted that the offending was in the "ordinary run" of cases.

Allowing the appeal and quashing the minimum period of imprisonment, the Court noted that the exercise under s 86(2) of the Act has shifted in the way identified in *R v Taueki* [2005] 3 NZLR 372 (CA). The focus of the inquiry is on the four factors listed in s 86(2) and the question is whether serving one third of the sentence is insufficient for any of those purposes. It is not necessary to identify unusual or abnormal features of the offending before a minimum period of imprisonment can be imposed. However, the Court noted that considerations of that kind may still be relevant to the overall assessment required under s 86(2).

The Court found that the usual minimum non-parole period of one third would sufficiently fulfil the relevant statutory purposes.

*Minimum period of imprisonment – absence of jurisdiction*

In *R v Bell* [2007] NZCA 17 the Court allowed an appeal against sentence on the ground that the minimum period of imprisonment imposed by the Judge was in excess of his jurisdiction.

The appellant had entered pleas of guilty to various charges arising out of two series of events. As to the first series, Judge Lance QC sentenced the appellant to concurrent sentences of four years imprisonment on a charge of causing grievous bodily harm, and one year imprisonment on each charge of theft of a vehicle, driving

while disqualified, and failing to stop. As to the second series of events, the Judge sentenced the appellant to nine months imprisonment for driving while disqualified (to be served cumulatively with the sentences just mentioned), and dealt with the remaining offences by way of disqualification or conviction and discharge. Applying the totality principle the Judge reduced the overall term to four years and six months imprisonment. He directed that the appellant serve a minimum period of imprisonment of three years and six months imprisonment.

The Court noted that s 86(1) of the Sentencing Act 2002 provides that a minimum period of imprisonment may be imposed only in respect of a sentence of more than two years. Further, under s 86(4) the minimum period of imprisonment must not exceed two thirds of the full term of the relevant sentence. In this case the relevant sentence was the sentence of four years imposed for causing grievous bodily harm. Two thirds of that sentence was two years, eight months, and it was this minimum period that was therefore substituted by the Court.

*Fraud – breach of trust – sentencing levels and principles – good character as mitigation*

In *R v Findlay* [2007] NZCA 553 the Court discussed and compared the relevant authorities on sentencing for fraud and considered the relevance of good character as a mitigating feature.

Mr Findlay was a registered valuer. He came into association with Mr McKelvy. Mr McKelvy was the ringleader of a group of persons engaged in a fraudulent practice known as a "property price hydraulic scheme". In essence, the group would purchase a property through an open market transaction, but, not having adequate funds, would enter into an agreement for a contemporaneous on-sale. The on-sale agreement would be drawn up at an inflated price, often using a valuation from a registered valuer. The purchasers would then apply to a financial institute and borrow up to 80 percent of the inflated purchase price. Lending institutions would thus fund the entire open market transaction. If the property price rose, the money would be paid back and the financial institute would make no loss. If the property did not appreciate in value, the financial institute could lose money. Mr Findlay provided fraudulent valuations on several property transactions, often raising the value of property on the basis of fictional improvements or misdescriptions. He was tried by Judge Spear alone in the District Court and found guilty. Judge Spear sentenced him to 12 months imprisonment with leave to apply for home detention. Mr Findlay appealed against conviction and the Solicitor-General applied for leave to appeal the sentence.

Mr Findlay raised several arguments against his conviction. In essence, he contended that Judge Spear failed to take account of the inherently subjective nature of valuations, unreasonably relying on the conservative valuations of the Crown's valuer witnesses. The Court rejected this argument. Mr Findlay's valuations were generally improbable and the Court agreed with Judge Spear that the references to fictional improvements and misdescriptions of property were telling.

In sentencing Mr Findlay, Judge Spear adopted a two year starting point and reduced this by one year to take account of Mr Findlay's excellent long-term involvement in

the community. The Solicitor-General made three points. First, the starting point was manifestly inadequate; the lowest possible starting point available was two years and six months imprisonment. Secondly, a 50 percent discount on account of good character was excessive; a discount of six months would have been sufficient. Thirdly, the sentence raised issues of disparity as between Mr Findlay and two other offenders caught up in the same fraudulent schemes (*R v Warburton* HC HAM CRI 2006-419-135 30 January 2007 and *R v Perry* HC HAM CRI 2005-419-122 29 September 2005).

The Court examined the sentencing ranges adopted in cases of fraud, noting that no general starting points have been adopted. In so doing, the Court noted the view expressed in the United Kingdom for cases of this kind: "imprisonment only when necessary and for no longer than necessary" (*Kefford* [2002] 2 Cr App R (S) 106 at [19] (CA)). The cases showed the necessity of a "culpability assessment", entailing as a useful starting point an evaluation of the offender's monetary gain and the victim's monetary loss. This was also the approach adopted by the United Kingdom Sentencing Advisory Panel (*Consultation Paper on Sentencing for Fraud Offences* (2007)). In Mr Findlay's case, there were real difficulties, identified by Judge Spear, in quantifying the loss suffered by the financial institutes. As for personal gain, Mr Findlay's was minimal – he received only commissions on the work he undertook. He was, however, in a position of trust in the community as a registered valuer. The Court had noted on a previous occasion that sentences in the range of two years and six months imprisonment to three years imprisonment could not be considered out of range for fraud offending of a similar kind involving persons in positions of trust. The Court consequently considered that although the starting point of two years was lenient, it was, taking into account the minimal gains made and losses incurred, not outside the permissible range.

Mr Findlay had led a life of considerable service to the Anglican Church, at both a national and local level. Judge Spear was particularly impressed by this. However, the Court compared the reduction given (50 percent) with general allowances for guilty pleas (discounts between 20 to 33 percent). The only mitigating feature in Mr Findlay's case was his good character. The Court stated that a discount of over 25 percent for good character would be outside the permissible range. The Court therefore granted the Solicitor-General leave to appeal and increased the sentence to one of 18 months, with leave to apply for home detention.

*Limitations on power of imprisonment for youth offending*

In *R v C-W* [2007] 3 NZLR 797 the Court considered the extent of the District Court's powers under the Sentencing Act 2002 (the Act) to imprison youth offenders.

The appellant had pleaded guilty to a charge of assault with intent to injure. He was 14 years old at the time of the offending, but Judge McGuire determined that a sentence of 18 months imprisonment was warranted. On appeal, the appellant contended that the District Court had no jurisdiction to imprison him because of s 18 of the Act. Judge McGuire had considered that s 18 was trumped by s 17. It is convenient to set these two provisions out in full:

**17 Imprisonment may be imposed if offender unlikely to comply with other sentences**

Nothing in this Part limits the discretion of a court to impose a sentence of imprisonment on an offender if the court is satisfied on reasonable grounds that the offender is unlikely to comply with any other sentence that it could lawfully impose and that would otherwise be appropriate.

**18 Limitation on imprisonment of person under 17 years**

(1) No court may impose a sentence of imprisonment on an offender in respect of a particular offence, other than a purely indictable offence, if, at the time of the commission of the offence, the offender was under the age of 17 years.

(2) In subsection (1), purely indictable offence means any indictable offence within the meaning of section 2(1) of the Summary Proceedings Act 1957, other than an offence for which, under section 6 of that Act, proceedings may be taken in a summary way in accordance with that Act.

It was common ground that the charge to which the appellant pleaded guilty was not a "purely indictable offence". Accordingly, imprisonment was only available if it was found that s 17 trumped s 18 of the Act.

The majority of the Court (Chambers and Gendall JJ) found that s 18 prevailed and the District Court had no jurisdiction to imprison C-W. They reviewed the legislative history of the provisions and, in particular, examined the Act's predecessor, the Criminal Justice Act 1985 (the 1985 Act). It was absolutely clear under the 1985 Act that a youth under the age of 16 could not be imprisoned except for a purely indictable offence: see s 8 of the 1985 Act. There were three core presumptions in the 1985 Act: *in favour* of imprisonment of violent offenders; *against* the imprisonment of offenders against property; and *in favour* of keeping offenders in the community as far as practicable. The majority then examined the scheme of the Sentencing Act 2002, which is quite differently structured. The scheme of Part 1 requires the sentencing judge to consider the purposes and principles of sentencing, identify aggravating and mitigating factors, then move methodically through the hierarchy of sentences set out in ss 11 – 16. Limitations on the court's discretion to imprison are now, the majority said, found throughout the first Part of the Act.

Nothing in the legislative history suggested to the majority that Parliament intended to reverse the dominance of s 18 (the old s 8) over s 17 (the old s 9). There was no mention of such a step in the parliamentary debates, the explanatory note to the Bill, or the select committee reports. There were three indications that Parliament intended the opposite (i.e. that the age at which offenders became eligible for imprisonment actually *increased* under the 2002 Act). First, there was a Department of Corrections report which noted extremely high recidivism rates for young offenders who were imprisoned in adult prisons. Secondly, the reversed order of ss 17 and 18 suggested to the majority that Parliament was emphasising limits on the discretion to imprison: s 17 of the Act refers to the limits on the discretion found earlier in the Part, while s 18 is a prohibition on imprisonment. Thirdly, the majority noted that s 18 was worded

in the same fashion as s 30 of the Act, which prohibits the imposition of a sentence of imprisonment in the absence of legal representation. If s 17 trumped s 18, it would also (presumably) trump s 30, which is an outcome very unlikely to have been intended by Parliament.

The majority noted that their interpretation was consistent with the rights of children under s 25 of the New Zealand Bill of Rights Act 1990. Any prima facie infringement of that right would, it was presumed, require clear evidence of parliamentary intent. The majority allowed the appeal and quashed the sentence on jurisdictional grounds. A sentence of community work and supervision was substituted.

Heath J dissented. He did not consider that the scheme of Part 1 of the Sentencing Act required the interpretation given by the majority. Were the position otherwise, Heath J said, a court would be required to sentence an offender to a non-custodial sentence even though it had reasonable grounds for believing that the offender would not comply with its terms. Such an approach was likely to undermine the sentencing process to an extent which would impact adversely on public confidence in the criminal justice system.

*Discount for illness – evidence unavailable at sentencing*

In *R v Rys* [2007] NZCA 360 the Court reduced a sentence on the basis of a medical condition suffered by the appellant, the existence of which came to light after sentencing. MacKenzie J had sentenced Mr Rys to 10 years and six months imprisonment on multiple charges of importing the Class B controlled drug Fantasy. This sentence followed from a starting point of 13 years and six months. The reduction was as a result of Mr Rys' guilty pleas. On appeal the Court held that the starting point selected by MacKenzie J was too high – 11 years would have been appropriate. The Court said MacKenzie J had placed undue weight on Mr Rys' continued offending while on bail.

After sentencing, new medical information came to light concerning a mental disorder known as body dysmorphic disorder, or megarexia. The disease was described in the evidence as a chronic preoccupation with the belief that one is not sufficiently muscular. The Court accepted that this condition moderated Mr Rys' culpability in that it distorted his reasoning process. The Court treated as a neutral factor the fact that Mr Rys' drug use might lead to his death while in prison, the evidence suggesting that Mr Rys' condition had stabilised. Accordingly, the Court reduced Mr Rys' sentence from one of 10 years and six months imprisonment to one of seven years and six months.

*Effect of sentencing indication – failure to consider pre-sentence reports*

In *R v Gatoloai and Eteuati* [2007] NZCA 319 the Court considered the position where the sentence ultimately imposed is inconsistent with a sentence indication given by a trial Judge that induced a guilty plea.

The appellants initially pleaded not guilty to one charge each of wounding with intent to cause grievous bodily harm. They then sought a sentencing indication and Judge

Epati, in the District Court, gave an indication of a starting point of five years imprisonment with a final sentence of three to three and a half years imprisonment. The appellants subsequently entered guilty pleas, whereupon Judge Epati imposed upon each a sentence of four years imprisonment. The Judge did not consider he was bound by the sentence indication because, in his view, the appellants had declined it.

The appellants argued that not only was the sentence inconsistent with the indication given by Judge Epati, but that he did not refer to and apparently did not give any weight to the pre-sentence reports. Further, they contended the discount for mitigating factors was insufficient and minimal.

The Court reiterated the difficulties that can arise from providing sentence indications otherwise than in accordance with the guidelines provided in the District Court Bench Book. In this case the process had gone awry and, contrary to Judge Epati's view, he was bound by the sentence indication. Furthermore, he had failed to have the victim impact reports available to him at the time he gave the indication.

The Court found that the usual course in such a case would be to quash the convictions and remit the matter to the sentencing court for the appellants to plead again. However, the appellants submitted that if the appeals were to be allowed the Court should impose an appropriate sentence. Being satisfied that the sentences imposed were manifestly excessive the Court adopted this course. The Judge had failed to refer to the young age of the offenders and the prospects of rehabilitation (noted in the pre-sentence reports), as required by s 9(2) of the Sentencing Act 2002, and had thus erred in principle. The appellants' sentences were each substituted for sentences of three years and six months imprisonment.

*Sentencing indication prior to guilty plea*

In *R v Palmer* [2007] 3 NZLR 313 the Court considered the role of sentencing indications given prior to the entering of a guilty plea where there is serious divergence about essential facts.

The Solicitor-General appealed against a sentence of two years imprisonment with leave to apply for home detention and a $100,000 fine imposed on Mr Palmer after he pleaded guilty to one count each of importing a Class B drug (GBL), supplying GBL, and possession of GBL for supply.

Mr Palmer had filed an application for discharge under s 347 of the Crimes Act 1961. A memorandum of agreed facts was filed in which Mr Palmer admitted importing and selling GBL, but noting that GBL had been a legal substance until 2002. It stated that Mr Palmer was aware that GBL had been "scheduled" but that he thought that this meant that GBL could be imported with a license, not that it had become a controlled drug. It was argued that Mr Palmer lacked the requisite intention. The s 347 application was dismissed.

While it was acknowledged that ignorance of the law could be no defence, defence counsel argued that Mr Palmer's culpability was reduced by his misunderstanding of the factual and legal significance of the drug. The District Court Judge appeared

to agree with this approach. A sentencing indication was sought and was given. The starting point indicated was five years, with a 60 per cent discount for mitigating circumstances. The Crown strenuously argued that the sentence indication was not within the available range. Mr Palmer pleaded guilty on the basis of the agreed factual concessions.

The agreed facts were open-ended and ambiguous. They had been agreed for the purpose of determining whether there was legal liability and were not general concessions. The Crown's consistent argument that the sentencing indication was beyond the sentencing discretion should have provided a clear warning that the parties were not in agreement about the factual context. There had been no evidence and no adjudicative findings were made.

The Court held that sentencing on the basis of a brief summary agreed for the s 347 application was unsatisfactory. Either the facts should have been agreed in substantial detail or there should have been a disputed facts hearing directed to the knowledge and appreciation of Mr Palmer. A sentencing indication of the type given was never appropriate. There was a fundamental divergence of view as to culpability and legal responsibility which could not be resolved without evidence.

Mr Palmer was offered the opportunity to withdraw his guilty plea and have the matter tried before a jury. He did not wish to do so.

The Court found that the two year sentence imposed was not within the sentencing range given the size, scale, and nature of the importing operation. A sentence of at least four years imprisonment ought to have been imposed. The Court imposed a sentence of three years imprisonment because of the extraordinary procedure followed, which was not the fault of Mr Palmer.

*Sentence indication – comparable cases*

In *R v Mohi* [2007] NZCA 139 the Court allowed an appeal against a sentence of two years and four months imprisonment plus reparation of $6,000 on counts of arson and attempted arson of motor vehicles. The Court found that the sentence was "unduly severe" in relation to comparable cases.

Mr Mohi had set fire to two cars after resigning from his job and drinking "a good deal of vodka". The sentencing Judge found that the appellant wrongly attributed the termination of his work to his employer, and that had his plan succeeded a number of vehicles would have been set alight and people would have been at risk. He was satisfied that there was clear evidence of pre-meditation, but there was also some evidence of remorse.

Mr Mohi argued that a comment by a different Judge at a bail hearing, before trial, amounted to a sentence indication that should not have been deviated from. That Judge had stated in July that the trial should be heard before Christmas because "beyond that point any remand in custody is likely to exceed the sentence that he would have to serve if convicted". The Court rejected that submission, saying that the

comment was not a sentencing indication, and, in any event, the appellant placed no reliance upon the statement.

However, Mr Mohi succeeded on his second point. He argued that the sentence was unduly severe on several grounds. The Court found that the starting point for his sentence must have been something like 34 months. It considered two comparable cases. In *R v Golding* CA329/96 17 October 1996, the Court reduced a sentence of 36 months to 30 months for arson resulting in $2,350 worth of damage to a barn and haystack. In *R v Farrell* CA 303/86 22 May 1987 36 months imprisonment was considered appropriate for arson resulting in $22,000 worth of damage.

In light of these cases the Court considered Mr Mohi's sentence was unduly stern. The starting point should have been 30 months with a deduction of six months for the reparation, so as to result in a net sentence of 24 months imprisonment.

*Sentencing indication – Solicitor-General appeal – when Court of Appeal can interfere*

In *R v Anderson* [2007] NZCA 146 the Court examined when a sentence might be disturbed in the context of a sentence indication having been given.

Police searched Ms Anderson's home and found equipment and precursor substances used in the manufacture of methamphetamine. Cannabis and various utensils were also found. Mr Anderson eventually pleaded guilty to all charges and received a sentence of 150 hours of community service and 12 months supervision. The Solicitor-General appealed.

Leading up to trial, the Judge indicated that a community-based sentence was appropriate. The respondent, who the Judge accepted was simply keeping the tools and ingredients for a friend, was not especially culpable.

Quashing the sentence and imposing one of imprisonment, the Court noted it was entitled to interfere with a sentence following a sentence indication where the sentence could not be supported. One such circumstance is when the judge did not have access to all the relevant information: see *R v Edwards* [2006] 3 NZLR 180 (CA). In the present case there had been a failure to adequately consult all parties and consequently the sentence could be attacked for a failure to obtain a proper evidential base.

Reviewing the authorities, the Court concluded that sentences of imprisonment are appropriate for offending that involves precursor substances, along with chemicals and equipment for manufacturing methamphetamine, even where the offender had limited involvement and where personal circumstances call for some leniency. Providing a safe harbour for equipment and substances assists in the crime of manufacturing.

The Court's normal reluctance to replace a non-custodial sentence with a custodial one was overwhelmed, and a period of imprisonment was imposed.

*Circumstances in which a sentence of preventive detention is appropriate*

In *R v Hutchison* [2007] NZCA 55 the Court considered the circumstances in which a sentence of preventive detention would be required under s 87 of the Sentencing Act 2002.

The case concerned a Solicitor-General's appeal against a sentence of 13 years and six months imprisonment with a minimum period of imprisonment of seven years and six months. The offending involved the repeated rape and violation of a child over a five year period, when she was three to eight years of age. The Court described the offending as "awful"; it had clearly had a profound impact on the complainant and her family. The Solicitor-General sought a sentence of preventive detention arguing that the risk, or likelihood, that the respondent would commit a further qualifying offence upon release was such as to dictate the need to impose such a sentence.

The Court reiterated that preventive detention is a sentence designed to protect the community from those who pose a significant and ongoing risk to its members. While the imposition of the sentence is a matter of discretion, the sentence is not to be seen as one of last resort. The central issue was whether the offender posed such a significant and ongoing risk to the community. A sentence of preventive detention provides the ongoing protection of life parole, and the sanction of recall, which do not accompany a determinate sentence. Hence, a finite sentence to be followed by the backstop of an Extended Supervision Order should not be viewed as an "agreeable alternative" to preventive detention.

In the High Court, Cooper J had failed to make a finding in terms of s 87(2)(c), namely whether he was satisfied that the respondent was likely to further offend upon release. The Court was sympathetic, and considered that the issue was a difficult one given the evidence available to the Judge, however, it held that a sentencing judge is required to confront that question, regardless of the difficulties. On the facts, the majority of the Court was of the view that the statutory test was satisfied, in that there was a likelihood of further relevant offending upon release from a finite term. In light of that view, the appeal was granted and a sentence of preventive detention substituted for the finite term.

*Preventive detention*

In *R v Vincent* [2007] NZCA 238 the Court allowed a Solicitor-General's appeal against a refusal to impose preventive detention.

Mr Vincent was serving a 13 year sentence imposed in 1994 for the brutal rape of a 77 year old woman. In 2006 he pleaded guilty to one charge of assault with intent to injure and was found guilty at trial of a second count of the same offence. Both charges related to attacks on other inmates with a screwdriver. He was sentenced to concurrent terms of five and three and a half years imprisonment, with a minimum term of three years.

Mr Vincent appealed his conviction on the grounds that his lawyer had failed to adequately put his defence, and that the Crown cross-examination had been unfair. The Court found that neither of these grounds was made out.

The Solicitor-General appealed against the sentence, submitting that this was an appropriate case for preventive detention. The Court canvassed the appellant's background, which included 52 convictions prior to the rape conviction, and a history of intimidatory behaviour toward other complainants. It noted the Parole Board had made an order that the appellant not be released before the applicable release date, indicating that it was satisfied that he was likely to commit a crime of violence or a serious sexual offence if released. A psychiatric report also assessed him at moderate to high risk of serious re-offending.

The sentencing Judge, Cooper J, said that Mr Vincent's behaviour in prison did not justify preventive detention. He emphasised the long period in which Mr Vincent did not offend. The two assaults were recent and close together, and were "very different from" the rape offence. He felt that society would be adequately protected by a finite term.

The Court found that Cooper J put too much reliance on the absence of offending until 2005. Good behaviour in prison does not provide a reliable guide as to the risk of offending in the outside world. The offending needed to be considered in light of the assessment that the risk of re-offending was medium to high. The fact that the recent violence was different in nature from the sexual offending did not detract from the assessment of risk. The Court thought Mr Vincent would benefit from ongoing psychological treatment in prison, and that the community needed to be protected. It quashed the sentence and imposed a sentence of preventive detention with a minimum period of imprisonment of five years.

**The Supreme Court has refused leave to appeal.**

*Extended supervision orders – risk assessment tools – best practice*

In *R v Peta* [2007] 2 NZLR 627 the issue was whether Mr Peta ought to have been subject to an extended supervision order (ESO) for ten years due to the risk he posed of sexually re-offending against children.

The Court held that the effect of the statutory test set out in s 107I of the Parole Act 2002 (the Act) (in light of the factors set out in s 107F(2)(a) – (d)) was that the jurisdiction for making an ESO depends on the risk of relevant offending being real, ongoing, and of a nature that cannot sensibly be ignored, having regard to the nature and gravity of the likely re-offending: see *R v Belcher* CA184/05 19 September 2006. It was determined that the main focus in setting the term of an ESO is the safety of the community and that the term of any ESO is not designed to be proportionate to the offences committed. However, the Court held that it followed from s 107I(5)(b) (the seriousness of the harm that might be caused to victims) that proportionality in relation to likely future offending is a relevant factor in setting the term of an ESO.

It was held that the making of an ESO is a judicial decision and not that of the health assessor. Judges should avoid merely rubber-stamping health assessors' reports. Therefore, the Court then turned to the assessment tools used by health assessors and set out a best practice approach to risk assessment. It was pointed out that the Automated Sexual Recidivism Scale (ASRS), a static actuarial measure, cannot detect changes in risks over time. Therefore ASRS ought to be augmented utilising dynamic risk assessment measures such as the Sex Offender Needs Assessment Rating (SONAR). The Court pointed out the utility of the tools is only realised when they are properly administered, scored, and integrated with other relevant information which relates to the risk of re-offending, such as sexual deviance, level of psychopathy, and factors that are both environmental and inherent to the individual.

In this case, the original health assessor's application of the ASRS and SONAR, which the District Court Judge relied on, fell far short of best practice. The District Court Judge was also held to have erred by relying solely on Mr Peta's ASRS score, thereby only taking account of the static risk factors. Further, there was no specific consideration of the facts set out in s 107F(2) in setting the term, nor any separate consideration of the statutory criteria in s 107I(5) – in particular the seriousness of the harm to likely future victims and its relationship to other s 107I(5) factors. Due to the deficiencies in the assessor's report and in the reasons given by the sentencing Judge, the Court held that the sentence needed to be considered afresh. Because of the major restrictions on freedom of movement and association that are occasioned by an ESO and also the potential dangers to the community, leave was given for the parties to adduce further evidence.

The Court, in quashing the ESO, was most influenced by the fact that the sexual offending was not of the most serious character, it was not pursued in the face of resistance, and it appeared to have been out of character. In addition, the accused exhibited no signs of deviant sexual interest in children and had an ongoing supportive relationship with his partner and family. The Court made the comment that, had an ESO been warranted, the term would have been reduced by half.

*Whether bail can be granted to a person on home detention*

In *R v Topliss* [2007] NZCA 327 the Court held that jurisdiction exists to grant bail to an appellant who is serving a sentence of imprisonment on home detention, and that bail was appropriate in this case.

Ms Topliss had been convicted of multiple fraud charges and sentenced to home detention. She applied for bail pending the determination of her conviction appeal.

Section 70(2) of the Bail Act 2000 provides a general power to grant bail where the appellant is "in custody". The Court rejected the Crown's submission that home detention was not "custody". Sections 6(5) and 36(5) of the Parole Act 2002, which state that a person on home detention is not in custody, were of particular importance. They are directed to ensuring the detainee can access social welfare, and can be recalled to prison. These sections confirm that home detention is a custodial sentence, otherwise there would be no need for them. Jurisdiction to grant bail therefore existed in this case.

Under s 14(1) of the Bail Act the Court must be satisfied that it is in the interests of justice to grant bail. The Court found that bail was appropriate primarily on the basis that the sentence of detention was nine months and that time would be substantially elapsed before the appeal could be determined.

*Parole – interpretation of word "community"*

In *Va'alele v The New Zealand Parole Board* [2007] NZCA 535, the Court considered whether the word "community" in s 7 of the Parole Act 2002 was limited to New Zealand or includes the community to which the offender is to be returned or deported.

The appellant argued that "community" referred to the community of New Zealand. He argued that since he is subject to a removal order, he posed no risk to the New Zealand community. Therefore, under the s 7 premise that offenders must not be detained any longer than is consistent with the safety of the community, he argued that he ought to be released immediately.

The Court agreed with Panckhurst J's reasoning in the High Court (*Vaalele v Parole Board* [2007] NZAR 396 (HC)) and held that the primary meaning of community is the New Zealand community, but that there is also a secondary meaning which encompasses the community to which the offender is to be returned or deported to. It was also held that the similar case of *R v Parole Board, Ex parte White* Times Law Reports 30 December 1994 at 687 applies to New Zealand. The Court noted that *White* was approved by the House of Lords in *R (on the application of Clift & Hindawi) v Secretary of State for Home Office* [2007] 2 All ER 1.

*Using a document with intent to defraud – totality principle*

In *R v Armitage* [2007] NZCA 270 the Court questioned whether a sentence for tax evasion should be set at 15 months, given the impact of the totality principle.

The appellant pleaded guilty to 21 counts of using a document with intent to defraud, and one of tax evasion. He was sentenced to two years six months imprisonment for the fraud charges, and 15 months for the tax evasion, which was added cumulatively to the fraud sentence. The fraud offending gave the appellant access to some $12m of creditors funds, but creditors had in fact only lost some $90,000, which the appellant repaid. The tax evasion related to a sum of some $140,000 output tax on the sale of a motel.

Allowing the appeal and reducing the 15 month sentence to six months, the Court found that the sentencing Judge had not taken proper account of the totality principle. While it was appropriate for the fraud and tax evasions sentences to be cumulative, it was important for the Judge to look at the offending as a whole. Three years and nine months imprisonment for offending where the total deficit was some $140,000 was excessive.

*Secondary offenders* – Taueki

In *R v Kara* [2007] NZCA 189 the Court examined the application of *R v Taueki* [2005] 3 NZLR 372 (CA) in the context of secondary offenders.

Mr Kara and an associate had assaulted the victim with a baseball bat, killing him. Mr Kara was very much a secondary offender who provided encouragement and support for his associate. Significantly, the victim was extremely intoxicated when the assault took place, and had been seen by the offenders to fall to the ground, hurting his face. Mr Kara knew that the victim was in no state to defend himself, and that the principal intended to use the baseball bat.

The principal was found guilty of murder. The jury was unable to form a view as to whether Mr Kara was guilty of manslaughter, and he eventually pleaded guilty to an amended charge of causing grievous bodily harm with intent. The sentencing Judge, Panckhurst J, thought that the jury were unable to reach a verdict because they were not satisfied Mr Kara appreciated a blow to the head would be struck. As a consequence, band two of *Taueki* was seen as most appropriate. Starting at six years, Panckhurst J reduced this to three and a half years to take account of Mr Kara's age and prompt guilty plea.

Allowing the Solicitor-General's appeal, the Court criticised Panckhurst J's approach. The Judge had first assessed the principal's culpability and then adjusted down to reflect Mr Kara's lesser involvement. The artificiality of this approach led the Judge into error. Instead, the aggravating features of the offending (as identified in *Taueki*) needed to be assessed in relation to Mr Kara.

The offending in this case fell into band three (which warrants a starting point of between nine and 14 years). However, taking into account the secondary nature of Mr Kara's participation, the upper end of band two (five to 10 years imprisonment) was seen as appropriate. Re-exercising the sentencing discretion in the context of a Solicitor-General's appeal, the Court settled on a final sentence of five years imprisonment.

**The Supreme Court has refused leave to appeal.**

*Sexual offending – range when offending akin to rape*

In *R v A* [2007] NZCA 301 the Court was asked to examine the appropriate sentencing range for sexual abuse akin to rape.

The appellant pleaded guilty to nine counts of sexual violation by unlawful sexual connection (involving oral sex), two counts of attempted sexual violation (involving attempted anal intercourse), and ten counts alleging indecencies with boys. He was sentenced to 13 years imprisonment with a minimum period of imprisonment of seven years.

There were two victims of the offending, J and D. The appellant was married to their grandmother. J came to live with them in 1997, when he was eight. The offending

began almost immediately. When J moved back with his mother, the appellant continued to offend against him up until August 2005. D lived with his grandmother and the appellant between December 2000 and October 2002. He was seven when the offending began, which was similar to that perpetrated against J.

The offending had a significant impact on the victims, particularity J who attempted suicide on a number of occasions, and was diagnosed with post traumatic stress disorder. The impact on D was also appreciable.

The Judge took 16 years as the starting point on the lead charge and reduced this by three years to take account of mitigating factors (pleas of guilty and absence of previous convictions).

Allowing the appeal and imposing a sentence of 10 years, the Court first criticised the 16 year starting point. In an uncontested rape, a starting point of eight years should be adopted: *R v A* [1994] 2 NZLR 129 (CA). The Court thought this might also apply to situations analogous to rape – anal intercourse or penetration with an object. The more invasive the offending and the greater the physical consequences (or the risks) for the victim, the greater the offender's culpability. Thus courts have tended to deal with cases of oral intercourse or digital penetration more leniently. A court must make an assessment in all the circumstances, including the physical and mental consequences for the victim. All things being equal, conduct not amounting to rape (or analogous to rape) will be dealt with less severely. But the gravity of the offending can take "lesser" acts, such as digital penetration, into the bands of sentencing usually reserved for rape and similar offending: see *R v G A S* CA211/05 10 November 2005.

The Court thought that *G A S* was comparable to the present case. There a starting point of nine years had been adopted. A similar staring point was sufficient for the offending against J. When the offending against D and the totality principle were taken into account, a starting point of 13 years imprisonment was appropriate.

Re-exercising the sentencing discretion, the Court reduced the sentence by a little over 25 per cent to reflect the guilty pleas and imposed a sentence of 10 years imprisonment, with a minimum period of five years.

*Conspiracy to manufacture methamphetamine – cultivation of cannabis*

In *R v Te Rure* [2007] NZCA 305 the Court allowed the Solicitor-General's appeals against the respondents' sentences of two years imprisonment for conspiracy to manufacture methamphetamine, as well as a six month sentence imposed on Mr Watson for cultivation of cannabis.

The first issue for the Court was how the sentence levels in *R v Fatu* [2006] 2 NZLR 72 (CA) should be applied where the charge is conspiracy to manufacture, rather than manufacture. The Court said that a reduction of the penalties in *Fatu* is appropriate where the charge is conspiracy rather than manufacture: *R v Bryan* CA 239/05 6 July 2006.

Where a conspiracy to manufacture methamphetamine proceeds no further than a theoretical plan, offenders should expect a substantial reduction of the *Fatu* sentencing levels. However, where a plan has been developed to the point of action, the possession of precursor equipment and the use of that equipment to manufacture methamphetamine must be addressed as well. Where there is a theoretical plan, as well as possession and use, offenders should expect a very small discount indeed.

In this case the appellants were the primary offenders; they had formulated a plan to manufacture methampetamine and were putting it into action when the police forestalled them. The short period of offending and the absence of actual yield were a consequence of police actions. The Court considered that four and a half years was the most generous starting point properly open to the sentencing Judge. From that starting point, the reduction of one year for the guilty pleas was appropriate.

The Court was also asked to review Mr Watson's sentence for low-scale commercial cultivation of cannabis. The Court agreed with the Crown that the sophistication of the operation worked against the discount given by the sentencing Judge and the starting point should have been 18, rather than nine months. Taking into account the guilty plea, this would result in an end sentence of 12 months imprisonment.

The Court substituted sentences of three years and six months imprisonment for conspiracy to manufacture methamphetamine (both offenders) and one year imprisonment for cultivation of cannabis (Mr Watson only).

*Proceeds of crime – forfeiture order*

In *R v Ryan* CA514/05 18 December 2006, the Court was asked to determine what factors could properly be taken into account when calculating the gross gain from a crime, for the purposes of the Proceeds of Crime Act 1991 (the Act).

The appellant had set up a large-scale cannabis growing operation is his attic, involving 500 plants, which had run for some six months. At the time of trial, the appellant's home had equity of $202,000. Subsequently, a mortgagee sale occurred leaving the appellant with $242,000 available for distribution.

The property was clearly "tainted" under the Act. The trial Judge found that the operation generated some $225,000 and therefore it would not be unjust to order forfeiture of the house. Mr Ryan appealed.

The Court undertook a thorough examination of the facts and found that the Judge had overstated the gross benefits of the scheme. A figure of $170,000 was more realistic. The Court noted that an assessment of gross proceeds should allow for crops seized by the police, own use, bad debts, and gifts.

While forfeiture orders do not depend on equating the gain to the offender and the value of the asset, it was clear that the Judge had been primarily influenced by the fact that the gain (then $225,000) outweighed the asset (then $202,000). That was no longer the case, the figures being $170,000 and $242,000 respectively. Re-exercising the forfeiture discretion, the Court recognised that the gross gain does not cap the

extent of forfeiture that can be ordered. As a result, the forfeiture order was modified to cover $200,000 of the proceeds available for distribution.

Arguments relating to hardship were dismissed as not being out of the ordinary.

*Proceeds of crime – pecuniary penalty orders – relationship property*

In *de Bruin v Solicitor-General* [2007] NZCA 600 the Court considered several issues arising from the conviction of a drug trafficker and the proceeds of crime order made against him.

Mr de Bruin was convicted on five counts of importing and five counts of selling MDMA. He was sentenced to 12 years imprisonment and two of his co-offenders were sentenced to nine years. At the time of sentencing, pecuniary penalty orders of $1m were made against Mr de Bruin and his co-offenders. It was ordered that property that had earlier been restrained under the Proceeds of Crime Act 1991 be made available to satisfy the pecuniary penalty orders. This included a house owned by Mr de Bruin and his former de facto partner (and co-appellant) Ms Delaney as joint tenants. Certain debts were to be settled out of the proceeds of the restrained property before the pecuniary penalty order, including a sum representing Ms Delaney's equitable interest in the house.

Mr de Bruin appealed against conviction, sentence, and the pecuniary penalty order. Ms Delaney, who was not a party to the offending, appealed against the proceeds of crime order against Mr de Bruin.

Mr de Bruin submitted that his conviction was unfair because he was denied the opportunity to participate in the preliminary hearing of his co-accused, after which the indictment against Mr de Bruin was amended, presumably on the basis of information gleaned at that hearing. The Court held that Mr de Bruin did not have standing under the Summary Proceedings Act 1957 to attend the hearing. This did not result in a breach of natural justice, because mechanisms are available by which Mr de Bruin could have mitigated any prejudice caused by his exclusion from the hearing. In particular, Mr de Bruin could have applied to examine the relevant witness under s 178.

The Court was more concerned that Mr de Bruin's preliminary hearing was held before he knew that he would be charged jointly with his co-accused, which could have created a different context for examining potential witnesses. However, in this case counsel did not suggest that the case would have been conducted differently had he been aware of the joint charges before the preliminary hearing. The Court found that the trial as a whole was not unfair.

The Court allowed Mr de Bruin's appeal against sentence on the basis that there was no discernible reason why Cooper J had sentenced him to three years more than two of his co-offenders. The Court reduced Mr de Bruin's sentence by one year. It also reiterated that the existence of a pecuniary penalty order is not relevant to sentencing: *R v Brough* [1995] 1 NZLR 419.

Mr de Bruin contested the amount of the pecuniary penalty order, arguing that it was incorrectly assessed and not justified on the evidence. The Court found that the assessment was correctly made under s 27 of the Proceeds of Crime Act, which provides for certain matters to be taken into account where the offender has "derived benefit" from the offending. Mr de Bruin argued that Cooper J should not have referred to these matters as he was merely a courier and had not derived benefit from the monies that he had sent on to co-offenders in South Africa. The Court disagreed, finding that Mr de Bruin had clearly benefited from the offending. It was therefore not necessary to discuss the position of couriers in this case. The Court considered the evidence relied upon by the Judge in making the order, and found that it justified the amount. The Court also rejected the argument that the increase in the market value of the property was not a benefit that flowed from the offending and therefore should not have been included in the pecuniary penalty order.

As to Ms Delaney's interest, the Court found that she was never in a position to maintain any interest under the Property (Relationships) Act 1976 against Mr de Bruin's interest in the property. His interest in the property was tainted from the outset as his contribution to it was derived solely from the offending for which he was convicted. Section 19 of the Property (Relationships) Act preserves the title of any third person to any property and the entitlement to the benefit of any mortgage, charge or other security in relation to the property. The successive restraining orders made against Mr de Bruin's interest preserved the Crown's ability to obtain a confiscation order against it. Ms Delaney was entitled to 3.5% of the sale price of the house, as she had contributed 3.5% to the original purchase price.

*Reparation order – relationship to ACC compensation*

In *Davies v New Zealand Police* [2007] NZCA 484 the Court upheld a District Court reparation order under s 32 of the Sentencing Act 2002 that the appellant pay a substantial sum to the victim of his careless driving. This was to compensate her for the difference between her resultant loss of income and that part of her loss for which she was compensated under the provisions of the Injury Prevention, Rehabilitation, and Compensation Act 2001 (the Compensation Act).

The Court held neither s 317(1) of the Compensation Act, nor s 32(5) of the Sentencing Act, prevents the award of reparation to compensate for loss of earnings not compensable under the former Act.

Section 317(1) of the Compensation Act prevents a person bringing proceedings independently of that Act for damages arising directly or indirectly out of personal injury covered by the Act. The Court held that this bar did not apply because the prosecution of a charge of careless use of a motor vehicle causing injury did not constitute proceedings for damages arising directly or indirectly out of personal injury.

Section 32(5) of the Sentencing Act provides that a court must not order the making of reparation in respect of any loss or damage consequential on any emotional or physical harm for which the court believes that a person has entitlements under the Compensation Act. The Court held that this did not apply to a "top-up" that was

additional to the entitlement under the Compensation Act. It considered that the legislative history supported this interpretation, as does the definition of "entitlement" under s 69(1)(c) of the Compensation Act.

In addition, s 33(1)(c)(ii) of the Sentencing Act permits a Court to obtain a report, in the case of loss or damage consequential on physical harm, on "the extent to which the person who suffered the loss or damage is likely to be covered by entitlements under the [Compensation Act]". Section 10 of the Sentencing Act requires the court to take into account any offer by the offender to make amends. The obvious intention is that the consequences of physical harm may be the subject of a reparation order unless they are compensated under the Compensation Act. This ensures that there is no doubling up, but that the consequences of physical harm do not fall outside both Acts.

This interpretation is also supported by s 7(1)(d) of the Sentencing Act, which provides that one of the purposes of sentencing is "to provide reparation for harm done by the offending".

The Court commented that insurers will readily be able to specify the extent of the cover which they are providing as from the date of renewal of existing policies, or the commencement of new policies, and to set premiums accordingly.

**The Supreme Court has granted leave to appeal.**

***Trial Errors***

*Unrepresented defendant – appointment of amicus – representation and fair trial issues*

*R v McFarland and Brooks* [2007] NZCA 449 most notably concerned the appointment of amicus curiae in criminal cases.

The appellants both had gang affiliations, and were charged with maiming with intent to cause grievous bodily harm contrary to s 188(1) of the Crimes Act 1961. Mr Brooks entered a plea of guilty. Mr McFarland maintained his defence, but was convicted by the jury. Both appealed against conviction and sentence, although neither sentence appeal was seriously pursued.

Mr McFarland advanced a number of grounds for his appeal against conviction. On the basis of the Supreme Court's decision in *R v Condon* [2007] 1 NZLR 300 and s 30 of the Sentencing Act 2002, he argued that he had been deprived of an adequate opportunity to obtain a lawyer. Mr McFarland's original counsel had been granted leave to withdraw when it was apparent that he would not be paid. When it became clear that the trial would proceed with Mr McFarland representing himself, Mr Brooks' counsel requested an amicus be appointed to assist Mr McFarland.

In the Court of Appeal, Mr McFarland argued that he had indicated a wish to have a lawyer represent him. However, the Court found it was not apparent that Mr McFarland had sought an adjournment, as he alleged, and it was clear that he had

made no effort after his original counsel was excused to obtain a lawyer through legal aid or otherwise. The Court found that Mr McFarland made a deliberate decision to represent himself, knowing that he had a right to be represented by counsel and that he could apply for legal aid. There had therefore been no breach of his right under s 24 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) to instruct and consult a lawyer or to receive legal aid. The question thus became whether he could show that the trial was unfair (s 25(a) of the Bill of Rights) because the defence could not be conducted adequately without the assistance of counsel.

In the context of the right to a fair trial, Mr McFarland argued that the amicus had acted as his counsel and had not done so effectively. He argued that: it was unclear precisely what role the amicus was intended to, and did, perform; as the amicus was briefed at a very late stage he had been unable to prepare sufficiently; and, the amicus committed a number of errors, both in the advice he gave and the evidence he chose to present to the Court.

The Court reiterated the statement in *R v Hill* [2004] 2 NZLR 145 (CA) that amicus will rarely be appointed in criminal cases, given the availability of legal aid. Noting that it has become increasingly common for trial judges to appoint an amicus where an accused decides to represent himself, the Court cautioned that such appointments can create problems and should thus be rare. Not only was there potential for role confusion (is the primary role of the amicus to assist the court or the accused?) there may be the potential for conflict, misunderstanding or confusion, particularly in relation to issues such as legal professional privilege. The Court emphasised the important right of accused persons to present their defences personally, as confirmed by s 354 of the Crimes Act. Accordingly, if, having been appropriately advised and given sufficient time (so that the decision is informed and deliberate), an accused chooses self-representation, that choice must be respected, and the accused must live with its consequences.

In this case, the role of the amicus had expanded during the course of the trial, so that the amicus conducted much of the trial on Mr McFarland's behalf. The Court held that there can in principle be no objection to an amicus acting in this way if that is what the accused wants and no issue of conflict of interest arises. The Court was satisfied that throughout the trial the amicus acted with Mr McFarland's consent. The Court accepted that although lack of clarity as to the amicus' role at the outset of a trial is undesirable, it may be inevitable. Each of the more specific complaints as to the conduct of the amicus were dismissed.

The Court then turned to consider whether Judge Sharp had erred in directing the jury. Easily disposing of an issue relating to a direction given in respect of television coverage, the Court considered more closely the issue of standard of proof. Rather than the standard formula that the jury had to be "sure" before they could convict, the Judge had used the term "satisfied". The question was whether this may have resulted in the jury misunderstanding the standard that the Crown had to reach in order to succeed. The Court considered that the summing up, read as a whole, and the Judge's answer to a jury question, sufficiently explained both the burden and standard of proof. Two further grounds, regarding the Judge's directions on joint enterprise and gang associations, were also dismissed.

The Court concluded that, overall, there had been no miscarriage of justice. The case was therefore dismissed. Mr Brooks' conviction appeal was also dismissed, the Court being satisfied he made his plea deliberately and with full awareness of what he was doing.

**Leave to appeal to the Supreme Court has been sought.**

*Historical sexual offending – application for stay – trial irregularities*

In *R v Fernando* [2007] NZCA 485 the Court dismissed an appeal from a medical practitioner who had been convicted in the High Court of 26 counts of assault concerning ten complainants. Multiple complainants had given evidence regarding allegations pertaining to actions up to 25 years before the trial, leading to several difficulties.

The High Court Judge had dismissed the appellant's application for a stay in respect of four complainants whose medical records were no longer available. The appellant argued that he was prejudiced as a result, because the records would have assisted his memory of events, and would have allowed him to challenge the credibility of the complainants. The Court was not convinced that the missing records would have affected the jury's verdict. The Court also dismissed submissions that the summing up was defective and that a lies direction should have been given.

The appellant also raised questions about the deliberations of the jury. After dismissing the suggestion that the verdicts were perverse, the Court considered the problems that had arisen with one juror during the course of the trial. The juror had been discharged on the second day of deliberations due to ill health. The appellant argued that her indisposition was a result of pressure put on her by the foreperson to agree to the guilty verdicts. The Court found that the trial Judge had handled the situation appropriately and that there was no compelling reason to take the exceptional step of looking into the deliberations of the jury.

***Unreasonable Verdict***

*Whether a jury verdict is unreasonable or unable to be supported having regard to the evidence – conflicting expert evidence*

*R v Manu'ula* [2007] NZCA 82 concerned whether a jury verdict was unreasonable or unable to be supported having regard to the evidence in terms of s 385(1)(a) of the Crimes Act 1961. The only evidence to support the verdict was that of the Crown expert witness.

Mr Manu'ula was caring for his child while his wife was at work. A relative noticed that the child was bruised on her right ear and had some swelling on the scalp. The child was taken to hospital. While being interviewed at the police station Mr Manu'ula said that he had left her sitting on a chair and returned to the room to find that she had fallen onto the floor and the chair had tipped over. He then saw that her

ear was red. He was charged with injuring with intent to injure. At trial the Crown called a consultant pediatrician who said that the bruising was not consistent with a fall but rather with an assault by striking. The defence expert said that the injuries were consistent with a fall and, in cases of non-specific bruising, an allegation of assault had no valid foundation unless there was reliable evidence about the cause of the injury. There was no such independent reliable evidence in this case other than the appellant's account.

Judge Gittos directed the jury that to convict they would have to wholeheartedly accept the impressions and opinion offered by the Crown expert. If they were to do that and dismiss the defence expert's medical opinion then it was open to them to convict the accused. The jury convicted and Mr Manu'ula appealed.

The Court noted that this was an unusual case insofar as the only evidence to support the Crown case was the opinion of its expert witness. His evidence was fair, measured and balanced, and could not be criticised, but the crucial issue was whether the evidence was sufficient to support the charge beyond reasonable doubt. The Court said that on a careful reading the evidence only went as far as showing that an assault was likely and accidental injury was unlikely. A deliberate assault was likely, but was not the only explanation for the injuries, and accidental injury could not be excluded. A jury which was acting reasonably and had been properly directed must have entertained at least a reasonable doubt as to the guilt of the appellant. The appeal was allowed and the conviction was quashed.

*Whether a jury verdict is unreasonable or unable to be supported having regard to the evidence – correct test to be applied – conflicting expert evidence*

In *R v Munro* [2007] NZCA 510 the Court of Appeal considered the test to be applied under s 385(1)(a) of the Crimes Act 1961, which provides that an appeal must be allowed if a jury verdict is "unreasonable or cannot be supported having regard to the evidence". Mr Munro appealed against his conviction for causing death while driving with excess blood alcohol on the basis of this provision.

Mr Munro's counsel invited the Court to revisit the leading authority on appeals under s 385(1)(a) of the Crimes Act, *R v Ramage* [1985] 1 NZLR 392 (CA). In particular, Mr Munro suggested that the test in New Zealand for an unreasonable or unsupportable jury verdict was out of line with comparable jurisdictions. In the alternative, Mr Munro contended that subsequent New Zealand cases have unacceptably narrowed the *Ramage* test. That test requires that a verdict will only be quashed where the jury acting reasonably *must* have entertained a reasonable doubt as to guilt. He said the existing test was too stringent because it means that a verdict will not be deemed unreasonable if there is some evidence, which, if accepted by the jury, would support the conviction. Mr Munro said the test should be whether, on the basis of all the evidence, a jury acting reasonably *ought* to have had a reasonable doubt as to the guilt of the defendant.

The reasons of the majority of the Court of Appeal (Glazebrook, Chambers, Arnold and Wilson JJ) were given by Glazebrook J. She surveyed the tests for unreasonable jury verdicts in other jurisdictions such as England, Canada, and Australia. She

concluded that there was nothing in the case law in those jurisdictions which suggested New Zealand should depart from its existing test. Glazebrook J rejected the Crown's submission that s 385(1)(a) appeals should be restricted to particular types of cases (such as expert evidence or eyewitness identification cases) in which appellate courts might have particular experience or expertise.

Glazebrook J stated that the correct approach to an appeal under s 385(1)(a) was to assess, on the basis of all the evidence, whether a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant. She said that the word "ought" is a better indication of the exercise to be conducted than the word "must" used in *Ramage*. It emphasises the task that the Court has to perform. This test also, in the Court's view, accords with the statutory wording.

Applying this test, Glazebrook J assessed the evidence as a whole in Mr Munro's case. Mr Munro had been driving a light Isuzu truck south on State Highway One towards Wellington. About halfway between Manakau and Otaki he collided with a Honda car which was travelling north. The driver of the Honda car, Ms Carley Aldridge, died at the scene of the crash. Mr Munro was charged with causing death while driving with excess blood alcohol under the Land Transport Act 1998. A jury in the District Court convicted him on 22 September 2006.

The Crown case was based on an expert's assessment of physical evidence such as tyre marks and scrapes on the road. The defence case was that this evidence was equally consistent with its version of events in which Mr Munro did not cross the centre line and cause the crash, and that the evidence of the sole eyewitness largely favoured the defence hypothesis.

Glazebrook J considered that there was no proper basis for the jury to find that the Crown's expert evidence proved the case to the requisite standard. In particular, there was no rational reason for the jury to reject the defence explanation as not being reasonably possible. Accordingly, there was not enough evidence to prove Mr Munro's guilt, especially taking into account the eyewitness evidence. Glazebrook J said that this was not a case where the jury was entitled to choose between competing expert hypotheses. She concluded that the lack of evidence underpinning the Crown case meant the jury should not have found Mr Munro guilty beyond reasonable doubt. A verdict of acquittal was entered.

Hammond J wrote a brief concurring opinion, in which he agreed with the Court on the merits of the appeal, but articulated a slightly different view on the law. He considered that there falls upon the Court an obligation to protect the integrity of the criminal justice system, where, in the New Zealand context, no alternative avenue exists for criminal appellants. Following from this point, he considered that the English "lurking doubt" safety valve, exercised rarely as an innominate category for miscarriages of justice, was of use to the New Zealand context. In such a context, it was important to not read down the words of the statute, or become overly analytical. At the same time, Hammond J noted that any complete and thorough review of the evidence on appeal raises questions of resource allocation.

# 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 D* [2007] NZCA 398: Murder – relationship between intoxication and insanity.
- *R v W* [2007] NZCA 96: Trial counsel incompetence – following client instructions.
- *R v D* [2007] NZCA 313: *Papadopoulos* direction – question of verdict safety.
- *R v W* [2007] NZCA 341: Whether victim's contractual incapacity needed to be proved beyond a reasonable doubt.