• *COURT OF APPEAL REPORT FOR 1998*

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JUSTICE KEITH

1. INTRODUCTION

The Court of Appeal's appellate jurisdiction remained unchanged for the period under review. It therefore continued to deal with civil and criminal appeals from matters heard in the High Court and criminal matters on indictment in the District Courts. Matters appealed to the High Court from the District Courts can be taken to the Court of Appeal with leave if they are considered to be of sufficient significance to warrant a second appeal. In addition, the Court hears appeals from the Employment Court and may grant leave for and hear appeals against pre-trial rulings in criminal cases.

In 1998 somewhat fewer appeals were filed, and heard, than in recent years. The reasons for the smaller numbers bear further investigation, and it is important when evaluating the following statistics to focus on content, complexity and trends as well as the raw volumes. During 1998, 478 criminal and 164 civil cases were heard by the Court. In addition, 305 miscellaneous motions were dealt with. In 1997 the Court dealt with 513 criminal cases and 160 civil cases. While there has been a small increase in the number of civil appeals, the number of criminal cases coming before the Court has gone down by just under 7% which may reflect greater consistency in sentencing.

The starting point for a meaningful trend analysis is not easy to find, and there may be more than one factor to be taken into account. We know, for instance, that the hearing time for jury trials has increased by about 40% over 10 years. When considering the reasons for that, issues such as the increased complexity of litigation, the increased incidence of cases involving special treatment of witnesses, and the impact of the Bill of Rights Act come to the fore. Their effects are felt right across the court system. It is possible that they influence both the volume of appeals brought – in that these cases require extended consideration in the lower courts – as well as the work and complexity of the cases that do come through on appeal.

In the criminal jurisdiction, while the bulk of jury trial matters are dealt with indictably in the District Court, appeals from decisions of District Court Judges and Judges of the High Court are about equal in number. Over 2,000 jury trial cases are dealt with annually in the District Court compared with 400 in the High Court, but the proportion of appeals from either source that are allowed is not very different – a change in the circumstances of 10 years ago when there was a higher successful rate of appeal in relation to District Court cases as compared with those from the High Court. It is encouraging to recognise the quality of work being done in the District Court and its jury trial system. In appeals from specialist jurisdictions, different patterns apply. The work of the Court of Appeal in overseeing the quality of the decisions in all areas has altered accordingly.

Such changes in workload are subtle and require an understanding of how the content of cases has changed. In the criminal jurisdiction, the throughput of cases in the Criminal Appeal Division has slowed. It used to be that 10 or 11 cases could be disposed of in a week's session. In 1998, the typical figure was eight. Comparative data on the number of appeals against sentence only, which are relatively quickly dealt with, as opposed to

appeals against conviction or conviction and sentence, show a further drop between 1997 and 1998, of about 2%, in the proportion of sentence alone appeals to total appeals.

In terms of case management principles, the heavier content of the cases has not greatly affected the Court's timeliness in dealing with appeals. Legal aid applications are processed with the aim, as far as possible, of having the matter brought to the point of allocating a hearing date, or an ex parte disposal date, within 30 days of filing the appeal. (If an application goes to review this target is not able to be reached. The Court will be monitoring its procedures in this regard with some care in 1999.) Between one in six and one in eight legal aid applications went to review each month in 1998 but the proportion of those granted was far more variable. In 1998 the Court recorded the number of appeals that went forward under private instruction notwithstanding the refusal of legal aid: of the 21 such cases, four were subsequently allowed (often with new points being raised) and 15 dismissed. The others awaited decision at the end of the year.

Overall, a steady and predictable throughput of cases, as intended by the Practice Notes for both jurisdictions, has been achieved. The Court can usually meet its 90-day target for hearing criminal appeals. Fixtures for civil appeals can generally be established within the dates agreed by counsel under the provisions of Rule 10 of the Court of Appeal (Civil) Rules 1997.

Nor do major emergencies necessarily affect the throughput. The Auckland power crisis occurred over a session of Criminal Appeal Division in Auckland. The local court officer, support staff and the Judges concerned were all, however, ready to respond to the difficulties and in very short order an alternative venue – a motel just outside the area of the central business district – was established, counsel were informed, and everyone rose to the occasion. In this temporary setup, using a conference room as a courtroom and adjacent suites as offices, files were safety managed and the hearings proceeded without interruption. The Court is also able to respond with urgency when required. As this report was being prepared, the court heard and disposed of two urgent appeals relating to the electricity reforms; in one case the decision was given on the day after the High Court decision and in the other two days later.

The year ended with no significant backlog of cases either to be heard or awaiting judgment. Sixty-two of the 72 criminal cases lodged before December were set down for hearing early in 1999. All but two civil cases whose applications for fixtures were received before 15 December have also been given fixture dates.

Membership of the Court

There were no changes to the membership of the court this year. In May 1998 Justices Keith, Blanchard and Tipping were appointed to the Privy Council. As in previous years members of the Court gave papers and public lectures to legal, university and other audiences. In 1998 the audiences included the Legal Research Foundation, the Law and Economics Association, the Asia Pacific Bar Association, the Intellectual Property Society of Australia and New Zealand, the Australasian Law Teachers Association, the University of Waikato for the Harkness Henry lecture (now given by six members or former members of the Court) and the New Zealand Institute of International Affairs.

The Judges on 1 August 1998 acting under the Judicature Amendment Act 1998 adopted procedures for assigning Judges to the Divisions and for determining appeals of sufficient significance for a full court:

Assignment of Judges to the Divisions of the Court of Appeal

The Judges of the Court of Appeal have adopted the following procedure for assignment of Judges to act as members of a criminal or civil division of the Court:

- The Court will prepare periodically a forward planning programme covering the anticipated sittings of the divisions.
- The President, acting President, or nominee, will determine which appeals are appropriate for hearing by a division comprising three members of the Court.
- Assignment to particular appeals or a particular appeal will be by the President, the acting President, or nominee, who where appropriate will consult with other members of the Court. Assignment will be with the concurrence of the Chief Justice and on a time period or case by case basis, taking into account the forward planning programme and the availability of Judges.
- The members of the Court will consult regularly to review the assignment process in the light of the ongoing workload of the divisions and the efficient dispatch of business.

Appeals of sufficient significance for Full Court

The Judges of the Court of Appeal have adopted the following procedure for determining whether a case is of sufficient significance to warrant the consideration of a Full Court:

- Practice notes will require parties to notify the Court at an appropriate stage of the proceeding if a Full Court is sought.
- Before final confirmation of a fixture the President or his nominee will assess the significance of the appeal taking into account:
  - (a) the importance of the issues, including any legal, social and general economic implications;
  - (b) whether it is appropriate to reconsider a previous decision of the Court;
  - (c) the desirability of resolving any conflicting decisions of the High Court;
  - (d) the request (if any) by a party for a Full Court hearing;
  - (e) any other relevant matters, including the availability of Judges.
- The appeal will be assessed as "suitable", "possibly suitable" or "unsuitable".
- Appeals assessed as "suitable" will be considered by the Full Court.
- Appeals assessed as "possibly suitable", and any other appeal to which (d) above applies will be referred to at least two other members, and following consultation with those members will decide (by majority) whether the appeal is or is not of sufficient significance.
- Appeals assessed as "unsuitable" will not be considered by the Full Court.
- The members of the Court will consult regularly to review the criteria, their implementation, and the general effect of the allocation to the Full Court on the overall workload of the Court.

NOTE: The Full Court will also consider references from a division of the Court made pursuant to s58(6) of the Judicature Act 1908 and appeals under s10 of the Courts Martial Appeals Act 1953.

(NZ Gazette, 24 September 1998, No 157, p3790)

Court office and accommodation

This has been a year of considerable change in the court office. Four new staff members were recruited between June and September – in the result, a complete staff turnover as from February 1997. The new structure is, however, working well and the increased emphasis on active management of cases is showing some impressive results. Last to change was the computer system : an improved operating system and some enhancements to the court database have improved the tools staff use to do their job. While the changeover was not without its difficulties, it is now feasible to consider a systematic audit and review of the court's information base, with attendant efficiencies and improvements in case management.

The new addition to accommodate the court office itself has worked well and actively contributed to its efficiency. But there is still an extreme shortage of space. One permanent Judge has substandard conditions and there is nowhere in the building to house High Court Judges sitting as appellate judges. Many court hearings have to be held in the High Court building. Library, research and conference space is inadequate and further renovations have been done to make suitable space for the new Judges' Clerks who began work at the start of 1999. The planned extensions to the building are ready to proceed once approval is given.

Practice Notes

The Practice Notes, issued in final form in 1997 for civil and criminal appeals, are now fully bedded in and are working well. In particular, the effect of Rule 10 on the processing of civil appeals has in the second half of 1998 begun to make itself felt and there are far fewer unactioned appeals before the court at the close of the year than used to be the case.

The objectives of the Notes are set out in last year's report. While most of them can be said to have been met and to have had the intended effect, the number of occasions when submissions from counsel come in after the time specified has emerged as an area of concern. The importance of getting material to judges in time for them to become familiar with the thrust and content of the case should not be overlooked, any more than the need for the written material provided to be focused and relevant.

Programme for Court sittings

In 1998 the Court sat in benches of three, five and, on one occasion, seven judges. The Judicature Amendment Act 1998 gave legislative authority for the practice of the Court in using only permanent judges when a case was of wider than usual significance and required a bench of five or more. The assistance of visiting High Court judges continued to be felt during the year. Their periods with the Court were spent sitting in divisional courts of three judges and the benefits of having the experience and perspectives of the trial court judges were much appreciated.

During 1998 the Court sat in a more complicated cycle of divisions and five-Judge courts. Criminal appeals were heard in divisions only every two months instead of the monthly cycle established in 1997. The result was a less even flow of work through the system and in the second half of 1999 the court is reverting to a monthly cycle (two weeks, five-Judge courts then two weeks, three-Judge courts, including the Criminal Appeal Division and the Civil Appeal Division).

Actual workflow, as noted above, did not fully match projections, although this was due to the lower number of appeals lodged rather than any weakness in the programme:

Five Judge cases heard	(41 civil, 12 criminal) 53	Projected for year, 60
Criminal Appeal Division	217	
Civil Appeal Division	32	

	31.12.98	**31.12.97**	**31.12.96**
Criminal Appeals awaiting hearing	115*	125	131
Civil appeals set down for hearing	55[§]	42	35

* Of the 72 Criminal Appeals filed before December 1998, nine were not ready to be allocated hearing dates.

[§] 53 of the 55 had confirmed fixtures.

The projected workload for 1999 is established and makes full use of the visiting High Court judges for the first half of the year. It is particularly useful to have this resource at this time because the two-month cycle of Criminal Appeal Divisions means that if cases cannot be fitted into the divisional cycle the lead time for setting a hearing in the permanent court becomes unacceptably long. A heavy workload clearing a minor surge in criminal appeals lodged in the last two months of 1998 is indicated, but the programme is adequate to meet this. Civil Appeal divisions were planned for the last weeks of February, April and May. Provision was also made for any urgent cases that may emerge for the attention of the Court immediately after the summer recess.

2. CASE STATISTICS

Criminal Appeals

	Heard	Ex Parte	Allowed	Dismissed
Conviction and sentence	*73	27	†29	70
Conviction	§67	38	16	87
Sentence	105	43	41	107
Solicitor-General sentence	16	0	8	8
Pre-trial	33	8	14	27
Other	10	1	1	10
Sub-total	**304**	**117**	**108**	**309**
Abandonments/No jurisdiction	57			

*Includes one case part-heard and held over until 1999

§Includes 12 cases where the appeal against sentence was allowed or was reduced.

†Includes three reserved judgments.

As indicated, the Criminal Appeal Division heard over two thirds of the criminal appeals that went to a hearing.

The following table enables comparisons with earlier years.

	Appeals or applications for leave filed	*Determined*	*Dealt with ex parte*	*Allowed*	*Dismissed/ abandoned/ no jurisdiction*
1993	550	519	151	110	405
1994	538	499	194	82	417
1995	582	606	226	125	481
1996	512	571	217	98	473
1997	508	513	157	98	415
1998	459	478	117	108	366

The number and outcomes of applications by the Solicitor-General for leave to appeal against sentence were:

	Heard	*Allowed*	*Dismissed*
1993	31	14	17
1994	16	9	7
1995	26	23	3
1996	21	16	5
1997	20	14	6
1998	16	8	8

The number and outcomes of legal aid applications were:

	Granted	*Refused*	*Total*
1993	146	231	377
1994	147	213	360
1995	141	266	407
1996	95	275	370
1997	144	188	332
1998	168	191	366

Civil Appeals

	1998	**1997**	**1996**	**1995**	**1994**	**1993**
Motions filed	305	303	305	287	302	304
Appeals set down	170	154	122	-	-	-
Appeals heard	164	160	164	181	178	181
Appeals allowed	62	58	56	50	46	66
Appeals dismissed	99	*93	117	113	119	92

* *Plus one adjourned sine die*

NOTE : The number heard does not equal the number allowed and dismissed as there was one costs hearing and two judgments reserved. In addition two cases were abandoned, three cases settled and one discontinued.

Privy Council Appeals

The following appeals were heard in 1998:

Privy Council Judgment	Parties	Result
23.3.98	Auag Resources Ltd v Waihi Mines Ltd	Dismissed
19.5.98	B (CA204/97) v Department of Social Welfare	Dismissed (petition)
27.7.98	Roussel UCLAF Australia Pty Ltd v Pharmaceutical Management Agency Ltd	Dismissed
29.10.98	Golden Bay Cement Co Ltd v Commissioner of Inland Revenue	Dismissed
29.10.98	W and L v CIR	Dismissed
2.12.98	R v Ramstead	Allowed (3:2)
19.1.99	W v W and J v Bell	Dismissed

In all but the first two cases five Judges sat in the Court of Appeal. No New Zealand Judges sat in the Privy Council hearings.

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3. MAJOR CASES

The choice of cases included here and in the appendices involves some element of subjectivity but takes account of the assessment of counsel in seeking and the court in assigning five or seven judges, reactions by those immediately involved (eg by appeal) and more generally (eg through the press or professional comment), and political or legislative reaction. (Of the 12 major cases in the 1997 Report, all but one were decided by five Judges, two were appealed, one has been reported as leading to a communication to the Human Rights Committee, and four have been followed by legislation.) Our assessment can also be tested against the (partly later) decisions of the law reporters. Only the judgments of course, and not these summaries, are authoritative.

Exemplary or punitive damages

The question before the Court in *Daniels v Thompson* [1998] 3 NZLR 22 was whether civil proceedings for exemplary damages could be brought in respect of sexual abuse when criminal proceedings have been brought or are in prospect. In three of the cases before the court the offender had been convicted of serious sexual offences sentenced to a term of imprisonment. In the remaining case the defendant had been tried, but acquitted.

The majority (Richardson P, Henry, Gault and Keith JJ) held that the claim could not succeed when, first, the acts complained of had been the subject of a conviction in a criminal court, second, where criminal proceedings had been unsuccessful and, third, where a criminal prosecution had begun or was likely.

That decision was not based on the double jeopardy prohibition in s26(2) of the New Zealand Bill of Rights Act 1990 as this applies only to criminal proceedings. The majority, like Thomas J who dissented, surveyed cases and law reform proposals from other jurisdictions and outlined the purposes and availability of exemplary damages.

The factors supporting the availability of an award were principally : the right of the victim to bring and control a civil action; the fact that the nature and conduct of a criminal trial differs from a civil action; and that an inadequate recognition of the effect on a victim could be redressed. Arguments against the award of damages included the avoidance of double punishment; the desirability of retaining protection of the criminal law for the imposition of a criminal type penalty; the recognition of the rights of victims in the criminal justice system; and the problems associated with inquiry into and taking into account a court imposed penalty. The majority judgment emphasised the role of the state in dealing with criminal conduct. Once it was accepted that the purpose of an award of exemplary damages was to punish the act complained of, then if there had been conviction and sentence for the same act, punishment had already been exacted. Similarly, where the person had been acquitted, it would be an abuse of process to allow the same issues to be relitigated for the sole purpose of exacting a punishment for their commission. The bar when criminal proceedings had begun or were in prospect followed because of the same combination of reasons of principle and policy.

Justice Thomas, while accepting that an award would be exceptional, was not prepared to impose an absolute bar on a claim for exemplary damages. In particular in the case of a convicted defendant, the defendant's criminal punishment in the criminal proceeding would need to be taken into account by the Court in determining whether an award is appropriate.

Parliament responded to the ruling by providing in the Accident Insurance Act 1998 s396 for the bringing of actions for exemplary damages and shortly afterwards the Privy Council dismissed an appeal against the decisions, stressing that the policy issues were for the New Zealand courts.

Mega firms, conflict of interest, "Chinese walls" and "cones of silence"

In *Russell McVeagh McKenzie Bartleet & Co v Tower Corp* [1998] 3 NZLR 641, Tower, which had had tax advice from Russell McVeagh, sought an order preventing the firm from acting for a company which was intending to take it over. A majority of the Court allowed the appeal against the grant of an injunction by the High Court.

A Wellington partner of Russell McVeagh was acting for Tower in a tax dispute. During the course of this retainer, the Auckland office was approached by GPG to act for it in an intended takeover of Tower. The partner concerned with GPG consulted the partner dealing with the Tower tax matter who advised that the function was specialised and narrow and there was no reason why Russell McVeagh should not act for GPG. Tower learned of the firm's involvement in GPG's takeover bid 16 months after that retainer began. Although by this time the tax dispute had been resolved and the Wellington partner was no longer acting for Tower, it sought an injunction preventing Russell McVeagh acting for GPG against Tower. Tower argued that an injunction was an appropriate remedy due to the conflict of interest created by allowing partners within a firm to accept instructions to act for new or existing clients where accepting those instructions potentially conflicts with the duty the firm owes to existing clients. Tower argued that Russell McVeagh had breached their fiduciary duty of loyalty and that there was a risk that the firm could have acquired confidential information about Tower which could be disclosed to GPG contrary to fiduciary duty.

The majority (Richardson P, Gault, Henry and Blanchard JJ) held that no injunction should issue. The basis of the claim was the existence of concurrent retainers from separate clients where interests may be in conflict. But the conduct which it was sought to restrain had ceased and in the circumstances there was no likelihood of re-occurrence. The test to apply was whether there was objectively a real risk that Tower's confidential information material to GPG's takeover interests might be disclosed. The tax matter was distinct from the takeover matter with sufficient mechanisms in place to protect the disclosure of confidential information. The limits of the New Zealand legal community, the limited number of specialists within a particular field and the right of Russell McVeagh to offer and to GPG to seek specialist legal services were mentioned.

Concurring, Blanchard J said that the duty of loyalty depends upon the scope of the

retainer and can arise only from the lawyer's knowledge of the client and the client's affairs. If that knowledge is and will be limited there may be no reasonable possibility of detrimental disclosure or misuse by the lawyer . If there is in fact no such possibility, the client will have no good reason to raise objection. The client's trust and confidence are not being abused.

Justice Thomas, dissenting, emphasised the importance of the client's right to be aware of potential conflict of interests. In his view, Russell McVeagh had an obligation to inform Tower of its intention to act for GPG. That obligation arose out of the duty of loyalty, trust and confidence which are integral to the fiduciary duty between solicitor and client. It was under a duty not to disclose information relating to Tower. To avoid a breach of that duty, Russell McVeagh was required to take all reasonable steps to avoid creating a risk that the information would be disclosed. The onus was on the firm to negate the inference that a risk of disclosure remained and it had failed to do that.

Political Speech and the Media

Lange v Atkinson [1998] 3 NZLR 424 concerned the application in defamation proceedings in respect of political speech of the defence of qualified privilege. The appellant, former Prime Minister, Mr David Lange, applied to strike out the respondents' defence that certain allegedly defamatory statements were protected by the defences of political expression and qualified privilege. The High Court had ordered that the two defences be recast into one, that of qualified privilege. The statements in question were political observations which reflected on Mr Lange's actions and qualities. Richardson P, Henry, Keith and Blanchard JJ in a joint judgment also refused to strike out the defence and Tipping J delivered a concurring judgment.

The Court held that the defence of qualified privilege applies to generally published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect their capacity (including their personal ability and willingness) to meet their public responsibilities. The determination of the matters that bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than private concern. Qualified privilege is founded in public interest; the courts and the legislature have recognised that "the common convenience and welfare of society" may permit a person to make defamatory, untrue statements about another. The defence of qualified privilege is not an area of law controlled and regulated by precise rules. A strict concept of reciprocity was not supported by the broad principle which underlies the defence. The defendant must prove that the occasion is one of qualified privilege, but the plaintiff can defeat the privilege by proving that the defendant was motivated by ill will towards the defendant or otherwise took improper advantage of the occasion of publication. Carelessness does not defeat the privilege.

The Court gave leave to appeal and the hearings in the Privy Council in this case and in the House of Lords in *Reynolds v Times Newspapers Ltd* [1998] 3 All ER 961 (in which the English Court of Appeal would "not unreservedly and fully adopt" this Court's analysis) are set down for late June.

Redundancy and the Employment Contracts Act 1991

In *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 the Court overruled *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158 relating to the rights of former employees to redundancy. It was the only case in 1998 heard by seven permanent Judges.

Three reasons led the Court to reconsider *Brighouse* : it was difficult to discern a single ratio; two of the judgments left the Employment Court with considerable flexibility to develop a concept of unjustifiable dismissal and later decisions in that Court demonstrated how far it felt entitled to develop it; and, given that redundancy is an important area of law, it was imperative that employees and employers be able to plan with confidence.

The respondent was a senior manager employed by the appellant. The appellant made a number of employees redundant of whom the respondent was one of the most senior. There was no formal contract between the parties and no provision for redundancy pay. The Employment Court found that the redundancy was genuine but had been handled in an unfair manner and relying on *Brighouse*, awarded damages for the loss of employment as well as for humiliation and stress.

The Court held that the remedies provided for by the Employment Contracts Act were directed to what was lost through the particular breach or failure. In the present case the personal grievance was not that the employment was terminated but that the manner of implementation was procedurally unfair. (The Court had earlier emphasised that the personal grievance provisions in the Act were part of the overall balance reflecting the special characteristics of employment contracts and under which employees and employers have mutual obligations of confidence, trust and fair dealing.) There was no jurisdiction in the Employment Tribunal or the Employment Court to impose compensation for redundancy itself.

In relation to damages the Court was not prepared to allow an award of $50,000 for the employee's humiliation. The Employment Court had failed to focus on the trauma and stress caused by the manner in which the redundancy was carried out, as distinct from the effects of the loss of the job. The Judge had to be taken as having set the award to cover the trauma from the loss of the job. Thus an award of $15,000 was substituted, with Thomas J dissenting and holding that an amount between $25,000-$30,000 was more appropriate.

The SIS and the power of entry

Choudry v Attorney-General CA 217/98, 9 December 1998, arose from an investigation by the New Zealand Security Intelligence Service into the activities of Mr Choudry, who described himself as a known political activist. He was involved in a GATT Watchdog Conference at the same time as an APEC Ministerial meeting. Shortly before that meeting two SIS officers entered premises of which Mr Choudry was tenant and occupier.

The first issue before the Court was whether the terms of s4A of the New Zealand Security Intelligence Service Act 1969 permitted such an entry. The section provided for the issue of interception warrants to SIS officers, on the authority of the Minister in charge (invariably the Prime Minister), for the "interception or seizure of any communication". The Act did not expressly provide for entry into premises; any such power would need to be implicit in the scheme of the legislation. The Court, allowing the plaintiff's appeal on this point, ruled that no such power should be read in, holding that "[t]here is nothing in the carefully focussed statutory language and scheme to justify going behind that narrow grant of invasive powers". At common law every invasion of private property is a trespass and any intended erosion of the protection of the common law should be spelt out in the plainest terms as has been done in numerous other statutes. The Court based that conclusion on the natural and ordinary meaning of the words, the history of the legislation (especially what was within the contemplation of the Chief Ombudsman, Sir Guy Powles, in proposing it), the standard legislative forms for conferring power of entry, the existence of express provisions in the comparable Australian, Canadian and United Kingdom legislation, and the fundamental values of privacy reflected in s21 of the Bill of Rights.

The second issue concerned the Minister's claim of public interest immunity in respect of 70 documents sought by the Appellant. The High Court had made an order for judicial inspection. While the Courts will pay deference to a Minister's certificate they are not bound by it, *Corbett v Social Security Commission* [1962] NZLR 878 and later cases. The Court's function is to balance the public interest in confidentiality against the public interest in the effective administration of justice. When the claim is based upon national security there is a particularly strong argument for judicial deference but two factors caused the Court to hesitate before deciding whether to defer. The first was the wide variety of meanings of "security" or "national security" and the second the limited information given in the Minister's certificate. The first was demonstrated by the Statute book. On the second, some precision in the drafting of the certificate is required because the credibility of effective judicial supervision is dependent on a public appreciation that the competing interests are in fact being judicially balanced. In this case the certificate was framed in such broad language that the Court could not effectively discharge its responsibilities; the Minister was therefore invited to file an amended certificate.

The Crown's responses to the judgment were to introduce legislation authorising entry (but the warrants are now to be issued by the Minister and a retired High Court Judge jointly), to seek leave to appeal and to file an amended certificate. A further Bill would change the definition of "security".

Judicial Review and Commissions of Inquiry

In *Peters v Davison (No 3)* (1998) 18 NZTC 14,027, the Court allowed an appeal by Mr Peters against a judgment striking out his judicial review proceedings seeking to challenge parts of the *Winebox* report.

The central issue in the case was the extent of the power of the Court to review reports of

commissions of inquiry. Counsel for the former Commissioner and the interested corporates invited the Court to confine review to breaches of natural justice and errors taking the commission outside its terms of reference. The extensive case law on review of inquiries that were in progress should not lead the Court to extend the grounds for review of the final report because while an inquiry is in progress, there is still a body, process and task to be affected by the Court's ruling. This is not, however, true of an inquiry that has completed its task and reported to the Governor-General.

The judgment of Richardson P, Henry and Keith JJ surveyed Commonwealth approaches to review of commissions of inquiry. In holding that review could proceed for error of law, the judgment observed that error of law is a ground of review in and of itself; it is not necessary that the error was one that caused the tribunal or court to go beyond its jurisdiction. There is a legitimate public interest in the findings of commissions of inquiry being properly based in law if the purposes of the report are to be achieved. Damage to reputation has played a central role in a number of cases where review of commissions has been sought. A practical remedy for damage to reputation can be provided by a declaration that the report or some part of it is procedurally or legally flawed and that that flaw has led to damage to reputation. Furthermore, the courts as a matter of fundamental constitutional principle have the power to see that public authorities do not make material errors of law. If the alleged error of law materially affects a matter of substance relating to a finding on one of the terms of reference it is in general reviewable. The reason for exercising the power of review is the stronger if that error damages the reputation of any person directly concerned in the inquiry.

In the present case it was arguable that the Commissioner had made material errors of law in his approach to the disclosure obligations under s301 of the Income Tax Act and in his construction of the Magnum transaction.

Thomas and Tipping JJ delivered concurring judgments. Both discussed the correct approach to the judicial review of commissions of inquiry, finding that errors of law, if established, would mean that the Commissioner had acted *ultra vires*.

Legal aid applications

The process followed by the Registrar of the Court of Appeal in considering applications for legal aid was addressed in *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385. Mr Nicholls had been convicted of murder and sentenced to life imprisonment. When he lodged an appeal against conviction, the deputy registrar of the Court of Appeal declined to grant legal aid. The decision was reviewed by a Judge of the Court, who confirmed the decision. A co-plaintiff, Mr Tikitiki, had been found guilty of sexual violation by rape by a jury, and sentenced to eight years' imprisonment. His application for legal aid was also declined. The plaintiffs challenged the registry decisions and Mr Nicholls also challenged the review of the Judge. The main issues were the interpretation of s7 of the Legal Services Act and in particular the meaning of "the interests of justice", whether the registrar's decision is susceptible to judicial review, whether the Judge's decision is susceptible to judicial review, and whether there were reviewable errors.

The applications for judicial review, which had been removed into the Court of Appeal, were dismissed by a majority. The Chief Justice stated that in order to confirm New Zealand's international obligations, any domestic legislation on the subject should make provision for legal aid for criminal appeals. In this context, s7 goes no further than to confirm New Zealand's commitment to the International Covenant on Civil and Political Rights, and as such, it should be read in the context of the Covenant and relevant decisions. However, s7 requires a weighing or balancing exercise between the consequences at stake for the applicant and the merits of the appeal, a process that will vary from case to case. Regard must be had to the merits but the extent to which they are taken into account is a matter of weight which cannot be examined on judicial review.

The Chief Justice also concluded that Parliament cannot have intended the decision of the registrar on the merits to be susceptible to judicial review, given that the procedure is streamlined, and that there is a requirement for consultation with a Judge of the Court. Moreover, the provision for review by a Judge of the Court indicates that Parliament cannot have intended that the registrar's decision also be subject to judicial review by a Judge necessarily sitting at a lower level in the hierarchy than the Judge consulted by the registrar. However, he was prepared to allow that the decision of the registrar could be susceptible to judicial review to a limited extent, namely that the decision was ultra vires, on the ground that the decision was not that of the deputy registrar, or on the basis that the required consultation was not carried out. However, the arguments of the applicants on these grounds lacked substance. When assessing the susceptibility of the Judge's decision to judicial review, he dismissed the applicants' contention that the review should be exercised by means of a hearing. Parliament cannot have intended to impose such an elaborate process that would necessarily delay the disposal of appeals, to the detriment of those involved. The jurisdiction assigned to the reviewing Judge was conferred upon such Judges in their judicial capacity. A decision of a superior Court Judge acting in the capacity of his or her office is not susceptible to judicial review. It followed that the applicants could not succeed on this ground. The procedure by which three judges considered the application was an added safeguard for the applicant which did not invalidate the procedure in itself.

Justice Tipping agreed that the appeal be dismissed. He stated that there is no capacity in the High Court to review a decision of the registrar of the Court of Appeal on any question arising under section 7(1)(a) following consultation with a Judge under section 15. Outside of this framework, the decision of the registrar would be reviewable in the High Court, although the discretion to review would probably not be exercised if the applicant had not exercised their s16 rights of review first, as Mr Tikitiki had not. If there had been errors in the decision of the registrar, the decision of the Judge on review would cure those errors, since the review is by way of rehearing.

Justice Smellie dissented, holding that the decisions of the registrar made under ss7 and 15 are subject to judicial review. However, he did agree that the decision on review by a Judge of the Court was not subject to judicial review. He concluded that the internal arrangements put in place by the Judges of the Court for dealing with legal aid applications work against the scheme of the Act. They have the appearance, if not the reality, of shifting the decision-making role away from the registrar (where Parliament

placed it) to three Judges of the Court. Applicants for criminal legal aid are thereby effectively denied a "determination" by the registrar since rarely, if ever, would a registrar gainsay the recommendation of three Judges as to whether or not legal aid should be granted. Therefore, since the consultation required by the Act had not taken place, there were sufficient grounds for review. Consultation with one judge is all that is necessary, and the opinion of the Judge on the merits of the case should not decide the issue. Justice Smellie would quash the decision of the deputy registrar and order the registrar to reconsider the application in accordance with the law.

Professional privilege and counselling notes

In *M v L* (CA 247/98, 15 October 1998), the Court explored the rights of defendants to inspect notes and records made by a sexual abuse counsellor in the course of a professional counsellor/client relationship. The plaintiffs, who were seeking exemplary damages against a teacher, who had been imprisoned for the actions in issue in the civil proceeding, and various school authorities, appealed from a High Court ruling that such notes were not privileged and should be produced for inspection by the defendants.

The issues were (1) whether counselling notes were protected by a class privilege, (2) if not, whether there was a general discretionary power to grant a privilege and, if so, whether it should be applied, and (3) the effects of ss32 and 35 of the Evidence Amendment Act (No 2) 1980 in the present circumstances.

The Court undertook a general survey of the discovery and inspection process. It noted that privileges are broadly of two kinds: class privilege, covering all documents within the defined class (for example, legal professional privilege) and irrespective of the contents of the particular document, and contents privilege, for documents not attracting a class privilege. A consideration of contents privilege involves an individual balancing exercise of the importance of the content as opposed to preserving confidentiality. The rationale behind both privileges is the public interest.

The Court, agreeing with the High Court, rejected the appellant's claim that a class privilege applied to counselling notes. The recognition or creation of a common law class privilege for counselling notes would be to move sharply against the tide of recent legal history and legislative policy. In line with a deliberate policy choice when a 1977 law reform report was implemented in the Evidence Amendment Act (No 2) 1980, no new class privilege has been created in New Zealand since then.

On content privilege, the Court held that s35 of the 1980 Act does not directly cover the inspection/discovery stage, as it is aimed at the production of documents by witnesses not parties. However, its provisions are likely to be of assistance by analogy when the Court is considering its discretionary power whether to order a document to be produced for inspection. The Court acknowledged that, although individual inspection by a Judge may be an onerous task, there is no satisfactory alternative. It will usually, if not always, be necessary for the Judge to inspect the documents. The consequence of the High Court's order was that some, perhaps all, of the counsellor's notes may not properly have been

the subject of the order for production and the matter was remitted to the High Court for reconsideration. Notes prepared by a doctor and a clinical psychologist were however protected by s32.

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At this stage in the report, an earlier author would have fashioned something out of cones of silence and Jade(stadium), Apec and Chinese walls, and Sir Guy Powles and Areopagitica. But we forbore.

4. SOME RECURRING CRIMINAL ISSUES

In 1998 the Court allowed 35 appeals against conviction alone. That is to be related to the total of about 2,000 jury trials.

In a small number of cases administrative deficiencies complicated the appeal process : the accidental loss of the summing up (*R v Hooker* [1998] 3 NZLR 562 – see also Appendix 1, p3) or the failure to keep an adequate record of the trial in other respects, an obligation stated in the Crimes Act 1961 s353(3) and (8) (*R v Walwyn* CA6/98, 15 June 1998). In two other cases the appeals were allowed for what were seen as errors of law in the ruling or judgment below (*R v Wilkinson* [1999] 1 NZLR 403 and *Sellers v Maritime Safety Inspector* CA104/98, 5 November 1998, both in the appendices pp2 and 23). In two cases the Court considered there were real problems with the evidential foundation for the conviction (*R v Bradley* CA368/97, 25 February 1998 and *Walwyn* above – where there were in addition problems with the summing up). In another case the availability of fresh evidence from a co-accused was the basis for ordering a new trial, *R v Gilbertson* CA 274/97 9 April 1998. That leaves 29 cases in which errors occurring in the course of the trial led to a successful appeal. They include two cases where the District Court did not have jurisdiction and the trials were nullities, *R v L,* CA71/98, 22 June 1998 and *R v O* [1999] 1 NZLR 326. Most of the remaining cases are mentioned below. Some appear in appendix 1 and some others where the appeal failed are included here.

Representative changes

In *R v P* [1998] 3 NZLR 587 the appellant was convicted of sexual violation. The indictment contained one representative charge of rape in relation to a one week period during which six distinct incidents were alleged and were the subject of evidence. The indictment should have contained six specific counts of rape so that each incident could be addressed as an individual event. Because the jury did not have to consider individual complaints the appellant was deprived of his right to have each allegation tested in the criminal process. As a consequence, the verdict may not reflect a unanimous view that any particular rape occurred and a new trial was ordered. See also *R v Moles* CA67/98, 2 June 1998.

Comment by prosecutor on accused's failure to give evidence

The prohibition in s366(1) of the Crimes Act is absolute. A breach which was not the subject of any comment by the Judge led to a successful appeal in *R v Ngatai* [1999] 1 NZLR 446. See also *R v Thomas* CA305/98, 15 December 1998, for uncorrected prosecutorial misconduct.

Prejudice and juries

In *R v Wickcliffe* CA 480/97, 9 September 1998, the Court by a majority quashed the appellant's conviction for murder and ordered a re-trial. The trial Judge had erred in declining to discharge the jury following the broadcast of a TV news programme about the appellant. Six jurors had seen the programme and the trial Judge directed the jury to put aside any information they had heard about the appellant outside of the courtroom. The applicable test was that where there would be a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury cannot discharge its task impartially, the Judge should discharge the jury. See also *R v Morris* CA89/98 11 November 1998.

Previous convictions

In one trial the prejudicial effect of allowing cross-examination on numerous previous convictions heavily outweighed its probative significance, *R v McC* CA19/98, 23 April 1998.

Summing up

• *RIGHT TO SILENCE*

The importance of intervening to prevent continuance of a breach by the prosecutor of the accused's right to silence at the earliest possible stage and in summing up was emphasised in *R v Fulton* CA 280/96, 7 April 1998. The Court noted that the Judge must explain that the accused's failure to provide any explanation when first apprehended is an exercise of the accused's right to silence and no adverse inference should be drawn. It also stressed the responsibility of the prosecutor. The Court applied the proviso.

• *REASONABLE DOUBT MEANS WHAT IT SAYS*

In *R v Manhaas* CA 228/98, 3 September 1998, the Court emphasised that the New Zealand practice is that little should be said beyond a reference to a doubt which is reasonable in the circumstances, of which the jury is the judge. The direction in *Manhaas* had been given in the following terms:

> The law is that the Crown must prove each count beyond reasonable doubt before you may bring in a verdict of guilty on that count. Reasonable doubt means what it says. It is not necessary that you be satisfied beyond all reasonable doubt to the point of mathematical

> certainty. That, as you will understand, is usually impossible in judging human events. Neither does it mean that you can seize upon some insubstantial, weak or thin doubt to avoid having to find the accused guilty.

In accepting the contention that there had been a misdirection and allowing the appeal, the Court noted the words "insubstantial, weak or thin" were capable of elastic meaning. It said that although a reasonable doubt was frequently contrasted with a vague or fanciful doubt reference to such concepts was not essential. The conventional New Zealand practice was to say little beyond the statement that a reasonable doubt meant a doubt which was reasonable in the circumstances, of which the jury was the judge. The Court pointed out that the concepts that were not clearly outside what is reasonable eroded a fundamental principle of criminal responsibility:

> Although the Judge no doubt intended to convey the flimsiness of a vague or fanciful doubt, we are not confident that the terms he used clearly conveyed that meaning. We are not persuaded that an "insubstantial, weak or thin doubt" is necessarily one which is not reasonable.

• *WRITTEN GUIDES CAN BE HELPFUL*

In *R v Tuhoro* (1998) 15 CRNZ 568, the Court noted that the summing up in cases involving secondary parties to homicide often required complex concepts to be put to the jury. The Court encouraged the provision of a written guide setting out the elements of the offence for the jury in cases like the present. "The written summary … set out the elements with admirable clarity."

• *CONSENT IN RAPE CASES*

In *R v Herbert* CA 81/98, 13 August 1998, the trial Judge in a rape case failed to draw specific attention to the fact that absence of consent was being postulated in the face of expressions of consent with no evidence of coercion by the accused. The Judge also incorrectly directed the jury in relation to the alternative counts under s134(1) by stating that a person aged between twelve and sixteen is deemed to be unable to appreciate the significance or quality of the sexual acts. In addition , there was insufficient evidence for the jury to be satisfied beyond reasonable doubt that the accused did not believe on reasonable grounds that the complainant was consenting.

In *R v Ibrahim* CA 20/98, 4 May 1998, failure to provide the jury with assistance on the question of consent, failure to instruct the jury that, before returning a verdict of guilty, the jury must be satisfied of guilt on at least one of the incidents (there were two incidents of indecent assault on the one indictment), as well as the failure to give the

standard direction about lies, led to allowing the appeal against conviction.

• *EXPERT EVIDENCE*

In *R v Flaws* CA 16/98, 20 May 1998, the appellant and his partner were in a car accident in which the appellant's partner died. The appellant was subsequently charged with manslaughter and at issue was whether the appellant was the driver. At trial, counsel relied on expert testimony to determine where the appellant was seated. In summing up the Judge made no reference about how the jury should deal with expert evidence. This Court held that it would be generally appropriate to instruct a jury that expert witnesses are permitted to express their opinions and beliefs on a subject which is beyond the ordinary experience of jurors. The jury should also be instructed that to have probative value, expert opinion must be based on a properly established evidential foundation and the jury is not bound to accept the expert's opinion.

In *R v Beard* CA 135/98, 17 December 1998, counsel for the appellant (charged with various sexual offences) submitted that evidence from an interviewer should not have been admitted, as the interviewer was not an expert of the kind defined in section 23G of the Evidence Act 1908. The Court noted that s23G did not represent an exclusive code. It did not prevent properly qualified persons from giving evidence of the kind described in the section. The Court acknowledged that the occasion for allowing the admission of evidence other than in accordance with the section would be rare and where evidence is admitted outside the scope of s23G, the witness must have appropriate qualifications and the backing of expert opinion for his or her views.

• *SIMILAR FACT EVIDENCE*

When ruling on similar fact evidence, the Judge should identify how it may be used probatively. Once it is admitted, the trial Judge must guide the jury on how it may and may not be used. The jury must be told of the purpose for which the evidence may be used, and how they should use the evidence and be warned that any assumption of guilt based on previous conduct without examining the pattern or link allegedly created could be wrong. The focus is on what sets evidence supporting a logical inference probative of guilt apart from evidence which simply indicates bad character. See *R v M* CA 461/97, 7 July 1998 and *R v P* CA465/97, 2 April 1998 for successful appeals.

• *PUTTING THE DEFENCE CASE*

It is important in the summing up to ensure that the defence case is put to the jury as fully and objectively as possible. See *R v Colquhoun* CA494/97, 8 June 1998, *R v B* CA 265/98, 21 December 1998 and *R v Adamson* CA 207/98, 10 November 1998. In all cases, appeals against conviction were allowed and new trials ordered. In *R v Beard* CA135/98, 17 December 1998, (mentioned above) a further element was the inadequacy of counsel's conduct of the defence.

• *JURY DELIBERATION – TIME LIMITS*

From time to time the jury will raise the question of what would happen should they fail to reach a unanimous decision. In *R v Furneyvall* CA 246/98, 25 November 1998, the Court said that when a such a question is raised during the initial stages of deliberation, it is wise to avoid any reference to a time frame .

• *JURY REQUESTS FOR LENIENCY*

In *R v Sharplin* (1997) 14 CRNZ 682 the jury asked whether they could find the accused guilty with a request for leniency. The jury was simply advised that they may return such a verdict which they did two minutes later. Following English authority, the Court allowed the appeal, saying that in circumstances in which the jury has indicated uncertainty about its processes and inquired about the approach which may be taken on sentencing, the Judge ought to go beyond merely confirming that the jury may recommend leniency. He ought to have told them that they must try the case on the evidence and leave the question of penalty to the Judge.

If that practice is not followed there is room for anxiety about whether the jury's processes may have been compromised by irrelevantly taking into account the likelihood of a lenient sentence when considering whether guilt is proven to the requisite standard.

The same issue arose recently in *R v Higgs*, CA 420/98,11 March 1999. In this case the Judge was asked whether it was possible for the forewoman to make a comment on behalf of the jury. The Judge responded by telling the jury that they had to try the case on the evidence, in accordance with their oath. If the verdict was one of guilty they had to leave the penalty to the Judge. Finally, he told them of their right to add a representation by means of a rider, to which the Judge would give such attention as he thought proper; but in the same sentence he said he made no assumption as to the verdict they would return, nor was the term "leniency" used. This Court held that the Judge's answer properly addressed the risks involved when questions of this kind are asked. The appeal was dismissed.

Both *Sharplin* and *Higgs* illustrate the point that a Judge must take special care in responding, not to make an assumption that the ultimate verdict will be one of guilty, in case the Judge is taken as inviting or supporting that outcome. Thus, in *Higgs*, the Judge took care to emphasise to the jury that they had to reach a verdict on the evidence, and in accordance with their oath.

Sentencing

In *R v N* CA 499/97, 21 April 1998, the 15 year old respondent pleaded guilty to seven representative charges of rape and indecent assault. He had undergone treatment while awaiting trial and had made good progress. He received a two year suspended sentence, conditional on attending counselling. This Court held that a sentence of two years was too low. Although rehabilitation is a legitimate objective of sentencing it cannot be pursued in disregard of the statutory framework. The interests of the victim and the effect of the sentence on the victim's recovery and rehabilitation are also valid considerations. On a Solicitor-General's appeal, the Court imposed a sentence of 3½ years imprisonment.

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5. SOME RECURRING CIVIL ISSUES

1. Leave to appeal – second appeals

We recall again that the standard for the grant of leave is a high one, in recognition of the fact that the matters in dispute have already been the subject of two full hearings : see the reference in last year's report to *Waller v Hider* [1998] 1 NZLR 142. Not every alleged error of law is of sufficient importance either for the parties or generally to justify a further hearing.

Among the second appeals before the Court in 1998 was *Arnold v Livestock Traders International Pty Ltd* CA105/98, 10 December 1998, in which the Judge in granting leave in terms of s67 of the Judicature Act 1908 referred to the well established principles stated as long ago as 1923 by Salmond J and recalled and applied in *Waller v Hider*. He indicated general agreement with counsel resisting the grant of leave that the principles did not indicate that leave should be given, but (1) he had disagreed with the interpretation of a contract given by an experienced District Court Judge, and (2) it was unsatisfactory from the point of view of the losing party that the case should be left in that state when final resolution could be achieved by a short appeal which both could afford. This Court said that these were not legitimate reasons for granting leave. The result had been that the parties had suffered the expense and delay of a further (unsuccessful) appeal and the Court had been required to determine an appeal which should not have been brought.

The issue also arises of course with applications for leave in respect of matters commencing with interlocutory rulings by Masters and in other jurisdictions, as well as in the criminal jurisdiction.

2. The form and style of judgments

These comments are offered tentatively and constructively. The indication from the meetings of the Executive Judges is that advice is sought on matters where our experience might be helpful.

Styles of judgment writing, of course, vary greatly. We must always have regard to our audiences – the losing party, their advisers, the other parties and their advisers, others directly or indirectly affected, those with responsibility for the area of law, the profession including the academics, the press, the general public – as well as appeal courts. So far as the first category of audience is concerned – and to return to crime for a moment – last year's comment on sentencing notes might have been more explicit about the value to the person being sentenced of a fair and full explanation of the reasons.

Some formal matters can help. In major cases a summary at the outset or end of the judgment is not only of value to the various audiences but can also be a considerable discipline in terms of a better understanding of what is written in the rest of the draft. That double value may also be provided by headings and tables of contents, and by clear statements of the issues and conclusions on them.

Those formal and structural devices may also help control any tendency to set out a summary of, and lengthy extracts from, many cases. They may lead to a greater emphasis on the principles or rules to be found in those cases (or just one or two of them). Similarly, lengthy quotations from documents or evidence should be carefully justified.

A more general proposition is of course that judgments like other legal and official writing should be as understandable and accessible as practicable, and their expression and content as simple as practicable. The *Cabinet Office Manual* gives indirect endorsement to George Orwell's *Politics and the English Language*:

(i) Never use a metaphor, simile or other figure of speech which you are used to seeing in print.

(ii) Never use a long word where a short one will do.

(iii) If it is possible to cut a word out, always cut it out.

(iv) Never use the passive when you can use the active.

(v) Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.

(vi) Break any of these rules sooner than say anything outright barbarous.

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APPENDICES

6. IMPORTANT CRIMINAL CASES

Substantive matters

Electronic transfer and theft

In *R v Wilkinson* [1999] 1 NZLR 403 the issue was whether the appellant had obtained anything capable of being stolen for the purposes of charges of false pretences under s217 of the Crimes Act 1961.

The case demonstrated that certain dishonest actions which constitute the offences of theft or obtaining by false pretences if they result in the obtaining of payment by cash are not those offences if the mode of payment employed is a direct transfer of funds from one bank account to another. (They might of course fall within s229A.) This is because for a thing to be "capable of being stolen" it must have two characteristics: it must be the property of a person and it must be movable, or able to be movable. The majority, agreeing with the House of Lords in *R v Preddy* [1996] AC 815, held that the entitlement of a financier to draw on a bank account could not be described as property. Instead, what the appellant obtained in the present case was a right to demand money from his or her own bank. There was no transfer of rights of property.

The Court also examined the definition of the term "movable" noting that the definition harks back to the common law definition of theft and the requirement of asportation. A chose in action, such as a credit in a statement of account, was not capable of being stolen and things larcenable at common law are said to require the quality of being tangible, being movable, having value and having an owner. Accordingly, the appeal was allowed and the convictions overturned.

Justice Thomas expressed misgivings about the reasoning in *R v Preddy* because it was inhibited by undue regard to the technicalities of the transfer process of the banks. The reality was that the transfer of money through banks involved the transfer of property. He agreed with the majority that a chose in action is not a "movable" as the word is used in s217.

The Court said that legislative intervention may well be desirable and the Law Commission has recently released a report, *Dishonestly Procuring Valuable Benefits,* suggesting an amendment to the Crimes Act to fill the gap exposed by *R v Wilkinson.*

Maori fishing rights

In *McRitchie v Taranaki Fish and Game Council* CA 184/98, 24 November 1998, the appellant, a member of the Ngati Hine, Ngati Ruawai and Ngati Waikarapa hapu from the Mangawhero River which is within the rohe over which these hapu have manawhenua,

challenged a High Court decision that he was not entitled to invoke as a defence to fishing for trout in the river without a licence that he was exercising a Maori fishing right.

The majority emphasised that this was not an appeal on fact. It was confined to questions of law.

Legislation had always controlled the taking of trout and fishing for trout could not be regarded as the exercise of an existing fishing right. It was unnecessary to examine the nature and scope of Maori customary rights and Treaty of Waitangi rights and their inter-relationship. Accordingly, while the majority acknowledged that the facts of a particular case might establish that a customary fishing right was a right to fish for food in a particular fishery, not confined to a particular species, but to all the fish present in the waters, regardless of whether they were migratory or introduced, in the result that question did not require decision.

A review of the legislation, beginning with the introduction of trout, from the Salmon and Trout Act 1867 to the Conservation Act 1987, demonstrated beyond doubt that the appellant and his hapu did not have a Maori fishing right to take trout in the Mangawhero River.

Justice Thomas disagreed. In his view the majority had turned directly to the legislation enacted by Parliament without first discussing the question of whether the fishing rights of the appellant's hapu in the Mangawhero River include the right to take trout from the river. He focused on the issue of the hapu's mana and rangatiratanga or control over the river. He emphasised that when the issue is perceived in terms of control, the question of the particular species of fish in the river or when any particular species was introduced ceases to be significant in defining the nature or extent of the right. However, since the issue had not come before the Court in these terms, he declined to answer the first issue and (assuming the hapu have Maori fishing rights) focused on the second issue whether Parliament had extinguished or curtailed Maori fishing rights. He held that in order to extinguish or curtail Maori fishing rights, the Legislature must not only direct its attention to the question of extinguishing or curtailing that right but must also deliberately determine that it should be curtailed or extinguished. It was not permissible to conclude as a matter of ordinary statutory interpretation that Parliament intended to curtail Maori fishing rights by enacting an apparently exclusive regime for trout.

"Sales" of drugs between partners

In *R v Hooker*[1998] 3 NZLR 562 (also mentioned at the beginning of ch 4) a conviction for possessing cannabis for sale was upset because when the parties who owed shares in an undivided quantity of drugs divided the cannabis according to their shares they were supplying to each other but they were not doing that for sale.

Conspiring to supply drugs to oneself

R v Lang (1998) 16 CRNZ 68 was a successful appeal from conviction for conspiring to supply one tablet of LSD. The issue was whether the defendant could conspire to supply a drug to herself.

The Court pointed out two problems with that proposition : first, every person in possession of a controlled drug having been supplied by another person would appear to be guilty of conspiracy to supply, and second, the use of the words "to any other person" in s 6(1)(c) of the Misuse of Drugs Act seems to prohibit such an interpretation. The Court expressed serious reservations about endorsing the proposition that the appellant could properly be convicted of conspiracy to supply herself, particularly when the conspiracy does not form part of any wider agreement involving other persons, nor embracing any transactions other than the one intended for her personal use.

Procedural and evidentiary matters

Alibi

The appellant in *R v Hines* CA 235/98, 16 November 1998, was convicted of wounding with intent to cause grievous bodily harm. An alibi notice had been served but no evidence was given at trial by the appellant or on his behalf. There was only one identification witness, who testified that the alibi was false.

The trial Judge directed the jury that if they concluded that the appellant had attempted to pervert the course of justice, they could take that into account as providing some support for the Crown's case. The Court held that this was consistent with *R v Turnbull* [1977] 1 QB 224 which stated that it is only where the jury is satisfied that the sole reason for the fabrication was to deceive them, and there is no other explanation for it being put forward, can fabrication provide any support for identification evidence. The trial Judge did not expressly warn the jury to exclude all other possible explanations. The jury was instructed not to simply conclude that an attempt to construct an alibi meant the appellant was guilty and the Crown must prove the case. The Court held that the direction though cryptic was sufficient. It also upheld the direction that if the jury decided the evidence pointed to guilt, they could draw an inference adverse to the appellant from his refraining to give evidence. The only adverse inference available was that the identification evidence, being unanswered, could be accepted.

This did not reverse the onus of proof as the Judge informed the jury that the inference was only one factor in deciding whether the Crown had proved its case. In this case the trial Judge had directed as follows:

> If there has been given at trial evidence that points to the guilt of the accused and the accused has elected to refrain from giving evidence, you may from that, draw an inference adverse to the accused.

The Court said that generally the criticism made of this direction would be fatal, in that it did not give any explanation of what inference adverse to the accused might be drawn. This would leave a jury with the available assumption that it is the inference of guilt, which would be wrong. The available inference should be clearly identified. Here the available inference was that the credibility of the essential Crown witness as to identity was enhanced. Because, on the facts, this was the only possible adverse inference, the Court decided there had been no miscarriage of justice.

Child witnesses

In *R v R* CA 130/98, 24 September 1998, R appealed unsuccessfully from conviction for the rape of his youngest daughter on grounds including a challenge to the conduct of her videotaped interview. The Court set out the factors put forward by counsel as likely to undermine the reliability of child witnesses. The Court also discussed the role of the judge and jury in this area.

On the issue of the extent to which the interviewer should test the reliability of disclosure the Court commented that

> The role of the interviewer is to receive a record of the disclosure of the child. Any form of cross-examination would be counter-productive. Any testing of the evidence short of challenge to it doubtless would be insufficient to avoid subsequent criticism of not going far enough. As presently informed, and, without the assistance of evidence, we are not convinced that the evidence of child interviews is to be rejected as unreliable on the ground that the interviewer did not test alternative hypotheses as the disclosure unfolded. We do not find any such requirement in the statutory authority for the receipt of evidence in this form.

In *R v T* [1998] 2 NZLR 257, an indecent assault case, the Court was asked to decide four issues, namely: whether the child witnesses understood the requirement to tell the truth; whether the jury should have been directed to disregard the prosecutor's contention that the complainants had no reason to lie; whether a mistake in the similar fact direction in the Judge's summing up provided grounds to set aside the verdict; and finally, whether evidence relating to the discovery of the offences fell into the category of recent complaint, and if so whether the jury should have been directed on this point.

On the first matter of competence what was central was the child's understanding of truth and of giving a promise, not the ability to recite definitions. In this case, nothing in the transcript indicated any reason for concern.

On the second matter, the theory of the defence at trial was that the complainants had fabricated the allegations, and the question was put to the jury by the prosecution whether the complainants had a credible reason to lie. The accused had also been cross-examined as to whether he knew of any reason why the complainants might lie, and he

acknowledged that he knew of none. The appellant argued that the jury should have been directed to disregard the prosecutor's comment. It would follow that cross-examination on that matter should also not be allowed. The Court acknowledged the controversial nature of these issues, and that the question, spoken or unspoken, of why the complainant would lie hovers over many trials of the present kind. It has been the practice that such questions might be put to the accused and the inability to explain any motivation to lie could be used in favour of the complainant's credibility. But regardless of whether any explanation could be put forward, it had to be emphasised to the jury that the onus remained on the Crown to prove the particulars of the charge. The question, "why should the complainant lie?" must be interpreted as and confined to eliciting facts known to the accused, not to speculation about possible motives.

On the issue of the Judge's summing up, the Court noted that an inaccuracy in summing up (repeated in this case from an incorrect law report) is not itself reason to overturn a verdict. The context and general impact of the error has to be considered. The Court considered whether the ordinary listener would realise the mistake or in fact be misled, and found that the former would be true in the context of the Judge's summing up.

Finally, the Court turned to the failure of the trial Judge to give any direction in respect of the recent complaint evidence. Where such evidence was given a direction to the jury on the point was required. Otherwise the jury might assume that the evidence of a prior consistent statement could be used as a way of establishing the truth of evidence given by the witness at trial. For this reason, the conviction was quashed and a new trial ordered, although the Court noted the distress and inconvenience that this would cause to the complainants and their families.

References under s406

By Order in Council the question of Mr Peter Ellis's convictions for sexual offences against children was referred to the Court of Appeal. In *Ellis v R* [1998] 3 NZLR 555, the Court was concerned with two preliminary matters, namely, the scope of the reference, and the application for bail.

The grounds for making the reference were given in a schedule : first, evidence is available that could lead the Court to conclude that a miscarriage of justice might have occurred because of the techniques used to obtain the evidence of the child complainants; second, the recantation of the child in respect of whom the appeal succeeded was of greater significance than the Court appreciated; third, a miscarriage of justice might have occurred because the trial Judge was not aware of a connection between one of the jurors and a Crown witness; and, fourth, a miscarriage of justice might have occurred because photographs that the applicant considers would have been important to the defence were not disclosed to him.

Counsel for the applicant submitted that the terms of the reference to the Court of Appeal did not restrict the scope of the argument, but, the Court, after considering the relevant

authorities and the terms of s406, concluded that "the hearing and determination of references under s406(a) should be confined to the matters raised in the reference".

The Court then turned to the application for bail. Section 397(2) of the Crimes Act allows bail to be granted to an appellant on such terms and conditions as the Court thinks fit pending the determination of the appeal. A reference under s406 is not an appeal as such, but s406(a) provides for a hearing by the Court "as in the case of an appeal by that person against conviction". Giving the provision a "fair large and liberal interpretation", and with reference to the New Zealand Bill of Rights Act 1990, the Court said that there was not reason to refuse to apply s397. Applying the principles expressed in *Moananui v R* (1984) 1 CRNZ 231, however, the application for bail was refused. Only in exceptional cases will bail be granted pending an appeal. The concern is for the overall interests of justice. The fact that the applicant in this case had been found guilty and sentenced was the starting point, but the Court must also look at the apparent strength of the appeal and the element of delay causing injustice. With respect to the apparent strength of the grounds for appeal, it was not palpably obvious that the points raised in the reference would necessarily be established and lead to the convictions being quashed. With respect to the question of delay, in bringing the reference to finality, while the Court was able to accept a fixture within a couple of months, the applicant's counsel required time to engage expert witnesses and assess the position. The applicant's counsel also intended to apply to the Governor-General to have the terms of the reference widened. There was so much uncertainty as to what would ultimately be put in issue that the Court could not confidently predict when a substantive hearing would take place. The Court also noted that, although the applicant asserted his innocence, the existence of the convictions required the Court to assess the risk to the public if he were released on bail. In the circumstances at the time of the application, the Court was not satisfied that bail should be granted. A further application for bail has since been rejected: *R v Ellis* CA 120/98, 18 December 1998.

The Bill of Rights

The central issue in *R v Van N*, CA 269/98, 2 December 1998 was whether the New Zealand Bill of Rights Act 1990 applies to actions taken by the staff of a shop to bring an alleged shoplifter back to the shop. Evidence of the alleged theft was obtained as a result.

Section 3(b) of the Bill of Rights provides that the Act applies to acts done "by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law". The issue was whether the arrest provisions of the Crimes Act 1961 confer functions or powers falling within this definition on private citizens. The Court held that they did not. Powers and functions on the one side and immunities on the other are separate concepts. Although the Act provides for situations where citizens are "justified" in arresting or are protected from criminal responsibility, no powers of arrest are conferred on them (other than in the situation of assisting a constable, inapplicable here).

The judgment traced the history of the relevant sections back to Sir James Fitzjames Stephen's Draft Code and concluded that there is no basis in the statutory scheme or in

the legislative history for concluding that an arrest provision under the 1961 Act confers a power of arrest. Section 3(b) of the Bill of Rights must be given a generous interpretation as legislation concerned with human rights and fundamental freedoms. Nevertheless, that generous interpretation still requires that the acts in question fairly come within the description in the section. In the present case the immunity provisions, focused and limited as they are, could not be characterised as constituting a function, power or duty conferred by law on private citizens. The Act did not therefore apply. The Court also held that there was no purported exercise of a citizen's right of arrest.

Sentencing

Manslaughter

In *R v Albury-Thompson* (1998) 16 CRNZ 79, the Court allowed the appeal against sentence of the appellant who was found guilty of the manslaughter of her autistic 17 year old daughter Casey. Casey had been cared for by her mother and by staff in a special care facility for people who are intellectually handicapped. In the two weeks prior to Casey's death, she had been cared for almost exclusively by her mother. Out of extreme frustration and a lack of support from social services, the appellant killed her daughter. At trial the Judge allowed provocation to be put as an issue for the jury. The jury returned a verdict of manslaughter. The homicide was caused by the appellant being deprived of the power of self control expected by the law. As the sentencing Judge put it, she "just snapped".

Manslaughter will almost always attract a custodial sentence. There could be no doubt that special circumstances existed in this case but they were outweighed by the seriousness of the offence and the sanctity of human life. The circumstances were however exceptional and unlikely to recur. Thus the element of general deterrence was not assessed as highly as it apparently had been by the sentencing Judge. The sentence had to contain a strong message of concern to protect the value community places on human life. That end could however be achieved by a lesser term than four years. The Court reduced the sentence to 18 months.

Rehabilitation and suspended sentences

In *R v Clotworthy* (1998) 15 CRNZ 651, the respondent pleaded guilty to wounding with intent to cause grievous bodily harm. The respondent attacked the victim who was a passerby in a city street and demanded money. He slashed the victim with a knife, cutting his face and stabbed him in the chest and stomach. He assaulted two police officers who tried to intervene. The victim underwent emergency surgery for a collapsed lung and diaphragm. He was left with permanent scarring.

Following a restorative justice conference, the respondent received a sentence of two years imprisonment suspended for two years, $15,000 reparation and 200 hours community service. The $15,000 reparation was to assist with the victim's cosmetic surgery payments.

On the Solicitor-General's application for leave to appeal, the Court held that the starting point considered by the sentencing Judge was clearly too low. The appropriate starting point was five to six years. While the respondent's willingness to make reparation may constitute special circumstances under the Criminal Justice Act 1985, a suspended sentence will only be available in cases of moderately serious offending where there is a chance of reform and the need to deter others is not paramount. Taking into account the guilty plea and the offer of reparation, the respondent was sentenced to three years imprisonment and $5,000 reparation.

Appropriate level of sentence for sexual assault type cases increased

The appellant in *R v Hassan* [1999] 1 NZLR 14, following pleas of guilty, was sentenced to concurrent terms of imprisonment of six years and two months on charges of assault with intent to commit sexual violation and injuring with intent to injure. The charges related to a single incident in which the appellant assaulted the complainant intending to commit a sexual offence, but she was able to resist him. He then beat her around the head, causing her to tumble down a steep hill, from where she was able to escape.

A five Judge Court dismissed the appeal against sentence. The Court stated that since there was one continuing incident, which involved the commission of two separate offences, which were closely related in both time and the assessment of their own respective criminal culpability, the Judge was required, as she did, to look at the totality of the offending and then impose a sentence appropriate to that. The question here was not whether the sentence was excessive for the charge with the sexual violation connotation, but whether it was excessive for the total offending.

In upholding the sentence, the Court confirmed that an increase from the previous level of sentences for this kind of offending was appropriate, although it did not find it necessary to indicate anything in the nature of a tariff for this level of offending, since the circumstances can be so diverse. The Court stated that as a matter of policy, the Court is entitled or even required to review from time to time the appropriateness of the levels of sentences for various kinds of offences. While the Court took into account the fact that the Legislature did not see fit in 1993 to raise the maximum sentence for this category of offending, this did not prevent the Court from reviewing any guidelines which may have been derived from its earlier judgments. A review of an appropriate sentence involves the Court determining in a responsible way the level of sentencing which should now be imposed in the overall interests of society and to meet the ends of justice, while recognising the maximum which is applicable to the particular case.

The Court also stated that while the reasons for the failure to commit sexual violation may be weighed in such a case, they are only relevant in so far as they properly relate to the offence actually charged. Little weight was given to this factor in this case since the appellant had gone some distance to effecting his intentions, and it was only because the complainant fell down the bank that she succeeded in escaping. Taking all these considerations into account, the Court felt the sentence appropriate, although at the upper

end of the range.

Criminal Justice Act and parole

In *Attorney General v Manga* [1999] 1 NZLR 129, the Court examined a prisoner's eligibility for release under s90 of the Criminal Justice Act 1985 and whether custodial remand time should be taken into account when the offender is recalled from parole. The Court concluded that the scheme of the legislation is clear; time spent on custodial remand is to be taken into account in determining an offender's final release date, whether or not the offender has been recalled from parole or from final release. That time is also taken into account in determining an offender's sentence expiry date.

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7. IMPORTANT CIVIL CASES

Contract Law

Waiver of conditions

Globe Holdings Ltd v Floratos [1998] 3 NZLR 331 concerned the attempted waiver by the purchaser of an apartment block of a condition in the contract for sale and purchase that it obtain resource consent for subdivisional purposes. The contract also provided that a party could unilaterally waive any condition inserted for its sole benefit.

The vendor claimed that the notice of waiver could not constitute a waiver within the terms of the agreement, as it was not for the sole benefit of the purchaser. There was no evidence that the purchaser would not be able to complete the agreement if subdivision did not proceed.

In terms of the law as set out in *Hawker v Vickers* [1991] 1 NZLR 399, the Court emphasised that the question whether the condition is exclusively for the benefit of one party is one of construction of the contract as a whole in the light of the surrounding circumstances, and that oral evidence of the parties' intentions and of the course of negotiations was inadmissible. The use of such material in the High Court had been directly contrary to the established position.

The burden of proof rests on the party asserting the right of the waiver. The possession date was stated in the contract to be "the first Friday 3 months after confirmation". It was the opinion of the Court that confirmation did not refer to confirmation of the resource consent for subdivision. Rather, the term was neutral as between fulfilment of the condition or its waiver, as distinct from words such as "fulfilment" or "satisfaction". It referred to notice of any event which confirmed or ratified the contract, and that could be either fulfilment of the condition or waiver.

It was contended for the vendor that there was substantive benefit for the vendor if the condition was fulfilled to the extent that subdivision would allow individual sale of the units, and thus the apartment block could not be used in competition with the vendor's own motel. This argument, too, was rejected by the Court. To so use the property would be in breach of local ordinances, and thus the purchaser could not legally use the property competitively.

The Court also rejected an argument to the effect that the condition was of benefit to the vendor to the extent that resource consent permitting unit titling would provide the vendor with greater assurance that the purchaser would be financially able to settle. Given that a financial condition was waivable, both under the contract and generally at law, such an argument did not stand. The necessary issue was whether, on an objective reading, the condition was for the benefit of only one party.

Finally, the Court held that benefit from the ability to cancel the contract should a condition not be fulfilled did not stand in the way of the other party's ability to waive such a condition. Certainty for both parties arises from knowing whether or not the transaction would proceed. If there has been a waiver, then the contract proceeds as it would if the condition had been fulfilled.

The purchaser's appeal was allowed and the Court declared that the condition was validly waived.

Accord and satisfaction

Magnum Photo Supplies Ltd v Viko New Zealand Ltd [1999] 1 NZLR 395 was an appeal from a decision of the High Court that a dispute between the parties had been settled by accord and satisfaction. Viko contended that, in respect of earlier litigation, it had made a plain offer to settle rather than pursue an appeal, and in so doing specified the manner of acceptance and that Magnum, through its solicitor, had accepted by banking a cheque offered in settlement, thus creating a binding accord and satisfaction. Magnum contended that it never intended to accept and that the cheque was banked because of administrative error on the part of its solicitor's employee.

As noted by the Court, differing approaches to accord and satisfaction have been demonstrated in a number of High Court decisions in recent years. Ultimately, though, the assessment must be based on the particular circumstances of the case. As with formation of a contract, agreement should be found, in the absence of express confirmation, only where that is a proper inference on the facts. The central question for the Court was whether, by the actions of their solicitors, Magnum had acted in a manner to cause Viko reasonably to believe that its offer was accepted, before the fax from Magnum's solicitors made it plain that there was no such intention.

In this case, the letter from Viko accompanying the cheque specified that presentation of the cheque would constitute acceptance. However, the letter also required confirmation of acceptance. The issuing of a receipt did not indicate that the cheque itself had been presented but only that it had been received by the solicitors. Notification of banking was not received until the letter from Magnum denying any intention to accept was also received. Further, even if the receipt could be seen as confirmation that the cheque had been banked, it had in fact acknowledged the cheque as part payment of the outstanding debt. Thus there was no accord and satisfaction.

It was acknowledged by the Court that a trial Judge's finding of fact should not be departed from lightly, but that in this case there were no issues of credibility nor dispute about the primary facts. The difference arises out the inference to be drawn from those facts. As the Court found that no inference of agreement was available, it was not necessary to decide the point relating to the state of mind of the parties.

Tort

Rylands v Fletcher, bursting water mains and summary judgment

In *Autex Industries Ltd v Auckland City Council* CA198/97, 23 February 1998, Autex sued the Council in respect of an underground water pipe owned and operated by the Council which burst at a point eight metres from Autex's premises, damaging the plaintiff's premises, plant, equipment and stock. Autex pleaded two causes of action. The first cause of action presupposed that the Council was strictly liable for the escape of the water and the resulting loss. The second cause of action pleaded that the Council was negligent in various respects. The plaintiff applied for summary judgment on the basis that the Council had no defence to the first cause of action.

The plaintiff relied on the Court of Appeal's decision in *Irvine and Co Ltd v Dunedin City Corporation* [1939] NZLR 741 which was on all fours with the facts of the present case and held the city liable for the resulting damage. On the application of the Council, the Master removed the application for summary judgment to the Court of Appeal. According to the Master, the rule in *Rylands v Fletcher,* as applied in *Irvine,* had been qualified in *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 WLR 53, and 'effectively abolished' by the High Court of Australia in *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42. The Master considered it desirable that the challenge to *Irvine* be put before the Court of Appeal as soon as possible.

The majority noted that the principles governing summary judgments were well settled. The onus is on the plaintiff to show that the defendant has no defence to the claim. Autex relied on *Irvine*, but the defendant Council submitted that *Irvine* no longer represented the law in New Zealand and should not be followed. Where the only defence raised is a question of law which is clear cut and does not require the ascertainment of disputed or further facts, the Court should normally decide it on an application for summary judgment. However, if the defence relies on the ascertainment of further facts, the defendant must provide an affidavit containing an adequate evidential foundation.

The Council sought to invoke developments in case law in other jurisdictions and also asserted that the Council's use of the land under the street for a water main was a natural use, but had not provided any affidavits. There may have been changes to the provision of water to public and private premises affecting the risk of water escaping and damaging neighbouring properties, but there was no evidence of the nature and extent of such changes with respect to whether the Council, for the purposes of the common law, could be seen as a reasonable or natural user of the land under the street.

The Council had provided no evidential foundation to raise an arguable defence, and would normally have had to submit to summary judgment. However, under R 136, the Court has a residual discretion to refuse summary judgment even though the material presented does not itself raise an arguable defence. With some hesitation, their Honours accepted that this case was not an appropriate one for entry of summary judgment, and the application was dismissed and remitted to the High Court for trial of the causes of action. Their Honours emphasised, however that they were 'not to be taken as expressing

any view as to the evidence which might be adduced or as to the need for any extensive curial review of the law in this area'.

The minority of two judges would have entered summary judgment in favour of the plaintiff. They referred to a number of cases, and in the light of these authorities, particularly *Cambridge Water*, they did not consider that there was a tenable argument that *Rylands v Fletcher* had been absorbed into the law of negligence in New Zealand. In their view, cases about the bulk storage or conveyance of things which are likely to cause damage if they escape, the issue which was at the heart of *Rylands v Fletcher*, were most appropriately dealt with by the law of nuisance. Autex's application for summary judgment invoked *Irvine*, which treated *Rylands v Fletcher* as a nuisance case. The Council had not been misled about the nature of the claim, and the absence of affidavits was not prejudicial. Summary judgment ought to be entered in favour of the plaintiff.

Solicitors' professional responsibility – negligence and limitation

Gilbert v Shanahan [1998] 3 NZLR 528 presented a set of issues arising out of a claim by the appellant against a firm of solicitors for negligent advice. The plaintiff was one of four shareholders in Tudor, a company which negotiated for the lease of certain premises. The negotiations culminated in a Heads of Agreement to Lease. Neither that document nor the negotiations made any reference to the need for personal guarantees. The deed of lease submitted required personal guarantees from all four shareholders. The plaintiff firm was aware of the existence of a Heads of Agreement to Lease, although not its contents. It failed to advise the appellant or his fellow shareholders that they were under no legal obligation to provide such a guarantee. Ultimately, the plaintiff became solely liable under the guarantee. Tudor failed and judgment was obtained by the landlord for rental arrears against the plaintiff who in turn sued the solicitors.

The High Court upheld the claim of negligence but had uncertainties about its causative effects, the amount of loss and contributory negligence. It awarded the plaintiff 10% of the amount of rental paid out. It dismissed a limitation plea raised by the solicitors based on the contention that the proceedings were brought eight years after the date of signing of the guarantee which was the date of any loss. Both sides appealed.

The cross-appeal based on the limitation defence succeeded. Because the Court held that any breach of fiduciary duty by the solicitors was not causative of any loss, the limitation issue arose only in respect of the negligence ground. The period began to run with the signing of the document which, while described as an indemnity and guarantee, in fact rendered the plaintiff liable under the lease as a principal debtor/covenantor. The Court, referring to the Law Commission's report *Limitation Defences* submitted to the Minister of Justice, said that the subject deserved early legislative attention. From the plaintiff's point of view, it was unfortunate that the proposed reform had not been implemented.

The solicitor's negligence in failing to give advice about the guarantee had not caused the plaintiff's loss measured by having to pay the rental arrears. Rather, he was deprived of the chance of being able to proceed without signing a guarantee, a chance assessed at

20%. That figure would have been reduced for his contributory negligence of 10% to 18%.

The only viable head of claim for breach of fiduciary duty was the failure of the solicitors to offer the plaintiff the opportunity of taking independent advice, but it was clear that had that advice been offered he would not have taken it. Hence there was no causative link of any breach to any loss.

Malicious prosecution

Van Heeren v Cooper CA 196/98, 10 November 1998, dealt with the issue of when proceedings for malicious prosecution can properly be brought after charges have been dismissed or diversion has been effected. Mr Cooper alleged that following a dispute with Mr Van Heeren the latter made a false complaint to the police, which led to the police charging Mr Cooper with three offences, namely intimidation, demanding money with menaces and possession of a restricted weapon. Mr Cooper pleaded guilty to the weapon charge and accepted diversion on the intimidation charge, while the demanding with menaces charge was withdrawn. Mr Cooper then filed a claim for malicious prosecution against Mr Van Heeren who applied to strike out the cause of action.

The High Court found that although the intimidation charge had been withdrawn, the situation was analogous to a dismissal following a finding or plea of guilty, and the action could not proceed on that basis. However, the cause of action based on the demanding with menaces charge could continue, since there had been no express or implied acknowledgement of guilt. Mr Van Heeren appealed this decision, contending that a termination is inconclusive if the withdrawal of a charge is achieved only as part of an agreement in which the plaintiff has made other concessions. Mr Cooper cross-appealed against the decision to strike out the cause of action arising from the intimidation charge, contending the Judge was wrong to equate a police admission with a guilty plea.

The Court dismissed Mr Van Heeren's appeal and allowed Mr Cooper's cross-appeal, leaving Mr Cooper free to pursue his claims with respect to both intimidation and demanding with menaces. The Court discussed the principles relating to malicious prosecution. The object of the tort of malicious prosecution is to protect individuals against the use of criminal courts for purposes other than law enforcement. The core elements of the tort are improper purpose and lack of reasonable belief in guilt when instigating a prosecution. In choosing between possible outcomes on the margins of the tort, the competing interests to be weighed are the protection of the individual against unjustifiable litigation and the public interest in seeing an end to litigation on the one hand and the encouragement of lay assistance in law enforcement on the other.

The five elements to be proved in an action for malicious prosecution are: (1) that the defendant prosecuted the plaintiff on a criminal charge; (2) that the criminal proceedings terminated in the plaintiff's favour; (3) that the defendant had no reasonable and probable cause for bringing the proceedings; (4) that the defendant acted maliciously; (5) that the plaintiff suffered damage as a consequence of the proceedings. The second element,

favourable termination, was challenged here. The need for favourable termination is to ensure the judicial system is consistent and to avoid relitigation. In effect, the defence of guilt for civil purposes has already been established in advance by the criminal proceedings. Moreover, on a policy level, allowing a person who may be guilty to sue his or her accusers without challenge seems repellent.

If the criminal prosecution came to an end without any plea or acquittal on the merits, this does not expose the case to conflicting findings and the guilt or innocence of the plaintiff could be ruled upon for the first time in a civil setting. Thus, it is sufficient if the outcome of the prosecution is merely non-incriminating, as distinct from favourable, i.e. no conviction. The onus is then on the defendant to establish the plaintiff's guilt in the civil setting; there is no justification for requiring a plaintiff to prove his innocence. Further, it is only the formal criminal court process itself which must have been non-incriminating. Extra-curial admissions to others raise no dangers of duplication or conflict. If the plaintiff pleaded guilty as part of a compromise, there can be no malicious prosecution claim, but if there was no plea made in the compromise, there is a non-incriminating termination. The fact of a compromise is of no consequence. Applying these principles to the present case, the Court concluded that there had been no plea of guilty to either charge, so that Mr Cooper was not precluded from bringing his claim on either ground.

Liability of builder and Council for defects in construction of house

The issues in *Riddell v Porteous* [1999] 1 NZLR 1 arose from defects in the construction of a house, which caused the substructure of a deck to rot. The Riddells had employed Mr Porteous on a labour-only contract to build the house to the specifications of a draughtsman, and to notify them of any departures from the specifications. They contracted separately with an electrician, a plumber and a roofer. Mr Porteous, the Court held (restoring the District Court finding and referring to *Hutton v Palmer* [1990] 2 NZLR 260), changed the construction of the deck without the knowledge of the Riddells. The changes caused the deck to leak and rot. The Riddells had sold the house to the Bagleys before the defect was noticed. The Bagleys obtained judgment against the Riddells for the cost of repairing the deck. The Riddells claimed indemnity from both Mr Porteous and the Dunedin City Council. Against Mr Porteous, they pleaded a breach of contract, and claimed in tort alleging breach of a duty of care. Against the Dunedin City Council, they claimed breach of duty of care in carrying out inspections of the house under the building permit and in failing to notice that the construction did not comply with the permit and was not fit for the purpose for the particular design of the house and in failing to notify them accordingly.

If the damage had manifested itself before sale, it is settled law that the Riddells could have brought a claim against the builder in tort and against the Council for the building inspector's negligence. The Court held that the relationship was not significantly reduced by the subsequent sale, so that Mr Porteous and the Council were still potentially liable in tort. The only issue was whether there were policy considerations which should lead the Court to reduce the scope of such liability.

Although the loss would be characterised as economic loss, the claim is not excluded due to this; it is merely a factor to be weighed in determining whether a duty of care is owed. It was not attributed any significance in this case. The Court must consider the potentially crushing burden on the defendant and others in analogous positions and the detrimental effects on commerce and trade which might flow from an imposition of liability in such circumstances. However, in this case, the only possible "transferred loss" claimant was the plaintiff, so that there is no possibility of indeterminate liability. Therefore, the Court will place most of the emphasis on proximity. The Court suggested that it would have allowed a claim of contributory negligence by the Council, but none had been made. The appeal was allowed.

Accident compensation

Scope of coverage, exclusion of common law actions.

In 1998 three cases addressed questions about the scope of coverage of the Accident Rehabilitation and Compensation Insurance Act 1992. In *Danes Shotover Rafts Limited v Palmer* CA 81/98, the Court decided that s14(1) of the Act did not prevent Mr Palmer from bringing a claim for compensatory damages for mental suffering caused by witnessing the death of his wife in a rafting accident.

Survivors of, and family members bereaved by, the Ansett crash at Palmerston North were held not to be able to sue in *McGrory v Ansett New Zealand Ltd* CA2/98, 18 November 1998, except to the extent that they were suing for mental injury that was not the consequence of physical injury.

The appellants in *Brownlie v Good Health Wanganui Ltd* CA 64/97, 10 December 1998, claimed compensatory and exemplary damages against three respondents in relation to misdiagnoses of a cancerous condition by a doctor, the third respondent, at Good Health Wanganui Hospital, the first respondent. The Master struck out the claims of the appellants, stating that they were barred by s14. The appeal against that striking out failed, without prejudice to the right of the appellants to amend the statement of claim to include claims for compensatory damages for mental injury arising from the uncertainty of not knowing whether they had been misdiagnosed.

Equity

Express and implied trusts in commercial dealings

The plaintiffs in *Fortex Group Ltd v MacIntosh* [1998] 3 NZLR 171 were employees of the Fortex Group who made claims based upon trusts relating to payments made by them and due to be made by Fortex into a superannuation scheme for the employees' benefit.

Although source deductions were made from employees' wages and contractual commitments undertaken by Fortex for the company to make its contributions, there was a shortfall in payment of $251,042 on the date of liquidation of the company. The employees argued that their funds and the employer's contributions to be made should not go to the debenture-holder but be held in trust for them.

In the High Court it was held that there was no express or constructive trust but recognised a restitutionary remedial trust in favour of the plaintiffs. The defendants appealed and the plaintiffs cross-appealed, relying inter alia on unjust enrichment.

The Court held, first, that express and constructive trusts had to have certainty of subject matter. There were no such trusts in this case because there was no identifiable subject matter, any retained moneys merely reducing Fortex's debt and having no separate identity. Further, there had to be an intention to establish an express trust.

The Court went on to consider the alleged remedial constructive trust. A remedial constructive trust does not require a fund in the same sense as the other categories. All it requires is the existence of assets in the "trustee's" hands which the Court considers are appropriate to impress with a trust in favour of the plaintiff. The Court pointed out:

> [B]ut before the Court can contemplate declaring that assets owned in law should, by way of remedy be held by A in trust for B, there must be some principled basis for doing so, both vis-à-vis A and vis-à-vis any other person who has a proper interest in the subject matter which would be affected by the imposition of the trust.

The Court commented that Equity acted as a court of conscience to intervene to prevent those with rights of law (the debenture holders) from enforcing those rights when in the eyes of equity it was unconscionable to do so. The plaintiffs therefore had to point to something that made it unconscionable for the debenture holders to rely on their rights at law. The failure by Fortex to pay contributions did not impinge on the debenture holders' consciences. Accordingly there was no justification for the intervention of equity. The appeal was allowed. The cross-appeal failed.

Equitable duties, causation, remoteness

Bank of New Zealand v The New Zealand Guardian Trust Company Limited CA 95/98, 18 December 1998, addressed the issue of causation and remoteness in the context of breach of trustee duties. The main judgment noted that the test for causation in cases relating to breach of trust is that the trustee is liable for all losses which would not have been incurred but for the trustee's breach, characterised by the High Court as the "distant nexus" test. Such a test is subject only to a common sense view of causation. Losses are thus recoverable as equitable compensation by the beneficiary. However, this case did not deal with a loss to the trust estate, but rather a loss suffered directly by the beneficiary, other than dissipation of the trust property. The opportunity alleged to have been lost was not a part of the trust estate.

The Judges stated that they had not been directed to any authority for the proposition that a breach of trust causing loss to the beneficiary directly, rather than a loss to the trust estate, is to be compensated on a restitutionary basis as if the losses were to the trust property itself. Equally the present case did not involve a breach of a fiduciary duty of loyalty or fidelity. The Court confirmed the established principle that not every breach of a duty by a fiduciary to a beneficiary is a breach of a fiduciary duty. Rather, the case concerned a breach of a duty to exercise reasonable care. The question then was whether the breach of duty by the trustee, Guardian, to act with reasonable care was to attract liability on a restitutionary basis in the same way as breaches of trust causing loss of trust property or breaches of fiduciary duties of loyalty or fidelity. The restitutionary approach in such cases is aimed at deterring breaches which take advantage of the vulnerability of the beneficiary. Where the breach is of a duty to exercise reasonable skill and care, even in a fiduciary context, there was no reason to treat such a breach any differently from an equivalent breach in tort or contract. The fact that liability arises in equity is no sufficient reason. Something more substantial than historical origin is needed to justify disparate treatment of those breaching their obligation to exercise reasonable care.

The "but for" test of causation and remoteness has been consistently rejected in both contract and tort, and recent authority favours a similar approach for breach of a duty in equity of similar scope. On a strict "but for" analysis, the loss suffered by the beneficiary would be covered, despite intervening circumstances. There being so suggestion of fraud, impropriety or breach of duties of loyalty and fidelity, there was no reason to depart from the approach to causation and remoteness used in contract and tort.

In regard to the scope of the duty to be imposed, it was noted that the duty to inform, or inform correctly, has not been commonly found to extend to losses arising from an independent cause where the breach has merely created or preserved the circumstances in which loss might occur. In this respect is was necessary to look to the trust deed itself and to construe that deed in its contractual setting. Although the deed embodies a trust, the judgment noted that with the increasing use of trusts as an element in commercial transactions, it would be undesirable to compartmentalise them for treatment according to separate equitable principles. The scope and purpose of the duty are to be ascertained as a matter of construction from the document in its overall context. The same result, it was noted, was achieved by Fisher J on the ground of forseeability. The judgment went on to note that characterising the claim in terms of loss of opportunity could not be a method of circumventing the principles of causation in this context, reintroducing the "but for" type of test. The appeal was dismissed.

In a concurring judgment Tipping J further commented on the issue of how duties might be classified. The recent trend has been to focus on the nature of the duty rather than its historical source, and that this has been the increasingly important factor in determining issues of causation and remoteness. The nature of this relationship, in this case beneficiary and fiduciary, should not necessarily dictate how issues of causation and remoteness might be determined. Rather the nature of the duty and the breach will be central to this analysis.

Fair Trading Act

Measure of damages

In *Cox & Coxon Ltd v Leipst* CA59/98, 24 November 1998, the Court considered whether claimed loss or damage suffered by purchasers of property to whom misleading information was given by a real estate agent in contravention of s9 of the Fair Trading Act 1986 fell within the scope of the remedies available under s43.

The appellant real estate agency acted for the vendor when in 1995 she sold her five acre lifestyle block with an apple and pear orchard to the respondents. The appellant's representative told them that in 1994 58 bins of pears had been produced on the property and sold to Watties for $12,000 whereas the actual figure was $8,801. Did this breach of s9 entitle the purchasers to the future profits that would have been earned had the representation be accurate? By a majority of 3:2 the Court answered No.

Employment Law

Whether a Minister of religion is an "employee"

The question of law in *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513, an appeal from the Employment Court, was whether the personal grievance provisions of the Employment Contracts Act 1991 applied to the dismissal of a Methodist Minister from his appointment to a shared ministry between the Anglican Parish of Holy Trinity, Woodville, and the Union Parish of St James, Woodville. Ministers were stationed by the Conference and paid a stipend when they were stationed in a parish, or under certain circumstances, when no parish was available. Otherwise ministers had to fend for themselves. Ministers were treated by the Inland Revenue Department as if they were employees, although the laws and regulations of the church stated that they were not. The view of the Church had not changed despite the production by the board of administration of a legal opinion to the contrary.

The appellant was the Methodist Minister appointed to the shared ministry. He was subsequently dismissed and required to leave the parish. He initiated a personal grievance claim. The Court of the Employment Court, on the preliminary issue of whether the appellant was an employee of the respondent, held that he was not. This Court dismissed his appeal.

The issue was essentially a matter of construction of the Laws and Regulations of the Church which governed the relationship between ministers and the Methodist Church. The Court, while expressing reluctance to determine what at heart are ecclesiastical issues where matters of faith or doctrine are at issue, stated that the courts will intervene where civil or property rights are involved. The issue in this case must be determined by an analysis of the actual intention of the parties, in particular whether they intended legal relations. The common law recognises that not all agreements are intended to give rise to

legal relations. While the agreement may resemble a legal contract of employment, it does not necessarily create legal relations.

In the absence of a document recording the terms of engagement of the Minister, the intentions of the parties were to be derived from the relevant Laws and Regulations and resolutions of the Conference along with the Letter of Appointment. The Laws and Regulations were unequivocal and categorical. "A minister is not an employee of the Church". That statement is not confined to the status arising from ordination and being received in full connexion. It is also concerned with the position of ministers when they are "appointed by the Conference of the Church". Further, the Letter of Appointment was entirely consistent with the Laws and Regulations and did not affect the minister's status as expressed in the Laws. While the arrangements made by the Conference with the Inland Revenue Department are relevant, they were intended to have legal consequences as between the Revenue and ministers affecting the taxation of ministers and administration and reporting by the Conference. There was no evidence that the negotiations with the Revenue were conducted by the Church on the footing that the relationship between Conference and ministers was indeed employment. To the contrary, the Conference had expressly stated its belief that a minister was not an employee. The appeal was dismissed.

Harsh and oppressive conditions

Steelink Contracting Services Ltd v Manu CA 54/98, 16 November 1998, concerned an appeal from an Employment Court decision which set aside a clause of an employment contract because it was harsh and oppressive when it was entered into (s57 Employment Contracts Act 1991) and held that the respondent had been suspended or stood down and later dismissed in breach of contract.

The contract included a clause which empowered the employer to stand down workers in response to fluctuations in demand for work. The respondent was stood down at a time when there was limited work available, but not called back to work when vacancies later arose. Ultimately, the employer did not invite him back at all.

On appeal the Court of Appeal found the Employment Court's decision to set aside the stand down clause because it was harsh and oppressive was erroneous as a matter of law. This was for two reasons: (1) if at the time it was entered into, a term in an employment contract was capable of operating in a manner that was not harsh and oppressive but was also capable of being used harshly and oppressively by one party, it should be considered having regard to the fundamental obligation of each party to act towards the other fairly and in such manner as maintains the relationship of good faith and confidence; (2) a clause would be inherently harsh and oppressive within s57(1)(b) of the Act only where there is a realistic likelihood that it would be used in a manner that was harsh and oppressive and any such abuse by the employer could not be checked by invocation by the employee of the employer's obligation to act fairly and in good faith or by other means. With respect to the particular contract clause in question, it was held that the correct approach was to inquire if the provision could operate fairly and reasonably in its context, as properly constructed with regard to the duty of fair treatment, rather than by

examining how it might, in theory, operate to the disadvantage of employees by its use as a substitute for redundancy.

Notwithstanding the foregoing, the Court upheld the finding of the Employment Court that the employee had been unjustifiably dismissed. That was a decision open to the Employment Court even on the basis that the initial suspension of the employee was an exercise of a valid contractual right to stand down.

Company law

Effect of amalgamations under Part XIII of the Companies Act 1993.

The issue in *Carter Holt Harvey Ltd v McKernan* [1998] 3 NZLR 403 related to the transferability of a guarantee executed by the defendants in favour of a subsidiary of the plaintiff, which was later amalgamated into the plaintiff. No mention was made of assigns or successors of John Edmond Limited, the firm to which the guarantee was given. After amalgamation, the business records of John Edmond contained a reference to "a division of Carter Holt Harvey Limited" but no separate notice was given to customers like Pioneer Builders Limited, the debtor.

After earlier phases, including a hearing in the Civil Appeal Division, a five judge Court addressed the question whether the contract guarantee continued in respect of liabilities incurred by the debtor to CHH after the amalgamation. The answer was Yes.

The Court reviewed the provisions of Part XIII of the Companies Act 1993 (part VA of the 1955 Act) in relation to amalgamations, and held that Parliament intended that the benefits and burdens of the contracts of all merging companies are to continue in force for all purposes. The amalgamated company is to enjoy all advantages previously conferred on any of the amalgamated companies and to have their liabilities. It is not to be treated as a different entity or a new party to the contractual arrangements. The evident policy of the provisions and their particular words led to that conclusion.

Support was found in the treatment accorded amalgamating companies in Canada, since the Law Commission based the new legislation mainly on the Ontario Business Corporations Act and the Delaware Corporations Act. The Canadian courts have regarded the concept of continuity as of overriding importance in determining the effect of amalgamation, for example *Stanward Corporation v Denison Mines Limited* (1966) 57 DLR (2d) 674. The Court also relied on United States authority, such as *W H McElwain Co v Primavera* 180 App Div 288, where the courts have consistently found that the full benefit of a continuing guarantee is taken by the merged corporation, notwithstanding the statutory description of the merged entity as a "new" or "consolidated" corporation. The position of the United States courts is not as persuasive as that of the Canadian courts however, since the wording of the legislation does not exhibit the same level of similarity.

Family law

Child abduction and the Hague Convention

Dellabarca v Christie [1999] NZFLR 97 concerned the interpretation of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction which is given effect in New Zealand law by the Guardianship Amendment Act 1991.

The case involved an unmarried couple and their two year old son. The father had no guardianship rights although on separation, according to the father, the couple had come to an "agreement" during counselling that the father have access at certain times. He sought a declaration from the New Zealand Family Court under Article 15 of the Convention that the mother's removal of the child to Australia was wrongful because it was in breach of his custody rights conferred by an agreement having legal effect.

The High Court concluded that the rights of access relied on in this case did not amount to rights of custody since, as a matter of law, an essential aspect of rights to custody was the right to determine the child's place of residence and the father did not have that right. As well, the "agreement" made during counselling was simply too informal to have legal effect.

On an application for leave to appeal the Court disagreed with the High Court's interpretation of the term "rights of custody". The Court concluded that in light of the Convention, interpretative materials (for example, the explanatory report prepared after the Convention was drafted) and surrounding case law, the term "rights of custody" is a broad expression not necessarily confined to national concepts of guardianship or custody. It followed, assuming that the agreement had legal effect, that the father in this case had rights of custody because of his access rights under the agreement. Those rights, which included the direct care of the child, would be defeated by the child's removal to another country.

On the question whether an agreement reached during counselling could be elevated to an agreement having legal effect, the Court, in agreement with the High Court, concluded that the document was not in the proper form of an agreement, as it was unsigned and imprecise in its terms. The relevant legislation, in the context of which the "agreement" was prepared, provided a substantial further reason for holding that the document was not an agreement having legal effect. It followed that the removal was not in breach of the Convention. Leave to appeal was granted and the appeal was dismissed.

Resource Management

Principles of non-notification under the Resource Management Act

The appellants in *Bayley v Manukau City Council* [1998] NZRMA 513 sought judicial review of the Council's determination under s94 of the Resource Management Act 1991 that an application by Sanctuary Developments Limited for three land use consents need

not be notified. It granted the consents, which related to a 57-unit terrace house development on a property adjacent to those owned by the appellants. The High Court dismissed the application for judicial review by the appellants, who then appealed to the Court of Appeal on the same grounds – unreasonableness and illegality. The matter was complicated by the fact that the first respondent had both an operative and a proposed district plan. Sanctuary's proposal was discretionary under the operative district plan, and required one controlled and two restricted discretionary activity consents under the proposed district plan. Consents were needed under both proposed and operative plans since the new rules would not allow the activity. An applicant cannot realistically hope to use separate applications under operative and proposed plans as a means of circumventing the Act. The weight to be given to the outgoing plan will depend upon the stage the proposed plan has reached.

It was accepted that it could not be said that in terms of s94(2)(b) it was unreasonable in the circumstances to require the obtaining of written approvals from the appellants and other neighbours. The number of persons who might be affected was quite small, and none was unavailable.

In the judgment of the Court allowing the appeal, it was stated that the policy evident upon a reading of Part VI of the Act, dealing with the grant of resource consents, is that the process is to be public and participatory. Section 94 spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification. In the exercise of the dispensing power and in the interpretation of the section, the general policy must be observed. Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity on the environment generally or on themselves in particular.

Before s94 authorises the consent application to be processed on a non-notification basis, the authority must consider the adverse effects of the activity on the environment, with careful consideration of what may lawfully be done on the land. Any adverse effect which may affect any person, which adverse effect is more than *de minimis* and not merely a remote possibility, must be taken into consideration by the authority. Further, it should not be overlooked that "effect" in s3 includes a temporary effect, such as the adverse effects which may be created by the carrying out of the construction work.

Once there is any non-compliance that requires a discretionary activity application, it is necessary to take a holistic approach, looking at the whole of what the applicant is proposing to do. Further, the Court stated that if the nature of a proposal requires a discretionary activity consent application to be made, an overall exercise of discretion under ss104 and 105 could mean that full advantage might not be able to be taken of the maximum provisions set by the rules. The authority must consider the possibility of some consequential effects arising from the way in which the site layout may have been made possible by the use of the five-metre yard required by the plan in a non-complying way. It followed that the decision under s94 not to notify the restricted discretionary activity application in relation to the yard space was invalid. As a consequence, the Council should not have permitted the controlled activity consent application to proceed

on a non-notified basis.

Where a proposal requires multiple resource consents, the authority should direct its mind to whether the matters requiring consideration under them will overlap. If that is the case, it should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be to fail to consider the proposal as a whole, and instead to split it artificially into pieces. The Council did not approach the question of notification in this way and thus erred fundamentally in the exercise of its discretion under s94(1)(b) of the RMA. Moreover, the Council should have considered that the sheer size of the development alongside existing residences constituted a special circumstance, even though the site could be used for a business activity. While a balancing of good and bad effects is appropriate when making a substantive decision, it is not to be undertaken when non-notification is being considered. The only exception is where the possibility of an adverse effect can be excluded because the presence of some countervailing factor eliminates any such concern.

The Court declined to exercise its residual discretion to refuse judicial review on the grounds of prejudice to the second respondents from the appellants' delay in bringing proceedings. The appellants learnt of Sanctuary's consent at a late stage, and Sanctuary was aware it faced opposition even before it asked the first respondent to process its application on a non-notified basis.

Local Government

Rating of a retirement village

The central issue in *Hamilton City Council v D V Bryant Trust Board* [1999] 1 NZLR 41 was whether the land owned and occupied by the D V Bryant Trust Board, a charitable trust, for the purposes of operating a retirement village, was rateable under the Rating Power Act 1988. The village is for people who are able to cook, clean and care for themselves. Admission is irrespective of the ability to pay, and no charge is made where this would cause hardship. However a rental of a proportion of national superannuation was usually charged and no person had in fact been admitted without charge. Until June 1993, the Council had treated the land occupied by the village as non-rateable, but, having undertaken an internal review, its position changed. The contention that the land was in fact rateable in law was disputed by the Board and its position was upheld in the High Court. The Council's appeal was focused on whether the village fell within the exemptions under s179(4) of the Act.

The appeal was dismissed on the basis that the Board had a genuine policy that where a person had no income whatsoever it would not charge. That was sufficient to qualify under the Act.

International law

Freedom of the seas and foreign ships

The appellant in *Sellers v Maritime Safety Inspector* CA 104/98, 5 November 1998, was master of a cutter, the Nimbus, registered in Malta. As master of the ship he permitted it to leave Opua for an overseas port without the clearance of the Maritime Safety Authority, which it contended he required under s 21(1) of the Maritime Transport Act. On his return he was prosecuted for a breach of the Act. He was convicted and his appeal dismissed by the High Court.

The Court noted that in legal terms Sellers' defence was based on the freedom of the high seas, one of the longest and best established principles of international law. Central to this concept is that the state of nationality of a ship has exclusive jurisdiction over that ship when it is on the high seas. This principle is contained in article 92 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to which New Zealand is a party. Such jurisdiction is to be exercised with due regard for the interest of other States in their exercise of the freedoms. Exceptions to this freedom have been rare.

The Court cited two such exceptions, one relating to human rights and another relating to environmental disaster, and commented that such exceptions concern the actual exercise of enforcement jurisdiction on the high seas. However, a different approach applies to the exercise of legislative or judicial jurisdiction in respect of activities occurring on foreign vessels on the high seas. While the stated aim of safety regulations for pleasure craft is to exercise control over them only within New Zealand's internal waters, the reality is that the effect, if not the purpose, of the legislation is to place restrictions on the freedom to navigate based on the adequacy of the ship, her crew and her equipment. However, it is acknowledged that another state may have jurisdiction where a guilty act on the high seas produces its effects on a vessel flying another flag or in a foreign territory.

Treaties relating to safety at sea emphasise the role of the flag state but also acknowledge the role of the port state to some degree. A port state may verify that the safety certificates of the flag state are complied with. If there are breaches or the certificate is invalid, measures can be taken to ensure that the ship does not sail. The lack of unilateral national power to create safety obligations for ships on the high seas is inferred from the express denial of any such power of a coastal state in respect of foreign ships which have left port and are passing through territorial waters to the high seas, set out in article 21(1) and (2) of UNCLOS.

The Court also rejected the argument for the Maritime Safety Authority that customary international law allows the port state to control matters of external effect where there is an important state interest at stake, even if this impinged upon the freedom of the high seas. This, the Court said, went much further than the current state of the law. The emphasis is on the establishment of rules by international processes and on the duty of the flag state to enforce them, although ports may have a role in terms of inspection for compliance. However, to prevent sailing, the vessel must (a) be in breach of applicable

international rules and standards relating to seaworthiness; and (b) thereby threaten to damage the marine environment. The power proposed by the Maritime Safety Authority was much wider.

It was thus the conclusion of the Court that the port state has no general power to unilaterally impose its own requirements on ships flying under another flag relating to seaworthiness, safety equipment and crew. In this context, New Zealand courts have interpreted legislation relating to maritime issues within the framework of international law of the sea, and if possible, consistently with that law. The importance of the international setting is acknowledged in the long Title of the Maritime Transport Act and throughout other parts of the Act. While there were no relevant Ministerial directions on the point at hand, regard must also be had to Government policy on maritime matters, which is clearly aimed at promoting compliance with New Zealand's international obligations.

In interpreting s21(1), the Court noted that general legislative wording has often been read down in the area of maritime law to comply with international law. The Court concluded that the reference to pleasure craft in the section could not be read to mean only New Zealand craft, given the context of the Act and the careful distinctions made elsewhere. Nor could the territorial scope of the provision be read down so as to apply only to internal waters, as the term "voyage" is defined to mean passage through territorial water to the high sea and then into foreign territorial water and foreign internal waters to a foreign port. A third possibility was that the Director's powers must be exercised in accordance with the relevant rules of international law. Given New Zealand's commitment to its obligations under UNCLOS this approach was accepted and it was decided that the Director's power would extend only to ensuring the vessel's compliance with international standards. That extent will be widened when and to the extent that international law allows. On this basis the conviction and sentence were quashed.

Intellectual property

Trade mark infringement

The question of trade mark infringement was considered in *Mainland Products Ltd v Bonlac Foods (NZ) Ltd* [1998] 3 NZLR 341. The case fell to be decided under the Trade Marks Act 1953 as it stood prior to the 1994 amendments. Since 1964, Mainland, the appellant, had been the registered proprietor of the Part B trademark 'vintage' in respect of dairy products. In 1987 the mark was shifted to Part A of the register, which afforded greater protection, because the Commissioner was satisfied that, as a result of extensive use, the mark was 'distinctive,' meaning that it was adapted to distinguish Mainland's cheese from that of competitors. It also seems that Mainland had always managed to prevent competitors from the using the word in respect of cheese. In late 1992 Bonlac introduced to the New Zealand market a cheese product sold in packaging containing the word 'vintage.' When Bonlac refused to withdraw the product, Mainland commenced

legal proceedings, claiming infringement of its registered trademark, passing off and breach of ss9 and 10 of the Fair Trading Act 1986. Mainland failed in the High Court, but that decision was overturned on appeal.

To amount to infringement under s8 of the Act, use of the allegedly infringing mark must, inter alia, be likely to be taken either as use of a trade mark, or as importing a reference to Mainland or to Mainland's cheese. Bonlac had a defence if the use of 'vintage' was merely the use of a bona fide description of the character or quality of the goods that would not be likely to be taken as reference to Mainland or Mainland's products.

In asking whether the mark is likely to be taken as use as a trademark, the relevant audience consists of those persons to whom the product is presented in the course of trade, including wholesalers, retailers and retail customers. It is not necessary to show that the use complained of is likely to be taken by everyone encountering it in the course of trade as an infringing use. It need only be so taken by a substantial number of prospective purchasers. The Court did refer to evidence that had been obtained from market research, but did not consider that evidence to be of much use, because of the manner in which the survey was conducted and the questions that were asked.

'Vintage' is a common word with a number of meanings. It does not, however, describe the quality or character of cheese. Rather, it is a skilful allusion invoking laudatory notions by association with fine wine, a product to which the word is normally applied, but it no more describes the character or quality of cheese than it does of chocolate or ball bearings. The prominent appearance of the word 'vintage' on the top and side panels of the packaging would be taken by at least a substantial number of prospective purchasers as a means for distinguishing that particular cheese from equivalents on the market, rather than as a mere description of the cheese or its attributes.

Infringement of a patent before it is sealed

Pacific Coilcoaters Ltd v Interpress Associates Ltd [1998] 2 NZLR 19 concerned the time periods applicable to patent actions. Interpress Associates Ltd held a grant of letters patent covering a process for the manufacture of long-run roofing steel. Application for the grant was made by the inventor on 4 February 1977 and the complete specification was published on 1 November 1979. The patent was finally granted and sealed on 27 August 1993 shortly after assignment to Interpress. The patent had by then expired by operation of law, its term of sixteen years having run its course on 4 February 1993. Following sealing of the patent, two sets of proceedings were instituted in the High Court on 1 September 1993. The cause of action alleged against all defendants was for infringement, the period covered being from 1 November 1979 (the date of publication of the complete specification) down to the date of issue of the proceedings. Strike out applications contending that those acts of infringement were statute-barred were filed, the question being whether the causes of action accrued when the acts of alleged infringement were committed, or when the letters patent were later granted on 27 August 1993. Those applications were dismissed by the High Court and successful appeals ensued.

The Court (with two Judges dissenting) held that s20(4) of the Patents Act 1953 recognised and protected monopoly rights during the period from publication down to sealing. In its absence there would be no such protection. The proviso made it clear that the privileges and rights included those which could form the basis of an infringement action. The action was for infringement of a right owned at the time of the infringement and that was what s20(4) provided.

The Court noted that s20(4) vested all rights in the applicant as if a patent had been sealed. The plain meaning of the words was that the same monopoly rights which were given by a patent were owned by the applicant during the period between publication and sealing. The cause of action in question was the commission of an act which infringed that monopoly. Infringement was then complete, the right breached was an existing vested right, and the cause of action accrued at that time. There was a long line of statutory authority that a requirement such as that in issue here, which must be met before proceedings could be commenced, did not prevent time running for limitation purposes.

Rateable property

The rating of telephone lines

The Court in *Telecom Auckland Ltd v Auckland City Council* [1999] 1 NZLR 426, was concerned with the obligation of Telecom Auckland Ltd and Telecom New Zealand Ltd to pay rates to the Auckland City Council on telephone lines installed under or above the Council's streets and on telephone booths erected on those streets, pursuant to Telecom's authority under the Telecommunications Act 1987.

Under the Rating Powers Act 1988, all land is deemed to be rateable property. Land is widely defined as meaning all land, tenements and hereditaments, corporeal or incorporeal, and all chattels and other interests in land, and all trees growing or standing thereon.

Following an extensive review of the law in several jurisdictions, the Court concluded that, unless there was a clear indication in the Telecommunications Act that telephone lines and booths are to be treated differently from gas and electricity lines, the Court should apply to them its decisions in *Auckland City Corporation v Auckland Gas Co Ltd* [1919] NZLR 561 and *Hutt Valley Electric-Power Board v Lower Hutt City Corporation* [1949] NZLR 611. In the first case, it was held that the company's statutory right to lay, repair, alter, or remove pipes under the streets and erect pillars and lamps and other works amounted to a corporeal hereditament, and was rateable property. A similar decision was reached in the second case with respect to poles, cross-arms, insulators and wires for transmission of electricity.

English and Australian cases relied on by the appellants were critical of the tendency to assimilate rights created by statute with rights known to the general law. In the case under appeal the Court stated that where a relevant statute contains a broad definition of

an interest in land and the New Zealand courts have previously found one to exist in markedly similar factual circumstances, Parliament should be taken to have intended the same result. On considering the Telecommunications Act, the Court was satisfied that Telecom had an interest in land with respect to lines and telephone booths on, over or below Council roads. Clause 16, Part I of the First Schedule of the Rating Powers Act 1988 did provide that machinery, whether fixed to the soil or not, was not rateable for the purposes of the Act but Telecom's lines were not "machinery" falling within this exception.

The Court also rejected the appellants' argument that, even if the lines and booths were rateable, the Council had failed to consider the possibility of creating a separate differential for utilities and that it therefore failed to consider a relevant factor when exercising the statutory power of striking a rate to apply to them.

Tax

Costs in proceedings

The question for decision in *Auckland Gas Company Ltd v Commissioner of Inland Revenue* (1998) 18 NZTC 13, 408 was whether in tax cases in the High Court costs should generally be fixed at levels lower than in other civil litigation and, if so, on what principled basis costs should be awarded. The income years in question were governed by the Income Tax Act 1976 and relevant provisions of the Inland Revenue Department Act 1974. Except in two respects, the material provisions of the current legislation, the Income Tax Act 1994, the Tax Administration Act 1994 and the Taxation Review Authorities Act 1994 are essentially the same.

The only specific provisions as to costs in the High Court related to appeals from the Taxation Review Authority and recovery proceedings, in which case the Court may award such costs to or against either party as it thinks just : Inland Revenue Department Act 1974, s46(1). In the absence of special provision in the tax legislation, the High Court has the general jurisdiction under s51G(1) Judicature Act 1908 in regard to any civil proceedings "to award or otherwise deal with the costs of the proceedings". According to subs (2) these are "in the discretion of the court" and are governed by the High Court Rules, particularly r46. There are also no special provisions governing tax appeals to the Court of Appeal or the Privy Council; the general principles apply. In hearings before the TRA, no costs may be awarded to or against the objector or the Commissioner.

The Court held that the starting point in determining the matter was the relevant legislation. There were two categories of cases, namely, appeals from the TRA and first instance hearings in the High Court. With respect to appeals, the High Court may award such costs to or against either party as it thinks just: Inland Revenue Department Act 1974 s46. Nothing in that provision or more generally in the appeals provisions requires a lower regime for costs in tax appeals than in other civil appeals.

It would also be anomalous if tax appeals attracted a markedly different approach to costs depending on whether they were heard in the High Court or the Court of Appeal. Appeals come to the Court of Appeal either from first instance decisions of the High Court or where the appeal is moved from the TRA to the Court of Appeal, and also as a second appeal from High Court decisions on appeals from the TRA. The pattern of costs awarded in the Court of Appeal over the last 20 years conforms with the approach in civil appeals generally, although in some cases there may be special reasons for departing from the general approach.

With respect to first instance hearings in the High Court, the same provisions of the Judicature Act and the High Court rules apply to tax cases as apply to civil cases generally. There are no specific provisions suggesting a different approach to costs is called for. The Court considered a number of factors, and ultimately concluded that there was no reason to take a different approach to costs awards in High Court tax litigation than applies in civil cases generally. Indeed, to continue the practice which had developed in the High Court leads to uncertainty and unfairness.

Taxation of group schemes

The two appeals heard in *Miller and Others v Commissioner of Inland Revenue, Managed Fashions Ltd and Others v Commissioner of Inland Revenue* (1998) 18 NZTC 13,961 concerned a group scheme using a template designed and operated by Mr J G Russell. Mr Russell had created the template to take advantage of the tax loss grouping provisions in s191 of the Income Tax Act 1976. The Commissioner believed that the purpose and effect of the arrangement was tax avoidance.

The arrangements in both appeals were essentially the same. The owners of the shares in the trading company sold their shares to one of Russell's companies, taking a mortgage over the shares instead of receiving the purchase price. No transfer of shares took place; instead, a declaration of the ownership of the shares was made in favour of the buyer. The net profits of the trading company were then paid to Russell's company every six months as an "administration charge." The Russell company retained a proportion of that sum and accounted for it to a related tax loss company. The balance was paid to the former shareholders to reduce the amount secured. The amount of the profits transferred as administration charges was claimed as an offset against the tax losses available to the tax loss company. At the same time as it paid the administration charge, the tax loss company paid a "business consultancy fee" to another Russell company, which was calculated at five per cent of the administration charge, and was claimed as a tax deduction by the trading company.

In 1986, the Commissioner invoked s99 and made an assessment against some of the trading companies involved in the Russell template schemes. The Commissioner reconstructed the scheme under s99 by attributing the administration charge to the trading companies and allowing them a deduction for the consulting fees. This became known as the 'Track A' system for assessment. The Commissioner realised, however, that the

Track A system was not available in some cases, and decided to implement his s99 powers in another way. Assessments were issued against the former shareholders of the trading companies, saying that they had enjoyed the tax advantage of the void arrangements. The appeals in this case were concerned with these 'Track B' assessments, which related to the 1985-1989 income years.

The former shareholders pursued two courses of action. Firstly, they asked the Commissioner to state cases to the Taxation Review Authority. Secondly, they sought judicial review in the High Court of the Commissioner's decision to make those assessments. In a series of decisions, the appeal to the TRA was decided in favour of the Commissioner, and an appeal from the TRA to the High Court was also dismissed. The application in the High Court for judicial review was also rejected.

In the judicial review proceedings, which included a cross-appeal by the Commissioner, the Court was concerned only with matters of process – whether the Commissioner had exceeded his powers in making the Track B assessments, and whether those assessments were otherwise procedurally flawed and a nullity. The Court dismissed the appellants' appeals, and upheld the Commissioner's cross-appeal. The Commissioner was not improperly motivated in issuing the Track B assessments.

There is no reason why, if two taxpayers are liable in the alternative, the Commissioner should not select the one more likely to be able to pay. The Commissioner was quite entitled to consider that it was part of the arrangement that the moneys representing the net profits were removed from the trading companies, leaving them effectively judgment proof, and put in the hands of the former shareholders, who thereby obtained a tax advantage.

It had been submitted that the Commissioner's officers had acted beyond their powers by failing to comply with a Practice Statement issued by the Commissioner. The Court held that the Practice Statement had in fact been complied with, but that that was largely beside the point anyway, as the determination in question had been made long before the Practice Statement was promulgated.

The Commissioner was also entitled to assess the taxpayers on Track B even though the Track A assessments made in respect of the same corporate profits had not yet been withdrawn. Ultimately, of course, the earlier assessment must be amended, but the Commissioner must be allowed some flexibility to meet administrative demands. The Commissioner cannot, however, issue a new assessment once the matter has been placed in the hands of the TRA by signing and filing a case stated.

According to s25(1), the Commissioner may not alter an assessment made for a given year so as to increase the amount thereof after the expiration of four years from the end of the year in which the assessment was made. The time bar did not apply here, as the Commissioner could reasonably form the opinion that there had been an omission to mention income, within the terms of s25(2).

The Court then turned to the substantive appeal. The primary argument for the appellants was that s99 ought not to have been applied at all. The Court stated that the arrangement was clearly a tax avoidance scheme. Furthermore, in the circumstances, the s99 re-constructive powers were appropriately applied. Section 99(3) gave the Commissioner broad re-constructive powers. The Commissioner may look at the matter broadly and make an assessment on the basis of the benefit directly or indirectly received by the taxpayer in question. The focus of the re-construction provisions is to counteract any tax advantage obtained by the objectors. The appeals in the case stated proceeding were dismissed.

Rights and remedies

Freedom of expression and interim injunctions

TV3 Network Services v Fahey CA 276/98, 1 December 1998, concerns both prior restraint of free expression by way of interim injunctions and surreptitious filming by the news media. In October 1998 TV3 screened a *20/20* programme focussing on alleged sexual improprieties and professional misconduct in respect of three former patients by Dr Fahey, a Christchurch medical practitioner and local body politician. The doctor subsequently issued defamation proceedings against TV3 which pleaded the defences of truth, honest opinion and qualified privilege. Later that month another former patient made contact with TV3 and made an appointment to see Dr Fahey in the guise of a patient seeking a consultation. She confronted him about alleged sexual misconduct with her as a patient 28 years previously, employing a concealed camera to made a video recording of the interview. TV3 advised Dr Fahey's solicitors of its intention to show the video in a forthcoming edition of *20/20*; Dr Fahey sought an interim injunction to prevent that screening.

The High Court granted the injunction applying, it seems, a standard *American Cyanamid* approach: there was an arguable case that the screening would be a civil contempt and that there had been a trespass. The balance of convenience favoured the plaintiff.

On appeal this Court discharged the injunction It held that any prior restraint of free expression requires passing a much higher threshold that the arguable case standard. This has long been accepted in defamation (see *Bonnard v Perryman* [1891] 2 Ch 269) and the Court held, referring to Salmon LJ's judgment in *Thompson v Times Newspapers Ltd* [1969] 1 WLR 1236, that the same principle should apply in the case of successive defamations where the plaintiff alleges contempt. Wherever both free expression and other rights and values are raised the Court must seek to accommodate and balance both sets of values. As noted in *Gisborne Herald Ltd v Solicitor-General* [1995] 3 NZLR 563 it is only where freedom of expression and fair trial rights cannot be fully assured that it is appropriate to curtail temporarily freedom of the media. Here there was no indication that the proposed programme was likely to have significant effect on the fair trial determination of the issues.

On the issue of the alleged trespass and invasion of privacy, the Court again said that a

number of competing values must be balanced. The context in which the impugned methods were employed, any public interest considerations for broadcasting the programme, and the adequacy of damages as an available remedy, are amongst the considerations that must ordinarily be weighed. In this case these factors favoured TV3; that did not mean that the ends of news gathering justify the means.

See also *Attorney-General for England and Wales v Television NZ Ltd and MJR* CA274/98, 25 November and 2 December 1998 for a refusal to grant interim relief to prevent the showing of a programme about the SAS allegedly in breach of a former member's contract of employment.

A judgment?

What constitutes a judgment?

The issue to be decided in *Bell Booth v Bell Booth* [1998] 2 NZLR 2 was whether the High Court had "given judgment" in respect of an appeal from the District Court. The appeal had been argued before Temm J. Before judgment could be delivered in the usual way, Temm J fell ill and purported to give judgment by telephone from his home. The call was received by a Court-taker in the Judge's Chambers and she relayed the decision to counsel and the parties who were present. The Judge conveyed that he would dismiss the appeal and cross-appeal. The reasons for the judgment were going to be delivered later.

Justice Temm died two days later before giving the expected reasons. An application was made seeking a declaration that judgment had been given, notwithstanding that it had not been delivered in open Court. In response, it was argued that R 5 should be employed to cure the defect.

The High Court found that judgment had not been given in terms of the rules because there had been no physical manifestation of the Judge and no reasons for the judgment. Accordingly, R 5 did not apply since there was no judgment to which it could apply.

The Court allowed the appeal and found that although the judgment was given irregularly, it was not a nullity. The announcement of a decision over the telephone was a valid and irrevocable judicial announcement. Since judgment had been given, but not in the prescribed form, R 5 applied. Where judgment was not given in the prescribed form there was a failure to comply with the rules.

The Court considered the wording of R 540, noting that it required the close attention of the Rules Committee because it does not recognise the way in which many interlocutory orders are dealt with in practice. The present case, however, involved a Court decision, and the rule was clearly applicable. Judgment should therefore have been given in open Court, or by the written judgment as provided for in the rule. The conclusion was also reached in the High Court which held that the judgment was a nullity. The Court

disagreed and held that the judgment as read out to the parties could not be ignored. It was an irrevocable judicial act which would have started the time period for calculating appeal rights. The provisions of R 540 had not been complied with, but R 5 rendered this an irregularity. The fact that reasons for judgment had not been given could not alter this conclusion.

The Court recognised that the sensible course was for the parties to agree on a rehearing. The entry of judgment without reasons would lead to an appeal and a high probability that the case would be sent back to the High Court to be reheard. The Court emphasised the fundamental importance of reasons in the common law and the legal system as a whole. They assure litigants that their case has been understood and carefully considered. Reasons for judgment also enhance public confidence in the legal system by enabling the public to see that the system is striving to achieve justice according to the law.

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