Appendices

1. INTRODUCTION

Overview

The Court of Appeal, located in Wellington, has existed as a separate court since 1862. Until 1957 it was composed of Judges of the Supreme Court sitting periodically in panels. In that year the Court of Appeal was reconstituted as a permanent court separate from the Supreme Court. It now consists of the Chief Justice, the President and six other permanent members.

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

Civil decisions on first appeal from the High Court are in general appealable to the Judicial Committee of the Privy Council, in some cases as of right, in others with leave either of the Court of Appeal or the Committee. Criminal decisions may be appealed with the leave of the Judicial Committee.

In 2002 the Court dealt with 444 criminal and 151 civil cases. The total number dealt with in 2001 was almost the same with 413 criminal cases and 180 civil matters. Seven criminal and 15 civil cases awaited judgment at the end of the Court year.

Miscellaneous motion matters are listed once a month and heard by a permanent bench. In 2002, 215 matters were dealt with compared with 270 in 2001. Notices of discontinuance normally comprise the largest single group in this list, but in 2002 that was not the case: 50 notices of discontinuance were received compared with 70 in 2001. Fifty-eight appeals were deemed abandoned under Rules 10 and 11 of the Court of Appeal (Civil) Rules 1997 in 2002, 49 in 2001. One case settled this year but only after a full day hearing. This is the first reported settlement over the past three years.

The number of civil appeals filed has continued to drop with 276 filed in 2002. In 2000 and 2001 the figures were 301 and 296 respectively. Twenty-nine cross appeals were also filed in 2002. Applications for fixtures were down considerably this year with only 163 being filed compared with 203 in 2001. The increase in court fees may be one of the reasons for this drop in numbers. At the end of 2002 in the civil jurisdiction 48 appeals had fixture dates and 11 were waiting to have a date confirmed. Four of those 11 cases were adjourned in 2002.

Applications for waiver of fees were received at a steady pace with 51 such applications being considered. Twelve were accepted under section C pending legal aid decisions, 33 granted under sections A and B and six applications were refused. Two of those went to review, one of which was overturned on one point only.

There was an increase in the number of criminal appeals filed. A total of 457 was received, an increase of 26 from 2001. Of those, 115 were against both conviction and sentence, 73 were against conviction, 145 were against sentence, 62 dealt with pre-trial rulings and 21 were appeals by the Solicitor-General against sentence and pre-trial rulings. Of the

remaining 63 appeals, two were referred to the Court by the Governor-General and the others were bail, special leave, name suppression and rehearing applications and case stated matters.

The criminal appeal division continued to handle the majority of the criminal caseload.

With the entry into force of the Sentencing Act 2002 on 30 June 2002 it was anticipated that a large number of sentence appeals would be filed as a result. However, as the numbers reflect, this did not occur. Those filed were dealt with in a timely fashion and heard in the permanent Court.

Timeliness in processing criminal appeals in general has continued to be a concern. Parties from all areas of the legal profession met this year with some of the Judiciary to discuss the issues and their resolution. As a result at the end of 2002 only 2% of appeals requiring fixture were being delayed due to awaiting Legal Service Agency decisions.

At the end of 2002, 168 criminal appeals were on the hearing status list; of those 95 had a fixture date. The caseload position in 2001 at the same time was 134 appeals with 46 having a confirmed fixture date. Filings received in December have contributed to the number on hand. Fifty-three were received with 26 of those coming in within the last five days of the year.

Programme for Court sittings

The Court sat in benches of three and five judges. In the divisional Courts the contribution of High Court Judges amounting to 80 judge weeks was of considerable significance and is much appreciated.

The usual monthly cycle of a five-Judge fortnight at the beginning of the month, followed by a fortnight for three-Judge Courts and divisional sittings in either Wellington or Auckland, was followed this year. It was intended to have sittings in Christchurch on three occasions in 2002 but unfortunately one division was not able to be filled and was cancelled.

The 2003 programme for appeal hearings is in place and will follow the same pattern as that set in 2002. The usual provision was made for any urgent cases that may emerge for the attention of the Court immediately after the summer recess and there is a substantial workload set down for the first two months of the year.

Procedural developments

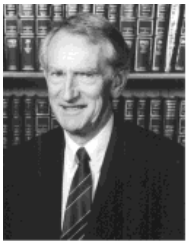
Implementation of the Amendment to the Crimes Act 1961, which came into force on 10 December 2001, changed the procedures for dealing with criminal appeals. New practices were put into place and the Registry staff continued to manage appeals in an efficient and timely manner.

The judgment of the Privy Council in *Taito v R* (2002) 19 CRNZ 224 was delivered on 19 March 2002. The appeals were allowed and remitted to the Court of Appeal for hearing. The

judgment also indicated that the Solicitor-General had advised the Privy Council that, in the event of such an outcome, the appellants would receive legal aid under the new system. Action was taken by the Court and council to bring these matters on for hearing. A number of them are listed in the early part of 2003 and some have indicated that they may not wish to continue.

As a consequence of the Privy Council decision a further appeal was lodged with the Court, *R v Smith* CA 315/96, 19 December 2002 asking that his appeal be set down again. Defence and Crown counsel agreed on a method for bringing this appeal to enable it to challenge the effect of Part II of the Crimes (Criminal Appeals) Amendment Act 2001. This Court concluded that approximately 1500 people have the right of rehearing under the inherent powers of the Court. A system for contacting appellants affected is being developed by the Registrar of the Court in conjunction with the Legal Services Agency.

The President retires



Rt Hon Sir Ivor Richardson retired as President of the Court on 23 May 2002. He had been a member of the Court since 1977 and President since April 1996.

He served the Court longer than any other permanent member and sat with more than fifty judges, including three Chief Justices, four Presidents and 14 other permanent Judges.

Sir Ivor's major contributions to the law, the justice system, the profession, legal education and the public generally were marked by the publication of special issues of the New Zealand Journal of Tax Law and Policy and the New Zealand Business Law Quarterly, a conference organised by the New Zealand section of the International Fiscal Association, a final sitting addressed by leaders of the profession and, notably, a wide ranging conference at the Victoria University of Wellington on 5 and 6 April 2002 on *Roles and Perspectives in the Law*. The papers for that conference, with associated commentaries, have since been published under that title by the Victoria University Press and also as a special issue of the Law Review of the Victoria University of Wellington where Sir Ivor is now a Distinguished Fellow. The Queen's Birthday honours for 2002 marked his contributions by his being made a PCNZM.

In the same honours list, Rt Hon Lord Cooke of Thorndon, the longest serving President of the Court (1986-96), was admitted to the rank of the Order of New Zealand.

Members of the Court

The Chief Justice, the head of the New Zealand Judiciary, is a member of the Court of Appeal by virtue of that office and sits periodically as well as sitting in the High Court. The President and six other permanent appellate judges constitute the full–time working membership of the Court.

The Chief Justice is the Rt Hon Dame Sian Elias, GNZM. She studied law at the University of Auckland and Stanford University in the United States, before practising as a barrister in Auckland. Dame Sian was appointed a Queen's Counsel in 1988 and was heavily involved during her career at the bar in litigation concerning the Treaty of Waitangi. She was appointed a Judge of the High Court in 1995 and became Chief Justice in 1999.

The President of the Court of Appeal is the Rt Hon Justice Thomas Gault, DCNZM, graduated LLM from Victoria University of Wellington. He was a member of a Wellington law firm for 20 years before commencing practice as a barrister sole in 1981. He was appointed a Queen's Counsel in 1984 and a Judge of the High Court in 1987. He became a Judge of the Court of Appeal in 1991 and President of the Court in May 2002 on the retirement of Sir Ivor Richardson.

Rt Hon Justice Sir Kenneth Keith, KBE, studied law at the University of Auckland, Victoria University of Wellington and Harvard Law School. Before his appointment as a Judge of the Court of Appeal in April 1996 he had been employed in the New Zealand Department of External Affairs and the United Nations Secretariat, a member of the Law Faculty of Victoria University and a member and, at the time of his appointment, President of the New Zealand Law Commission.

Rt Hon Justice Peter Blanchard holds LLM degrees from Auckland and Harvard Universities. He was a partner in the Auckland law firm Simpson Grierson and director of several listed public companies until his appointment as a Judge of the High Court in 1992. He became a Judge of the Court of Appeal in 1996.

Rt Hon Justice Andrew Tipping graduated LLM with 1st class Honours from Canterbury University. He was awarded the Canterbury District Law Society's Gold Medal and the Sir Timothy Cleary Memorial Prize. He practised as a Common Law partner in the Christchurch firm of Wynn Williams & Co before being appointed to the High Court Bench in 1986. He was President of the Canterbury District Law Society in 1984 and a Council Member of the New Zealand Law Society from 1982–1984. He was appointed as a Judge of the High Court in 1986 and of the Court of Appeal in 1997.

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

Hon Justice Noel Anderson graduated LLB from the University of Auckland in 1967 and was a partner in the Auckland firm Martelli, McKegg & Adams–Smith until commencing practice as a barrister sole in January 1972. He was appointed a Queen's Counsel in May 1986, a Judge of the High Court in May 1987 and of the Court of Appeal in September 2001.

Hon Justice Susan Glazebrook has an MA (1st Class Hons), an LLB (Hons) and a Dip Bus (Finance) from Auckland University and a D Phil from Oxford University in French legal history. Before being appointed to the High Court in May 2000 she was a partner in the law firm Simpson Grierson and a member of various commercial Boards and government advisory committees, serving as President of the Inter-Pacific Bar Association in 1998. She was appointed to the Court of Appeal in May 2002.

In 2002 Justice Tipping sat in the Privy Council in May and the President in October.

Members of the Court delivered papers and lectures to legal, university and other audiences in New Zealand and overseas. Three members gave papers to the conference in honour of Sir Ivor Richardson, two to a Criminal Law Symposium conducted by the New Zealand Law Society, two to the judicial orientation programme of the Institute of Judicial Affairs and another gave the Harkness Henry Lecture.

Other audiences were the New Zealand Lawyers Association in London, the Fiji High Court Judges retreat, a graduate class in Shanghai, a Bill of Rights seminar in Sydney, an international law conference in Canberra, the New Zealand Bar Association conference, a seminar on Sir Robert Muldoon in Wellington, and an accident compensation seminar in Wellington. One judge served as a member of the Advisory Council of Jurists for the Asia Pacific Forum on Human Rights Institutes meeting in Kuala Lumpur. One member also participated in the Ottawa Round of the Courts' International Working Conversations on Envirogenetrics Disputes and Issues.

✧✧✧✧

2. STATISTICS

Criminal Appeals

	Hearing	Allowed	Dismissed	On the papers Allowed	On the papers Dismissed
Conviction & Sentence	80	26	50	0	17
Conviction	55	11	35	0	10
Sentence	100	42	48	3	13
Solicitor-General Appeals	24	17	7	0	0
Pre Trial	40	18	21	0	4
Other	22	5	12	0	0
Sub total	321				
Abandonments/No jurisdiction	76				
TOTAL	**497**	**119**	**173**	**3**	**44**

NOTE: The number of cases heard does not equal the number allowed and dismissed. Seventeen cases were adjourned part heard, with additional 34 sittings days required to complete hearings. One case was adjourned and has yet to confirm a new date. One case heard in 2001 was decided in 2002 and seven judgments for 2002 cases are reserved.

Two cases required interim judgment and three cases required two judgments. Of the judgments allowed, 18 were allowed in part.

Criminal caseload

	2001	2002
Permanent Court – seven judges	1	Nil
Permanent Court – five judges	17	5
Permanent Court – three judges	24	51
Criminal Appeal Division	285	265
On the papers	34	47

Civil Appeals

	1999	2000	2001	2002
Motions filed	308	301	296	276
Appeals set down	185	149	203	163
Appeals heard	193	160	185	153
Appeals allowed	58	64	76	60
Appeals dismissed	131	95	107	83

NOTE: the number of cases does not equal the number allowed and dismissed. Judgments in 15 cases were reserved and five judgments came from cases heard in the previous year.

Civil caseload

	2001	2002
Permanent Court – seven judges	Nil	Nil
Permanent Court – five judges	25	18
Permanent Court – three judges	79	71
Civil Appeal Division	58	62
Discontinued	70	50
Abandonments	49	58

Year end workflow

	1999	2000	2001	2002
Criminal appeals awaiting hearing as at 31 December	143	109	134	168
Civil appeals awaiting hearing as at 31 December	54	47	55	59

Privy Council appeals

Date PC judgment	Parties	Result	Whether NZ Judge sat
4.02.02	Christchurch Pavilion Partnership No 1 and Ors v Deloitte & Touche Tohmatsu Trustee Co Ltd	Dismissed	No
6.02.02	Ancare New Zealand Ltd v Fort Dodge New Zealand Ltd & Nufarm Ltd	Dismissed	No
13.02.02	The Commerce Commission v The Opthalmological Society of NZ *(Petition to the P.C.)*	Dismissed	No
28.2.02	Hamilton v Papakura District Council &Watercare Services Ltd	Dismissed	Keith J
19.03.02	Taito & Bennett & Ors v The Queen	Allowed	No
15.4.02	Hemi & Ors v Te Runanga o Ngai Tahu & Ors *(Petition to the PC*	Dismissed	No
23.04.02	Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd & The Commerce Commission	Allowed	Tipping J
7.05.02	Man O'War Station Ltd & Anor v Auckland City Council & Anor	Dismissed	No
17.6.02	Man O'War Station Ltd & Anor v Auckland City Council & Anor	Dismissed	No
15.07.02	Canterbury Golf International Ltd v Yoshimoto	Allowed	Tipping J
15.07.02	Haines v Carter	Allowed in part	Tipping J
9.07.02	Bottrill v A	Allowed	No
7.10.02	Dymocks Franchise Systems ((NSW) Pty Ltd v John Todd & Ors	Allowed	No
7.10.02	Attorney-General v Rodney District Council	Allowed	No
22.10.02	M & J Wetherill Co. Ltd & Ors v Commissioner of Inland Revenue *(Petition to the PC)*	Dismissed	No
22.10.02	Russell & Ors v Commissioner of Inland Revenue *(Petition to the PC)*	Dismissed	No
11.11.02	Karpavicius v The Queen	Dismissed	Gault P

Total Heard	**17**
Total Dismissed	10
Total Allowed	7
Appeals from Courts of more than 3 Judges	6
Appeals from Courts of 3 Judges	11

✧✧✧✧

3. MAJOR CASES

The summaries in this and the next chapter and the appendices are simply summaries. It is the text of the judgment itself which is authoritative.

Defamation - Parliamentary privilege – effective repetition

In *Jennings v Buchanan* [2002] 3 NZLR 145 the majority of the Court (Richardson P, Gault, Keith and Blanchard JJ) held that a Member of Parliament might be held liable in defamation if the Member makes a defamatory statement in the House of Representative and later affirms the statement, but without repeating it, on an occasion not protected by privilege. Tipping J, dissenting, considered that the use of parliamentary words as a necessary step in establishing a cause of action should be regarded as inconsistent with parliamentary privilege and therefore impermissible.

Mr Buchanan, a senior official of the New Zealand Wool Board, claimed he was defamed by Mr Jennings, a Member of Parliament, in a newspaper interview which effectively repeated defamatory allegations made by Mr Jennings in a debate in the House of Representatives. The statements made in the House were clearly protected by art 9 of the Bill of Rights 1688 (Imp) which provides "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament."

The majority held that the protection afforded the Member's "freedom of speech … in Parliament" was not in itself being "questioned". The majority noted records of speech or proceedings in Parliament have long been used in Court proceedings in ways that are not considered to breach art 9:

1) to establish what was said or done in Parliament on a particular day as a matter of historical fact;

2) to assist in finding the meaning of legislation;

3) (in England at least) to assist in finding a government decision is or is not to be judicially reviewed; or

4) if legislation so provides, as with corruption and bribery of a Member.

In this case the record may be used to give meaning to the later non-privileged public statement without art 9 being breached or the underlying purposes of the privilege being damaged.

It was critical to the majority's conclusion that the non-privileged statement was made *after* the privileged statement was made. The public interest underlying art 9 is that Members and witnesses can speak freely in the House without fear that what they say will later be held against them in the Courts. The prospect of the present proceedings would not have inhibited Mr Jennings at the time he spoke in the House. It was only the later unprotected statement that enabled the proceedings to be brought.

The majority held that by saying he "did not resile" from what he said in the House Mr Jennings effectively repeated the earlier statement. "Not recoiling or retreating from something is equivalent to standing by it, that is adopting or affirming it. It is more than a mere acknowledgement of having made an earlier statement."

Tipping J, dissenting, considered that repetition, to whatever extent, by a Member of words spoken in the House becomes actionable only if the words spoken or written outside the House are defamatory in themselves, that is, on a stand-alone basis. That position was reinforced by the difficulties in distinguishing between acknowledgement and affirmation in effective repetition. The only secure and principled approach is to limit the plaintiff, for the purposes of establishing the ingredients of his cause of action, to words which have been spoken or written outside Parliament by the Member personally. Parliament can and should be relied on to employ its own procedures for dealing with abuse of parliamentary privilege.

Trade Marks – infringement

Anheuser Busch Inc v Budweiser Budvar National Corp & Anor (2002) 7 NZBLC 103,812 concerned a dispute over the entitlement to use the name BUDWEISER in relation to beer. The appellant, AB, registered the mark BUD in 1964 and BUDWEISER in 1984. The first respondent, BB, registered its BUDEJOVICKY BUDWAR mark in 1996. AB brought claims for rectification of the Trade Marks Register by the removal of marks registered in the name of BB; infringement of its own registered marks; passing off; and breaches of the Fair Trading Act 1986. The Court allowed the appeal on the cause of action alleging trademark infringement so far as it related to the use on the BB labels of the word "Budwiser". In all other respects the appeal was dismissed.

Gault P wrote the leading judgment. In respect of the labels the President agreed with the High Court finding that BB's pre-1998 label infringed AB's marks. However, he also considered that a minor change in the post-1998 label was not sufficient to prevent infringement because of the likely influence of the prior use of the earlier label version and of the concurrent use of the word much more prominently on the 4-bottle pack. The signs were unmistakably aimed at creating the impression of continuity. The test is one of imperfect recollection and not close scrutiny.

The President considered that the "own name" defence in s12(a) was not available to corporate defendants. He reviewed the legislative history of ss12 and 13 and concluded that that was the only operative effect of s13. Because that view was not shared by the other members of the Court the Judge went on to examine whether the use by BB of the mark was a "bona fide" use within s12(a). He concluded on the facts that it was not.

The President also made some observations on the evidential focus in infringement cases, noting that the comparison of trade marks to ascertain whether there is deceptive or confusing similarity contrary to s17(1) so as to establish a ground for removal of registrations is an entirely notional exercise. Opinion evidence that the marks are or are not confusingly similar is therefore of limited value.

In a separate judgment McGrath and Glazebrook JJ disagreed with the President's view that s13 renders a defence under s12(a) unavailable for companies. However, they concurred

with all other aspects of the judgment, including the President's conclusion that the s12(a) defence was not made out by BB.

Exercise of power for statutory and non-statutory purpose

Attorney-General v Ireland [2002] 2 NZLR 220 established that the exercise of a power for both statutory and non-statutory purposes is not unlawful as long as the statutory purpose is satisfied and not in any way prejudiced by the additional purpose.

North Head reserve is classified as a reserve for historic purposes. It is administered by the Department of Conservation. Section 58 of the Reserves Act 1977 permitted the administering body to use buildings on the reserve as residences or offices for the proper management of the reserve and to do such other things as necessary or desirable for the proper administration of the reserve. DOC proposed to site offices on the reserve to administer all reserves in the Auckland area, including the North Head reserve. On application for judicial review of this decision, the High Court found that, although the purpose of administering that reserve would be satisfied, the use of buildings on the reserve to administer other reserves was not a permitted purpose. The existence of the other purpose, being a material purpose, invalidated the exercise of the power. The Attorney-General, on behalf of DOC, appealed.

The Court allowed the appeal, holding the Minister's proposed use satisfied a statutory purpose. The additional purpose and use in the circumstances of this case did not prejudice that purpose and hence was not unlawful. There was no indication in the legislation that other non-prejudicial purposes are prohibited. The statute did not for instance expressly limit the purposes "only" to those enumerated, nor did it identify any purposes as invalid. Purposes not within the statute are not necessarily "invalid" or "improper" provided that the additional pursuit of such other purposes does not thwart or frustrate the policy of the Act in question.

Employers' duties in relation to psychological harm

In *Attorney-General v Gilbert* [2002] 2 NZLR 342, a Court of five held that an employer breached its obligation to maintain a safe working environment if it unreasonably failed to take all steps practicable to mitigate workplace risks and it was foreseeable that an employee may suffer harm as a result. In this case, the respondent was entitled to recover damages for such a breach.

Mr Gilbert worked as a probation officer but retired on medical grounds and subsequently developed serious cardiac disease, which left him 90% disabled. He brought personal grievance proceedings alleging unjustified dismissal on the basis of constructive dismissal occasioned by breaches of his employment contract. The Employment Court found that the medical grounds on which Gilbert retired were caused by the Department of Correction's breach of contract and that this constituted constructive dismissal. The dismissal was unjustified. On appeal alleging errors of law, the Attorney-General disputed the Department's liability for the losses arising from Mr Gilbert's disability.

Upholding the Employment Court, the Court held that the Department was under a contractual duty to maintain a safe workplace. This obligation derived from express incorporation of the State Sector Act 1998 and the Health and Safety in Employment Act 1992, and from implied duties recognised by the common law to take reasonable care to avoid causing injury to the employee's physical or mental health. The common law duties were informed by the statutory obligations.

The Court held that harm under the HSE Act is not restricted to a particular type of harm. The Act does not suggest a distinction between physical, psychiatric or psychological harm. It would be contrary to the objects of the HSE Act if an employer was not required to take all reasonably practicable steps to avoid causing psychological harm. This does not place an unreasonable burden on employers. What is "reasonably practicable" requires a balance. The severity of harm, the current state of knowledge about its likelihood, knowledge of means of countering the risk, and the costs and availability of those means are relevant. In some cases, a risk may not be apparent without specific information about the vulnerability of a particular employee. If an employer unreasonably fails to take all steps practicable to remove or manage the risk and it is reasonably foreseeable that any employee may suffer harm as a result, then the employer will be in breach of the contractual term to maintain safe working conditions. The application of the tortious 'nervous shock' distinctions to claims for compensation for breach of contract is inappropriate.

The appeal was allowed in part. Mr Gilbert was entitled to damages to compensate him for any loss he suffered through the breach of contract and to seek redress under s40 of the Employment Contracts Act 1991. He was able to recover for physical injury caused by stress. The Court rejected the policy reasons against imposing liability on an employer for coronary artery disease that the appellant put forward. The Court held it was inappropriate for the Employment Court to award damages for loss of career, lost employment status, employability and future marketability given the award of compensatory damages for the earnings for the balance of Mr Gilbert's working life. For exemplary damages to be warranted some there must be a conscious creation of, or persistence in, an unsafe system with the knowledge that there is a substantial risk of harm to the plaintiff. That finding was not available here.

Bill of rights – exclusion of evidence – balancing test

In *R v Shaheed* [2002] 2 NZLR 377 a full bench of seven reconsidered the test for excluding evidence as a remedy for breaches of the New Zealand Bill of Rights Act 1990. The appellant was arrested for offensive behaviour, and was requested to give a blood sample for the database. He was told that if he refused a court order would be obtained authorising the taking of a blood sample by compulsion. In fact, there was no such power in these circumstances. The appellant should have been advised of his right to a lawyer and told that he was not required to give a sample. The Crown conceded that the taking of this blood sample was both unlawful and an unreasonable in terms of s21 of the Bill of Rights.

When the blood sample was analysed it was found to match a sample found on the victim of a rape with which the accused had not previously been connected. The rape victim subsequently identified the appellant from a photomontage, and the police applied for a court order for a blood sample. This was granted and the appellant was charged with the rape. The

Crown then made a pre-trial application for a ruling on the admissibility of the evidence of the analysis of the second sample. The trial Judge ruled the evidence inadmissible and the Solicitor-General appealed. A majority of the Court (4-3) held that the evidence was inadmissible and dismissed the appeal.

The first question was what test to apply. Six members of the Court (Richardson P, Gault, Blanchard, Tipping, McGrath, Anderson JJ) held that admissibility of evidence obtained in breach of the Bill of Rights was to be governed by a balancing test directed to the ultimate question of whether exclusion of the evidence was a proportionate response to the breach of the relevant right. The starting point in the balancing exercise was the nature of the right and the breach. However, other factors may render the exclusion disproportionate to the breach and warrant a ruling that the evidence is admissible. These factors include the value of the right and the seriousness of the intrusion on it; whether the breach has been committed deliberately, or with reckless disregard of the suspect's rights, or has arisen through gross carelessness on the part of the police; whether other investigative techniques consistent with Bill of Rights were available; the nature and quality of the disputed evidence; the centrality of the evidence to the Crown's case; and in some cases, the availability of an alternative remedy.

The majority rejected the prima facie exclusion rule that had previously governed admissibility in this area. The rule was criticised for failing to adequately address the interest of the community that those who are guilty of serious crimes should not go unpunished, and for leading to undesirably mechanical judicial decision-making. It was observed that in most cases the balancing test would not lead to results different from those in earlier decisions of the Court, but would encourage a greater exercise of judgment than that fostered by the prima facie rule.

Elias CJ, dissenting, observed that the prima facie rule gave an effective remedy and gave clear direction to police, prosecutors and judges. The substitution of a balancing test was both an unnecessary and uncertain development. Her Honour warned that the balancing exercise risked promoting ends-based reasoning and could co-opt judges into completing breaches of Bill of Rights in further breach of the duty imposed by s3. It might also deny the only effective remedy.

The second question was whether the evidence was admissible on the facts of the case. The majority (Richardson P, Blanchard, Tipping, McGrath JJ) held that the evidence was not admissible. The breach of the appellant's right had to be given great weight. The police had no power to compel the appellant to provide a sample and denied him the opportunity of having legal advice. These factors in favour of admissibility were not outweighed by the seriousness of the offence nor the reliability or centrality of the evidence. The minority (Elias CJ, Gault, Anderson JJ) were of the opinion that the evidence was admissible because there was not a sufficient causal link between the breach, the first blood sample, and the evidence obtained from the second blood sample.

Re-hearing procedure for defective judgments

R v Smith CA315/96, 19 December 2002, concerned the effect of Part II of the Crimes (Criminal Appeals) Amendment Act 2001 on the 1996 determination of an appeal under an

'ex parte' procedure formerly used by the Court of Appeal for criminal appeals. In 1996 Mr Smith's appeal against conviction and sentence was dismissed after an ex parte hearing. In the light of the Privy Council decision in *Taito v R* (2002) 6 HRNZ 539, Mr Smith sought to have his appeal set down again.

The Crown accepted that the determination of Mr Smith's appeal was invalid given *Taito*. Part II of the 2001 Criminal Appeals Act validates the determination of an appeal in certain circumstances. The defects in Mr Smith's appeal determination were not confined to the qualifying errors set out in the Act. Because the decision was not validated by the Act, the Court had to decide what was to be done. It was estimated there were approximately 1500 persons in a similar position to Mr Smith.

The Court of Appeal has the power to re-open a decision under its inherent power. This derives from its inherent power to regulate its own procedure and practice. The jurisdiction goes beyond the ability to correct slips or omissions in judgments. The Court surveyed the approaches to the use of the inherent jurisdiction in other parts of the Commonwealth. It concluded that the Court has inherent power to revisit its decisions in exceptional circumstances when required by the interests of justice. This is necessary to maintain the Court of Appeal's character as a court of justice. It is only available where a substantial miscarriage of justice would result if fundamental error in procedure is not corrected and where there is no alternative effective remedy. In the case of Mr Smith's appeal, there was a clear miscarriage of justice caused by presumptive bias, breach of natural justice, and unlawful procedure. There was no alternative remedy as the Privy Council had already spoken on the matter and thus the availability of an appeal was uncertain, and also expensive.

It was necessary for the 1996 decision to be set aside. It had been determined and thus could only be re-heard if it was set aside according to law and a re-hearing ordered. The Crown argued that the statutory scheme of re-hearings under the Act excluded the inherent power of the Court to revisit an appeal. In the light of the New Zealand Bill of Rights Act 1990, the Crown's contention was not an adequate response. An inherent power may be exercised in respect of matters regulated by statute if its exercise does not contravene any statutory provisions.

The appellant was entitled to a re-hearing on making written application. It was appropriate to exercise the Court's inherent jurisdiction in this way given the history of the matter and the *Taito* decision. The Court ruled that it ought not initiate the re-hearing of appeals itself. A letter seeking a re-hearing is required. Information as to the ability to seek a re-hearing and to request legal aid should be given to the appellants affected.

On written application for a re-hearing, the Registrar was directed to set down the appeal for oral argument.

Judicial review and restitution

In *Waikato Regional Airport Ltd v Attorney General* [2002] 3 NZLR 433 a Court of five considered whether restitution should be ordered in a case where the monies concerned could subsequently be recovered by the party against whom the order was made.

The case concerned two decisions made by the Director-General of Agriculture and Forestry to recover the costs of border control services for international flights into regional airports from those airports. The airports concerned sought judicial review of the two decisions made to recover the costs and restitution of monies paid since charges had been imposed.

The Court held that the first decision to charge was invalid because it was not made by the Director-General or his delegate. The second decision was found to be valid and the Court held that the Director-General was entitled to impose charges retrospectively. Because the first and second decision were in the same terms, and the charges could be imposed retrospectively, it was held virtually inevitable that if the first decision was declared invalid and restitution were ordered the Director-General would immediately make another valid decision to the same effect. Accordingly, the first decision was specifically not declared invalid and restitution was denied. Although the appeal succeeded, the appellant was deprived of costs in the High Court and Court of Appeal because it was the beneficiary of an indulgence and as admonition for careless procedures.

Employment Tribunal – members' entitlement to remuneration

In *Claydon & Ors v Attorney General* CA229/01, 4 November 2002, the Court looked at the question of judicial independence in the context of the abolition of the Employment Tribunal and its replacement with the Employment Relations Authority. The change was effected by the Employment Relations Act 2000 (ERA).

The appellants were members of the Employment Tribunal who had been appointed for a fixed term under the Employment Contracts Act 1991. They were not appointed to the Employment Relations Authority when the Tribunal was abolished and sought compensation for the unexpired portion of their fixed term contracts. The appellants argued that they were entitled to the benefits of their judicial offices for the remainder of the fixed terms because these were "existing rights" under s17(1)(b) of the Interpretation Act 1999 which had not been abrogated by the ERA. It was argued that this interpretation was reinforced by the principle of judicial independence.

A bench of five rejected the appellants' claim and upheld the decision of the High Court. The Court held that it was clear under the ERA that office holders' rights ceased to exist when the Tribunal was abolished. Gault P and Blanchard J held that the principle of judicial independence could not assist the appellants' argument because the statute was so clear. Keith J observed that the principle of judicial independence could not assist the appellants in any event because its purpose was to protect the rights of parties seeking justice in the Courts. It was also observed that the principle of judicial independence did not apply to a quasi-judicial tribunal in the same way as it applied to a court (McGrath J), nor did it operate to vest rights in any particular judicial officer (Glazebrook J).

Statutory holiday pay in factories

In *Greenlea Premier Meats Ltd v Horn* CA98/02, 16 December 2002, a Court of five, in five separate, concurring judgments, held that the obligation in s7A of the Holidays Act 1981 to

provide for statutory holidays "on pay" was, as a matter of law, satisfied by payment at the rate specified in the employment contract. The workers concerned were employed in the appellant's meat works and were generally paid on a piece rate. They were paid for statutory holidays at what their collective employment contract referred to as the "ordinary hourly rate" of $9.50. Under the Holidays Act they were entitled to have the public holidays "on pay" (s7A) or at an amount fixed by reference to their "wages for an ordinary working day" (s25). The Act forbids contracting out of those rights and obligations (s33). A Labour Inspector brought an action in the Employment Tribunal claiming the employer had not met its obligations under the Act. The application was dismissed in the Employment Tribunal but allowed in the Employment Court which held a calculation by reference to the average wages was required by s7A and s25(1) of the Act. The specification of the wage rate of $9.50 per hour for public holidays was an attempt to contract out of the Act, contrary to s33.

In allowing the appeal and restoring the decision of the Employment Tribunal the Court considered the background to the current Holidays Act. The Act consolidates previously independent legislation for annual holidays and public holidays. Within the current Act the provision for annual holidays is still distinct from provision for public holidays. Calculation for annual holidays is based on average weekly earnings (ss16-18). In relation to public holidays the Act provides no indication of how the wages are to be calculated. It does not adopt the approximation of actual earnings provided for annual holidays. It simply signals an entitlement to pay, with the quantum of that entitlement to be found elsewhere. In this case it is found in the employment contract.

This does not mean however that provision can be made in an employment contract to defeat the purpose of the legislation. A special rate of pay applicable only to statutory holidays would not comply with s7A because it would not treat the statutory holiday as an "ordinary working day". Here however the rate of remuneration provided for in the contract is referable to the non-production rate paid on working days when the plant is not operating. The provision had also been included in previous awards made by the Arbitration Court and Arbitration Commission. The Arbitration Court's and Arbitration Commission's understanding of the fixing of wages "for an ordinary working day" (as the legislation of that period also provided) should not lightly be put to one side. There would be an inherent anomaly in allow the review of one element of a composite package such as this, which included piecework rates and designated hourly rates, without being able to review the whole.

Revocation of interim adoption orders

A Court of five reviewed the key operative provisions of the Adoption Act 1955 in *B v G* [2002] 3 NZLR 233. The Court had to consider the circumstances in which interim adoption orders under the Act can be revoked.

The High Court held that a birth mother's application for revocation should have been allowed if the Family Court had been persuaded that the welfare and interests of the child would not be promoted by adoption. It held that a "welfare and interests of the child" approach, rather than an "irrevocability of consent" approach, applied at all stages of the adoption process.

This Court found that there is no stark dichotomy between the two approaches identified by the High Court and that a combination of these approaches applies, with a narrowing of focus over the stages of the adoption process. Irrevocability of consent is always a factor to be taken into account, but the inquiry into the child's welfare and interests becomes less broad–based as the process advances. A broad–based inquiry is conducted at the time of the hearing of the interim adoption application. After that point the focus is on changes to the situation and, in all but exceptional cases, relates to changes to the position of the child in the care of the adoptive parent or parents. A revocation application cannot be seen as an opportunity to revoke consent or to put before the Court matters that could have been raised earlier. Accordingly, the discretionary power under s12 of the Act to revoke interim orders should be used by the Courts in a limited range of cases only — eg where there was a lack of jurisdiction to make the interim order through lack of true consent, where there was a material mistake or misrepresentation in the application for an interim order such that the order would not have been made had the true position been before the Court, or where, after the making of the interim order, matters arise that are so serious that they justify the adoption process being stopped immediately. None of these factors were present in this case.

The Court further stated that a birth mother may participate in the adoption process after giving consent, not because she has rights in the adoption process but out of her duty as guardian to act in the best interests of the child. The extent to which she may participate in the hearing in her role as guardian will in any individual case be at the discretion of the Family Court. Once she has participated in a hearing, she must abide by the decision of the Court, as she has no rights of appeal against the grant of an interim or final adoption order.

The appeal on the point of law was allowed and the case remitted to the High Court for the appeal there to be determined in the light of the Court's decision on the scope of s12.

Minimum terms of imprisonment - principles

R v Brown [2002] 3 NZLR 670 provided the Court with its first opportunity to consider the principles applicable to the power to impose minimum terms of imprisonment under s86 of the Sentencing Act 2002 in light of the changes to parole eligibility enacted in the Parole Act 2002. This involved reviewing the applicability of the principles set out in *R v Rongonui* CA321/00, 9 May 2001, a case decided by a Court of five under the equivalent provision of the Criminal Justice Act 1985.

The Court of five held that the enactment of the Sentencing Act and the companion Parole Act 2002 created a completely different context in which the views expressed in *Rongonui* are no longer applicable. Under s84(1) of the new Parole Act all offenders serving a long term determinate sentence, including serious violent offenders, become eligible for parole after serving one-third of the sentence. The combined effect of s84(1) of the Parole Act and s86(4) of the Sentencing Act is that the period within which a minimum sentence will have effect now is between one-third and two-thirds of the sentence (up to ten years).

The paramount concern for the Parole Board in determining whether to release on parole is protection of the community. Since minimum sentences under the new Act must end at the point during the sentence when a minimum sentence under the former Act would have begun to take effect, and since consideration of the safety of the community is now the prime factor

to be assessed by the Parole Board, it would be quite inappropriate to apply the *Rongonui* approach in the new context. If, in the period of any minimum sentence, the offender is assessed as being a danger to the community, he or she will not be released on parole in any event. It is unnecessary, therefore, for the sentencing court to attempt to assess at the time of sentencing, as the primary focus, the safety of the community in a period commencing after one-third of the sentence has been served. This suggests that the power to impose a minimum sentence for a serious offender must be intended for cases of such seriousness that, even if there is no danger to the community, release after one-third of the sentence has been served would represent insufficient denunciation, punishment and deterrence in all the circumstances.

The Court went on to indicate how s86 should be applied. When a minimum non parole period is in issue the sentencing judge is involved in a two stage process. First, the nominal or maximum length of the sentence is fixed by reference to all relevant sentencing considerations. Second, as part of a separate exercise, the judge must consider whether the offending itself is sufficiently serious so that for the offender to serve only the ordinary minimum period of one-third of the length of the sentence would not be enough to punish, deter and denounce the offending. It must be a matter for judicial judgment whether the "sufficiently serious" threshold is crossed. Generally this will involve identifying aspects that set the particular offending apart. If the threshold is met the judge may fix a minimum non parole period at a level (not more than two-thirds of the nominal length of the sentence or ten years) which does sufficiently punish, deter and denounce the offending.

In the result, the Solicitor-General's appeal was allowed and a minimum term of five years imprisonment imposed.

Preventive detention - principles

In *R v C* [2003] 1 NZLR 30, the appellant committed serious sexual offences against his daughter, including one incident of rape, over a ten year period commencing when she was four years old. He was sentenced to preventive detention under s87 of the Sentencing Act 2002 (the Act), with a minimum period of imprisonment of five years under s89. On appeal the appellant contended that he should not have been sentenced to preventive detention, and the Solicitor-General contended that the minimum period should have been more than five years.

The Court noted that this was the first preventive detention sentence imposed under the Act, and thus thought it desirable to discuss the relevant principles. The purpose of preventive detention, as set out in s87(1), is to protect the community from those who pose a significant and ongoing risk to the safety of its members. Under s87(2), the preconditions to the imposition of a sentence of preventive detention are (i) the commission of a qualifying offence, (ii) when aged 18 or older, and (iii) the likelihood of the commission of another qualifying offence upon release. But the establishment of the preconditions does not mandate the imposition of such a sentence, which remains a matter of discretion.

The sentence of preventive detention is not a sentence of last resort, albeit its imposition has to be carefully considered. Section 87(4) set out the matters which the Court was required to take into account when considering whether to impose a sentence of preventive detention.

Those factors were substantially a codification of the matters traversed by this Court in *R v Leitch* [1998] 1 NZLR 420. Section 88 then stated two further requirements before a sentence of preventive detention could be imposed. First, prior notice to the defendant that such a sentence was being considered and sufficient time to prepare submissions directed to that sentence. Second, consideration of reports from at least two appropriate health assessors about the likelihood of the offender committing a further qualifying offence following release on the date that would apply under an appropriate finite sentence.

The Court then turned to consider s89, which dealt with the minimum term of imprisonment which had to accompany a sentence of preventive detention. The period could not be less than five years. With that proviso the length of the period had to be the longer of (a) that required to reflect the gravity of the offence; and (b) that required for the purposes of the safety of the community in the light of the offender's age and the risk posed by the offender, assessed at the time of sentencing. The gravity criterion referred to in s89(2)(a) was directed to those matters having a bearing on the appropriate minimum period, from the point of view of punishment, denunciation and deterrence after bearing in mind all matters relevant to that inquiry. By contrast, s89(2)(b) was directed to the appropriate minimum period necessary for the purpose of the safety of the community, that is public protection. Section 89(2) therefore involved the Court in a two step inquiry. First, the Court had to assess what minimum period properly reflected the gravity of the offending on the basis mentioned above. Second, the Court had to consider whether that period was adequate for public protection purposes.

The Court also considered the requirements for a qualifying medical report under s88(1)(b). The Court rejected any contention that the reports be "independent" of each other. It was perfectly acceptable for a subsequent report to refer to an earlier one. All the section required was that each report should express the opinion and conclusion of its author. The Court also rejected the notion that a report could not be relied on for these purposes if it was not directly addressed to the sentencing at hand. In the end all that was essential was that the reports had sufficient relevance to their statutory purpose and the question to which they were directed, namely the likelihood of the offender committing a further qualifying sexual or violent offence when in a position to do so. It was a matter of judgment for the sentencing Court whether a report which was challenged in this respect was sufficiently related to the statutory purpose. In this case, despite the fact that the medical report under challenge was written for a different purpose, it contained a contemporary assessment of the statutory question and thus qualified under s88(1)(b).

It was concluded by the Court, after reviewing the relevant material, that a lengthy determinate sentence in the appellant's case would not provide adequate protection for society. There was here a clear pattern of serious offending, lasting for nearly ten years with the appellant's daughter and then continued with another complainant. There was a predatory element to the appellant's conduct and he had not given any measure of confidence that there would be no repetition. The sentencing Judge was right to regard the appellant as posing a significant and ongoing risk to the safety of the community such that a sentence of preventive detention was fully justified. The question of the minimum period of imprisonment was considered next. The present offending was particularly bad. It was long and sustained; it commenced when the appellant's daughter was only just four; it constituted a gross breach of trust; it involved a variety of sexual abuse including one incident of rape. Overall this offending deserved condign punishment and substantial denunciation and deterrence. The only factors that mitigated the offending were the appellant's immediate acknowledgement of full responsibility and his very early pleas of guilty. The Court noted that it was appropriate

to give credit for a plea of guilty when fixing the length of the minimum period. With these and other points in mind, the Court considered the minimum period which appropriately reflected paragraph (a) of s89(2) was 6 ½ years. This period fixed at step one did not require any increase for the purposes of the safety of the community. Therefore, the appellant's appeal against the preventive detention sentence was dismissed, and the five year minimum term order was quashed and a six year period substituted.

✧✧✧✧

4. CRIMINAL TRIAL ISSUES

This chapter summarises criminal cases where appeals against conviction succeeded because of problems arising in the course of the trial.

Conduct of trial

Judicial intervention

In *R v Hardie* CA421/01, 20 June 2002, evidence of an aunt was called in order to show opportunity in a case involving allegations of sexual violation where opportunity was not in issue in trial. The aunt's evidence was only relevant to show the nature of relationship between complainant and appellant. Although the aunt's evidence could have been properly admitted, it would only be with careful directions from the judge as to the limited scope of relevance. The overall effect of direction actually given left the jury with the impression that they should decide if the aunt's evidence directly corroborated the complainant's account of abuse. There was not the necessary adequate cautionary direction to address the evidence's prejudicial nature.

A further issue on appeal involved judicial interventions. The Court noted that a judge is to refrain from stepping outside the limits of judicial role and from acting in manner reasonably giving rise to an impression of bias or lack of neutrality. A judge is only to interrupt to clarify matters in evidence that the jury may misunderstand and to ensure questions put to a child witness are age appropriate. However inappropriate intervention does not necessarily vitiate a verdict. The test is whether irregular judicial questioning created real danger that the trial was unfair. There was overwhelming impression that three of the Judge's interventions amounted to significant interference the with the course of an unexceptionable cross-examination although, on their own, these would not have caused concern as to safety of verdict. However, although the approach facilitated giving of evidence by complainant, it also took away the impact cross-examination may have generated. The questioning during the re-examination carried the implication of acceptance of their probable truth by the Judge. The ground of appeal concerning questioning of complainant by the Judge was made out. A further ground of appeal relating to evidence of access to pornographic websites failed. The cumulative effect of the two errors identified give rise to a real danger that the appellant did not have a fair trial. The appeal was therefore allowed the convictions quashed and new trial directed.

Evidence

Cross-examination on previous conviction

The issue in *R v M* CA231/01 (2002) 19 CRNZ 300, concerned the trial Judge's decision to allow the Crown to cross-examine the appellant on a previous conviction. The appellant was charged with representative counts of sexual violation (two) and indecent assault (two). The complainant was his granddaughter who had been under his care since 1995. In 1999 the

appellant was convicted of permitting his wife to ill treat two of his grandchildren, including the complainant. The children were then taken out of their grandparents' care and the allegations of sexual abuse followed thereafter.

During the trial, the appellant stated that "I wouldn't harm them at all, my grandchildren, I just love them all". Based on this evidence, the Crown sought leave to cross-examine the appellant on his previous conviction. The trial Judge, exercising his discretion under s5(4)(b) of the Evidence Act 1908, granted leave on the basis that the defence had been conducted in such a way as to suggest the appellant was of very good character and would do no harm to his grandchildren. The appellant was subsequently found guilty of the charges. The issues on appeal concerned the granting of leave, the Judge's control of the cross-examination, and the directions given to the jury on this point.

The Court confirmed that where leave was given under s5(4), evidence of previous convictions was relevant only to the credibility of the accused, and was not relevant to the likelihood of his having committed the offence: *R v Anderson* [2000] 1 NZLR 667. This being so, the Judge directed himself wrongly when deciding to allow cross-examination. His focus was at least implicitly on the relevance of the previous conviction to the question of the likelihood of the appellant having committed the offence, rather than to his credibility, to which it certainly could have been regarded as relevant. If the Judge had properly directed himself as to the purpose of the proposed cross-examination, it may be that it would have been appropriate to exercise the discretion the way it was. Given the Court's conclusions on the remaining issues, it was not necessary to decide that question.

It was further confirmed by the Court that if cross-examination was allowed under s5(4)(b) it was necessary for the Judge to control its nature and extent so that the inherently prejudicial nature of the exercise for the accused was properly managed. The Court considered that the Judge had not exercised the necessary control.

The Court also considered there needed to be an appropriate warning to the jury in cases of this kind that a previous conviction can only be used as going to the issue of credibility, rather than to the issue of guilt.

It was not possible for the Court to say that had the jury been properly directed they would undoubtedly have convicted. There was also the problem about the nature of the cross-examination. Accordingly, the appeal was allowed, the convictions quashed and a new trial ordered.

Cross-examination on evidence excluded before trial

The appellants in *R v Ryland* CA389/01, 391/01 and 397/01, 17 April 2002, were each charged with one count of aggravated robbery. The two main issues on appeal were the correctness of cross-examination on evidence excluded in a pre-trial ruling and the sufficiency of evidence to support the convictions.

In a pre-trial ruling the Judge ruled that photographs of certain equipment found at the accused O'Connor's address (said to be purchased with the proceeds of the robbery) could not be introduced as part of the Crown case because there was no adequate proof of their link

with the appellant. This circumstantial evidence was therefore excluded as part of the Crown case due to the Crown's inability to establish an evidential foundation for its relevance. However, during the trial, the Judge permitted Crown counsel to cross-examine the appellant in relation to the equipment. One of the issues on appeal was whether the Judge had erred in allowing cross-examination on the photographs.

The Court held that the photographs did not fall within the general rule that cross-examination is prohibited where it seeks to establish that which has been ruled inadmissible. Unlike the confession example, such evidence is not inherently inadmissible once shown to be relevant. Crown counsel was entitled to attempt by cross-examination to establish the very links that could not be demonstrated as part of the Crown case.

At the trial the main issue for the jury was of identification. No eye witness described four people as having been involved in the robbery and, with a fourth co-accused having pleaded guilty, the Crown was presented with the difficulty of establishing that all three accused were participants. The Crown case against the accused Brown rested on his close association with the co-accused, Ryland and in particular what the jury might make of an exchange of text messages between them. However, the Court held that the significance of those text messages could be inferred only by reference to intercepted messages between Ryland and others. Because those statements were inadmissible against Brown that left a considerable gap in the Crown case. Further, the Judge, in directing the jury, did not tell them that evidence of these conversations was not to be considered in relation to Brown. Therefore, the only admissible evidence against Brown was one telephone conversation with Ryland which the Court held, considered separately, was more prejudicial than probative. Accordingly, the appeal was allowed in part, the conviction against Brown was quashed and a new trial ordered.

Admissibility of evidence

In *R v Brand* CA247/02, 19 September 2002, the appellant, a member of the Magog Motorcycle Gang, was charged with the rape of the complainant at her home. The Crown filed a pre-trial application to admit into evidence entries in the Gang Minute Book, including an entry in the following terms: "Put a stop to rape happenings around the Club house before they get out of hand." Each entry was ruled to be inadmissible. The matter was revisited at trial and the trial Judge admitted the evidence on the basis that the entry was relevant to and arose out of evidence given by the appellant in evidence in chief. The Crown then cross-examined the appellant in accordance with the ruling. The basis of the appellant's appeal was that the Judge should not have allowed the Minute Book entry to be referred to by the Crown in cross-examination of the appellant.

The Court held that the evidence was of marginal relevance and considerable potential prejudice. The passing reference to the subject of the club house being a place for casual sex in the appellant's evidence in chief, did not give sufficient grounds for admission of the evidence. Indeed, the prejudicial effect of the evidence significantly outweighed its true probative value, such that the evidence should not have been admitted. The Court considered that a miscarriage of justice could well have resulted from what occurred. Therefore, the appeal was allowed and a new trial ordered.

Recent complaint evidence

In *R v Rowan* CA354/01, 15 April 2002, the Court quashed a conviction for sexual violation by unlawful sexual connection and ordered a retrial. The conviction was quashed because of the combination of two factors. The first was the Judge's direction to the jury on the corroboration of the complainant's evidence by her distressed state as observed by two witnesses. Under s23AB of the Crimes Act 1961 a Judge is not required to give any warning to the jury relating to the absence of corroboration. However, a Judge may comment on any absence, in which case s23AB provides that no particular form of words is required. In this case, the Judge told the jury that "as a matter of law" the complainant's evidence did not have to be corroborated by an independent source and that the complainant's distress could, in any event, provide corroboration. The Court held that this direction without more watered down the Crown's standard of proof because the jury could have thought that it needed to go no further than the complainant's account. The Judge should have reiterated the onus on the Crown at this juncture. The second factor was the admitting of inadmissible recent complaint evidence. The complainant had complained about the appellant's actions once on the evening they occurred then again the next morning, recounting the same event on each occasion. Evidence of the first complaint was admissible to allow consistency to be established. However, the Court held that evidence of the second complaint should not have been admitted because, although it was "recent", it could prove nothing more. There was a risk that evidence of the second complaint may have led the jury to believe that repetition gave the complainant's account additional support. The Judge should have pointed out this fallacy to the jury. These two factors together gave rise to a concern about the safety of the verdict. The appeal was therefore allowed, the conviction quashed and a retrial ordered.

Jury Directions

Relevance of intoxication to knowledge of probable consequences

R v Hagen, Gemmell and Lloyd CA162/02, 185/02, and 195/02, 4 December 2002, was a successful appeal against conviction and sentence for sexual violation on the grounds of misdirection by the trial Judge on the relevance of intoxication. The convictions in this case arose from an incident at a party during which a high school student was sexually violated by fellow students by the penetration of his anus with the handle of a broom. The principal offender pleaded guilty and the Crown proceeded against the appellants as parties. At issue on appeal was the appropriateness of the jury direction as to intoxication where knowledge of probable consequences in terms of s66(2) of the Crimes Act 1961 was in issue. The Judge had directed that intoxication was of relevance only to the issue of intention.

The Court held that the jury should have been told that when considering any particular defendant’s actual knowledge of probable consequences, the effect of alcohol on that defendant’s knowledge should be examined. The directions given by the Judge had wrongly excluded alcohol from relevance when the jury were considering knowledge of probable consequences, and, in the context of the case, constituted a misdirection rendering the convictions unsafe.

The Court considered whether a new trial should be ordered or verdicts of indecent assault substituted. It was noted that the discretion to substitute convictions had not yet been exercised in a case where there was an adequate evidential basis for the verdict on the greater charge. The Court therefore quashed the convictions and ordered a new trial.

Failure to put defence case adequately

An appeal against conviction was allowed in *R v Miratana* CA102/02, 4 December 2002, because of a failure by the trial Judge to maintain balance in summing up. The appellant was charged with possession of cannabis for supply. The sole issue in the case was whether the appellant had discharged the onus cast on him by s66(6)(e) of the Misuse of Drugs Act 1975 to prove that his possession of more than 28 grams, which triggers a statutory presumption, was not for the purposes of supply. The Court found that nowhere did the Judge put succinctly the defence case as a whole in the way he had done for the Crown case. The Judge in summing up failed to mention the core of the defence case – that the appellant consistently stated the cannabis was for his own use, his consumption of cannabis shortly before the police raid and his account of being a Rastafarian and the significance that possessed in his life. The failure to present the defence contentions in fair balance to those advanced by the Crown, in a case where a balanced summing up could have led to a different result, entailed miscarriage of justice. The appeal was therefore allowed.

In *R v Schmidt* CA237/02, 21 October 2002, the appellant was charged with theft. His defence at trial was that the goods had been abandoned or, if they had not, the accused honestly believed that was so. The Court held that the trial Judge had erred in a number of material ways when directing the jury. First, the Judge was wrong when he said that there was no onus on the Crown to show that the goods were not abandoned. Once a sufficient evidentiary foundation had been raised to put the matter in issue, then the onus was on the Crown to show that someone had title in the goods such that they were capable of being stolen. Secondly, the Judge erred in saying that the appellant's belief that the goods had been abandoned had to be reasonable as well as honest. An honest belief would be sufficient. The Judge further erred by his endorsement of a criticism allegedly made by the Crown about the appellant refraining from giving evidence. The Judge also failed to direct the jury regarding the issue of lies. These errors lead the Court to the inevitable conclusion that a miscarriage of justice had occurred. Accordingly, the appeal was allowed and the conviction was quashed. It was not appropriate to direct a new trial.

Sexual violation – consent and reasonable belief in consent

R v Kaluza CA80/02, 29 July 2002, was a successful appeal against conviction on a charge of rape. The appellant and the complainant were members of a group of young people staying at a seaside bach. They had both been drinking heavily. In the early hours of the morning the complainant had consensual sexual intercourse with another man, D, on the top bed of a set of bunk beds before going to sleep on the bottom bed. She agreed to engage in further sexual activity with D later on. The complainant later awoke to find a male having sexual intercourse with her. Believing it was D, she went back to sleep. The complainant was awoken a second time to a male, who she thought was D, having sexual intercourse with her.

Thinking that it was D, she responded willingly. When the male spoke the complainant realised that it was not D but the appellant. The appellant was convicted of rape in respect of the second occasion of intercourse.

The appellant appealed his conviction on grounds relating to the Judge's summing up. The Court held that the Judge may have given the jury the erroneous impression that once intercourse was proved that effectively established the Crown case. The Judge did not go on to say that belief in consent was a further crucial issue. Further, the Judge did not give the jury sufficient help in isolating the matters on which they should focus on the belief in consent issue. Specifically, the Judge did not bring home to the jury the dual nature of the belief in consent issue, that is, first what belief, if any, did the appellant hold regarding consent, and second if he held, or it was reasonably possible he held, a belief in consent, were the grounds for that belief reasonable. In the present case, to ensure a fair trial, it was necessary for the Judge to focus the jurors' minds sharply on the state of the appellant's mind at the time of intercourse; whether he might as a reasonable possibility have believed the complainant was consenting. The Judge should then have directed the jury to consider whether his belief in her consent (if unable to be excluded as a reasonable possibility) had been shown by the Crown to have lacked reasonable grounds. The combination of the two matters meant that there was a real risk of a miscarriage of justice. Accordingly, the appeal was allowed, the conviction quashed and a new trial ordered.

In *R v Dysart* CA279/01, 28 February 2002, the appellant appealed against a conviction for sexual violation by oral sexual connection on the grounds that the Judge erred in his direction to the jury on the issue of absence of belief in consent. The jury, after deliberating for some time, returned with a request to have "point four" of the essential elements of the charge reiterated. The numerical reference was to that part of the judge's summing up which dealt with the Crown's onus of proving that the accused did not believe on reasonable grounds that the complainant consented. In reply, the Judge repeated the standard direction on consent and onus in relation to proof of absence of consent. However he then went on to say that while the jury might be concerned about element four, the pivotal issue in the case was what was the position as to consent at the time the act commenced. On appeal the Court held that this reply was effectively a direction to disregard the issue of belief in consent and concentrate on proof of absence of consent. The conviction was quashed as unsound and a retrial ordered.

Conduct of defence counsel

Failure of trial counsel to follow instructions and radical error

In *R v Hills* CA157/02, 11 November 2002, the appellant was found guilty on one count of indecent assault of an eight year old girl (at whose house he had been working wallpapering). He appealed against his conviction on grounds relating to the conduct of his trial counsel.

The Court accepted the appellant's evidence that it was agreed between him and his trial counsel that an adjournment of his trial would be sought on the basis of lack of preparedness for the case. The Court concluded that trial counsel did not carry out his instructions to raise

this issue on the sole occasion when a formal application for adjournment was being considered by the Court. If this additional dimension had been raised there was a reasonable prospect that the application might have succeeded. Although this failure may not have led to any specific prejudice, the various dimensions of the case as a whole did not give the appearance that justice had been done to the appellant.

The Court also found that trial counsel was wrong to advise the appellant not to call character witnesses on the basis that by putting his character in issue the appellant would be liable to cross-examination on his own previous convictions. The previous convictions were completely unrelated to the charge of indecent assault and were very old. The Court could only characterise this erroneous advice as a radical error given that the success of the charge against the appellant depended almost entirely on credibility issues.

Consideration was then given to the question of whether a substantial miscarriage of justice had occurred. When both grounds were considered together, the Court found itself, by an appreciable margin, unable to be sure that had the adjournment been granted and the character witnesses been called a jury would still undoubtedly have convicted. The appeal was therefore allowed and the conviction quashed. Given that the appellant had already served his sentence, it was not appropriate to order a retrial.

✧✧✧✧

5. APPELLATE COURTS : SOME REFLECTIONS

The following is based on notes I prepared for a seminar at the Constitution Unit, London, 15 November 2001. For the United Kingdom I drew on the publications prepared for the Constitution Unit by Andrew Le Sueur and Richard Cornes; *The Future of the United Kingdom's Highest Courts* (2001) by both, and *What is the future for the Judicial Committee of the Privy Council* (2001) by Le Sueur. For New Zealand we now have Peter Spiller's book, the Ivor Richardson conference book and the Geoffrey Palmer/Kim Hill interviews. In the seminar, I also spoke about the organisation and processes of the Court of Appeal.

The meaning of "finality"

Is any court really final? One fact relevant to that question is the proliferation of international courts and tribunals which may be able to examine national policies and laws, including decisions of national courts. That is familiar in the United Kingdom now, with the operation of the European Court of Justice and the European Court of Human Rights. However, the matter runs much more widely. For instance in recent years the International Court of Justice has made a ruling about the application of the death penalty in state courts in the United States in a claim brought by Germany in support of two of its nationals; and similar issues raised by Mexico are before the Court now (2003); tribunals established under the North American Free Trade Agreement (NAFTA) have been asked to rule on the consistency of decisions of national courts with the requirements of that Agreement; and the Human Rights Committee, established under the International Covenant on Civil and Political Rights, and the inter-American bodies have been regularly asked to intervene in respect of national court processes, notably, but of course not exclusively, in death penalty cases. There is also the prospect of national courts being asked to review the actions of some of these international bodies. A decision of a NAFTA tribunal was recently reviewed by the British Columbia Supreme Court for example, *United States of Mexico v Metalclad* [2001] BCSC 664.

There is a related question about what is "final" in international systems. In early November 2001 Judge Gilbert Guillaume, then President of the International Court of Justice, speaking at Cambridge University, expressed concern about the proliferation of international tribunals and raised the question whether the International Court of Justice might have some kind of final role, perhaps by use of the advisory jurisdiction of the Court. He referred to the parallel provided by the power conferred by the Treaty of Rome on national courts to refer matters of European law to the European Court of Justice. This suggestion raises important questions about the structure of international institutions.

A further point about finality is that no final court that I'm aware of considers itself unable to overturn its earlier decisions. There is accordingly no finality in the law in that sense and issues may return quite quickly as with the notable example here of Professor Glanville Williams getting the House of Lords to reverse its statement of the law of attempts. There may also be legislative responses – sometimes almost immediate - reversing the effect of court decisions, as I can testify from New Zealand experience. This point is relevant to the question of the levels of appeals since, to anticipate my next heading, the law may frequently be clarified and developed through court decision by the issue being revisited through a series of cases than through appeal in one case. Consider for instance Crown privilege or public interest immunity where the principal New Zealand case of the 1960s was heard and resolved

in the Court of Appeal without an earlier stage (*Corbett v Social Security Commission* [1962] NZLR 878).

To complete my discussion under this heading I should mention final courts which are not appellate. The International Court of Justice is a prime example, but so also in some circumstances are certain national courts. For instance the Privy Council can be asked under its devolution jurisdiction to rule at first and last instance on the validity of proposed legislation and there is always lurking the advisory jurisdiction of the Privy Council under the 1833 Act. The Canadian Supreme Court (as in the Quebec *Secession* case) and the final courts of some American states can have matters referred to them for first and final ruling and, as a matter of practice, that also happens quite frequently in the High Court of Australia, as for instance in the *Mabo* case about native title.

There is obviously the danger in such cases that the issues will not have been adequately refined. The parties, lawyers and judges will not have had the advantage of an earlier consideration of the matters in dispute. Sometimes that disadvantage can be removed or at least reduced through the procedures actually followed, as when the International Court considers in sequence provisional measures, disputes about its jurisdiction and possibly disputes about intervention and interpretation of earlier judgments before it gets to the merits.

The functions of appellate bodies, especially final ones.

It is often said that appellate courts have two tasks –

1. Correcting error in the particular case.

2. Settling and developing, or even innovating, in the law.

Lord Bingham has commented in this context that a different decision under either head is not necessarily a better one. The appellate decision should be a decision of better quality if the further stage is to be justified. But we should not neglect the well known statement by Justice Robert Jackson of the US Supreme Court : We are final not because we are infallible. We are infallible only because we are final. He added that the provision of a further appeal beyond the Supreme Court would no doubt lead to a proportion of successful appeals.

The second set of functions is sometimes further developed, for instance by reference to a systems management function or a constitutional role : the Le Sueur/Cornes paper is very helpful on that; see also New Zealand Law Commission, *The Structure of the Courts* (1989) paras 219-252, especially 225-236.

It is sometimes said that the first function is a function for a first appeal and the second is a function of a second appeal. But even a cursory survey of the work of many courts of appeal shows that that is not so. Even where there are two appeals the distinction may not appear. I can think of five Privy Council decisions over the last ten years allowing appeals from New Zealand where no issue of principle arose. All that the Privy Council did was to take a different view of the interpretation of particular documents or to make a different assessment of the facts. That is partly a reflection of the fact that the New Zealand Privy Council Appeal Rules do not, in general, provide a filter by reference to importance.

The distinction may not exist in practice since the error, or alleged error, may exactly equate to the question of law which is in dispute. The particular facts and the relevant legal principles may be very interdependent. This is frequently the case, for instance, with administrative law, tax and criminal procedure cases. The first case argued at the beginning of my month in the Privy Council in 2001 was a dispute about the interpretation of the New Zealand Income Tax Act. One side said that the Court of Appeal erred in its interpretation of the Income Tax Act, while the other side said it did not.

Further, cases which may be seen at the outset as raising major issues of law requiring clarification or development may in the end be decided very narrowly on their own facts. One example of this is the judgment of the Privy Council in *Takaro Properties v Rowling* [1987] 2 NZLR 700. There was, as I understand it, some initial thought within the Board which sat that broader questions of the law of negligence – *Anns* and all that – might be addressed. But in the end the case was decided narrowly on its own facts, the appeal judgment was reversed and the Supreme Court finding restored.

And finally, many important precedents are established by intermediate appellate courts, more perhaps than by final courts which, even in the largest countries with which I am familiar, decide fewer than 100 cases each year : one simple measure is the shelf space taken by the law reports of final courts compared with those of the courts below them.

But having expressed those cautions, I agree that the distinction between error correction and law development and clarification is valuable.

Judicial Method

Sir Ivor Richardson gave a paper on the work of the New Zealand Court of Appeal at a conference held in Auckland in May 2001, now published as "Trends in Judgment Writing in the New Zealand Court of Appeal" in Bigwood (ed) *Legal Method in New Zealand : Essays and Commentaries* (2001) 261. The paper includes quantitative measurements of aspects of judgments. There has been a great change in the range of material to which courts refer over the period since 1960. To refer to cases, there has been a large drop in the number of cases from England, a steady if falling reference to cases from Australia, a much increased reference to New Zealand cases and also to those from a number of other jurisdictions. The court also now draws on a much wider range of other material than was once the practice : it includes White Papers, departmental documents, such as the Treasury paper referred to without any exception at all in the New Zealand tax case I mentioned earlier heard in the Privy Council in October 2001, *Commissioner of Inland Revenue v Colonial Mutual Life Assurance* [2002] 3 NZLR 1, para [20], international material, not just relevant treaties but related interpretative documents, and scholarly writing.

What it seems to me is happening is that the old certainties about the "sources of law" have been broken. The sources are now much more heterogeneous. We have a much less certain view of the organisation of power, a lack of certainty associated with major changes in societal attitudes to authority. Related to this is a more explicit consideration of principles and policies. When urged by counsel to go down that route we are often however handicapped by the lack of relevant empirical material or serious law and economic analysis. Things have changed, we are told, society is different, the world has moved on, or New

Zealand is different and accordingly the law should be altered. We have had this argument presented to us for instance in respect of the liability of local authorities for escaping water, the proper distribution of family property following the end of a lengthy marriage, the unconscionability of terms in employment contracts, the relative responsibility of the press in New Zealand and elsewhere, and so on. But, with rare welcome exceptions, we are not helped in those tasks by appropriate material, nor by careful attention being given to a related question.

That question is whether the court or parliament should develop the law. That matter arose for instance in *Lange* v *Atkinson* [2000] 3 NZLR 385 and in respect of the claim by the Crown that a witness in a serious criminal matter could give evidence on an anonymous basis (*R v Hines* [1997] 3 NZLR 5). In the political defamation context the Court considered that it was for it to clarify and as appropriate develop the law of qualified privilege while in the anonymous witness case the court by three to two decided that the matter should be left to the Law Commission and Parliament. Those bodies did in fact move promptly and introduced a more detailed legislative regime than could have been fashioned through litigation.

The more explicit consideration of policy, the increased willingness of litigants to bring politically, economically and socially controversial issues before the court, and changes in attitudes to authority together mean that the courts are much more in the spotlight than in recent decades. Those developments are to be related back to changing attitudes to authority and to our accountability systems.

* * *

My final brief and tentative comments relate to the final courts in the United Kingdom. It does seem to me, as Andrew Le Sueur's paper carefully hints, that the position of the Judicial Committee of the Privy Council might, with greater or lesser speed, largely resolve itself with the health professional matters being handled through the regular court structure, with the Caribbean countries forming their own final court and with New Zealand appeals at some point, I do not predict when, coming to an end. There will still be the remaining jurisdictions within and without the colonial empire and those parts of the British Isles which are not subject to the courts of the United Kingdom. Presumably final courts for those jurisdictions can (continue to) be put together on an ad hoc basis as happens with the small jurisdictions in the Pacific Islands that a number of New Zealand and Australian judges sit on.

So far as a final court of the United Kingdom is concerned, I wonder whether one possible answer is not a distinct single collegial body of nine judges with all nine or seven or five siting, following for instance Canadian or Australian practice, with close control over its docket, with issues being defined in a precise way for final appellate argument and with a greater emphasis, at least so far as I can assess, on written argument, preparation in advance and a somewhat tighter control over oral argument. I say that very tentatively as a grateful visitor with limited immediate experience but as a long term observer of different courts. I think the experience of our court now over more than 40 years, to the extent that it can be generalised, shows that there is great value in having a small group of judges working and sitting together in a collegial way in its own building, situated near the other courts, and provided with appropriate support.

K J Keith.

APPENDICES

A. IMPORTANT CIVIL CASES

Contract Law

Unilateral variation of an agreement

Attorney-General v Forestry Corporation of NZ Ltd and Ors CA92/01, 3 September 2002, concerned agreements for the annual supply by the Crown of timber from Crown Forests to the Tasman group of companies, the Tasman Contracts. On the alienation of Crown Forestry assets to a State Owned Enterprise, the Crown provided protection for its liability against default by the SOE through Special Management Restrictions (SMRs) incorporated as covenants into Crown Forestry Licenses. On sale by the Crown of all its shares in the SOE, the Crown was released from its liability under the Tasman Contracts by way of Deed of Release. The question for the Court on appeal was whether the SMRs continued in effect. If they did, the annual license fee for the Crown Forestry Licenses would be significantly reduced. The Court considered whether the construction of the relevant documents extinguished the SMRs, and if not, whether the Crown as licensee was entitled to waive compliance with the restrictions.

The Court held that the restrictions were not extinguished by the relevant agreements and that the Crown was not entitled to unilaterally vary the contract by waiving compliance with terms which had a benefit for the licensee. The benefit was the SMR's effect in depressing the annual licence fee.

Tender process contracts

Transit New Zealand Ltd v Pratt Contractors Ltd [2002] 2 NZLR 313 was an appeal by Transit New Zealand from a High Court decision finding breach of a tender process contract, including an implied term that Transit would act fairly in considering the respondent's tender, and breach of the Fair Trading Act 1986. Pratt Contractors had twice submitted the lowest tender but did not get the contract.

The Court held that whether a request for tenders gives rise to a process contract, once a conforming tender is submitted, is in all cases a question of whether all the elements of contractual formation are made out at that point. Analysis of the terms of the invitation to tender is the starting point. Where the request makes no express commitment concerning the manner in which tenders received will be addressed, that may indicate the invitation was no more than an offer to receive them.

The Court found no implied term that Transit would act fairly in considering the respondent's tender. Transit plainly has an implied contractual duty to treat tenders equally in the performance of its contractual obligations. It must also comply scrupulously with the contractual provisions for evaluation of tenders. Such duties, however, do not depend on an implied term to act fairly and reasonably in the administration of the tenders received.

The implied duty of equal treatment should not be expanded by further implication to found obligations in relation to Transit's administration of tenders over and above those actually stipulated in the conditions of tender unless they meet the general requirements for implied contractual terms, including necessity for business efficacy. The concept of fair dealing is more often likely to be of importance in considering whether there has been compliance with contractual terms in tender process administration, rather than as a source of new terms. It follows that there is no implied duty of good faith in the process contract in this case of a kind that would require Transit to comply with obligations expressed in manual provisions which have not been expressly incorporated in the request for tender so as to give them contractual force.

The finding on the Fair Trading Act cause of action was also overturned as in this Court's view there had been no misleading and deceptive conduct by Transit in relation to the assurances given prior to submission of tenders that the process would be fair, and later, that it was correctly applied up to that time.

The appeal was therefore allowed and in its place the Court substituted judgment dismissing Pratt's claim.

Contractual interpretation and the Hague Rules

In *Dairy Containers Ltd v The Ship "Tasman Discoverer"* [2002] 3 NZLR 353 the Court was concerned with the interpretation of a provision limiting liability included in the bill of lading. Fifty-five coils of electrolytic tin plates were damaged by sea water while the ship *Tasman Discovery* was en route from Korea to Tauranga. Clause 6(B)(b)(i) of the bill of lading provided that liability be determined according to the Hague Rules 1924 and "for the purpose of this sub-paragraph" the limit of liability under the Rules shall be "£100 Sterling, lawful money of the United Kingdom per package or unit . . . and the Hague Rules shall be construed accordingly". This is the same limit of liability stated in art 4(5) of the Rules. Article 9 of the Rules, the gold clause, states that monetary units were taken as gold value. Clause 8(2) of the bill provided that provisions of the bill repugnant to the Rules were null and void. Similarly, under art 3(8) of the Rules any clause in a contract of carriage limiting the carrier's liability otherwise than as provided in the Rules was null and void.

The defendants argued that its liability was £5500 (55 packages at £100 each). The plaintiffs argued that the package limit was 55 times the present value in gold of £100 sterling in 1924. In the High Court the plaintiff succeeded on the basis that cl 8(2) of the bill of lading and art 3(8) of the Rules nullified the package limitation in cl 6(B)(b)(i); and under art 9 of the Rules the reference in art 4(5) to £100 sterling meant the gold value of £100 sterling in 1924. The second defendant appealed to the Court of Appeal.

The Court held that the parties' plain purpose in the bill of lading was to alter the limitation of liability provided by the Hague Rules. Clause 6(B)(i) provided for liability to be determined according to the Hague Rules in their 1924 form but the words "for the purpose of this sub-paragraph" and "the Hague Rules shall be construed accordingly" amended the Rules to apply a limit of £100 sterling per package or unit. The repugnancy provision in cl 8(2) of the bill of lading stated that it only applied to the "extent" that the Hague Rules were applicable "by virtue" of cl 6, that is, in accordance with the meaning of cl 6(B)(b)(i) set out

above. Art 3(8) was not applicable as it only operated as a paramountcy clause where the rules applied by virtue of an enactment and this case was concerned with contract. The appeal was therefore allowed and the appellant's liability limited to £100 sterling per package or unit or £5500 sterling in ordinary or paper currency.

Enforceability of "process" contract to negotiate in good faith

In *Wellington City Council v Body Corporate 51702* (*Wellington)* [2002] 3 NZLR 486, the Wellington City Council entered into a contract which obliged it to "negotiate in good faith" with Alirae Enterprises Ltd over the sale of the Council's interest as ground lessor in property where Alirae was the ground lessee. The High Court Judge found that the Council, through its officers, breached that "process" contract by failing to conduct the negotiations in good faith. Damages were awarded for breach of contract. The Council challenged that finding on the basis that the so-called process contract amounted to no more than an agreement to try to agree which the law does not recognise as an enforceable contract.

The Court stated that the essence of the common law theory of contract was consensus. Thus for there to be an enforceable contract, the parties must have reached consensus on all essential terms; or at least upon objective means of sufficient certainty by which those terms could be determined. Those objective terms may be expressly agreed or they may be implicit in what has been expressly agreed. The Court considered that this theory of consensus applied to a process contract which obliged the parties to negotiate in good faith for the purpose of trying to reach agreement on all essential terms. Good faith in this context was essentially a subjective concept which the Court could not resolve. If, however, a contract specified the way in which the negotiations were to be conducted with enough precision for the Court to be able to determine what the parties were obliged to do, it would be enforceable.

The Court was careful to note, however, that the reasoning which applied in ordinary contract cases could not simply be translated into the Employment Relations arena. There the good faith obligation must be regarded as having sufficient certainty, as the employment relationship itself immediately provided a degree of contextual objectivity.

The Court was led inexorably to the view that the process contract between the Council and Alirae was unenforceable. It was a contract to negotiate in good faith with no more definition than that of what the obligations of the parties were. As there was no enforceable process contract, there could have been no actionable breach of it, and no basis for an award of damages. In any event, Alirae had not established any failure to negotiate in good faith on the part of the Council. The Council was not obliged to reach agreement with Alirae but was entitled to hold out for terms which were in the circumstances honestly tenable.

Alirae's invocation of s9 of the Fair Trading Act 1986 was also unsuccessful.

Breach of contract through failure to follow amendment procedures

New Zealand Meat Board and Meat Industry Association v Paramount Export Ltd and Ronnick Commodities Ltd in Liquidation CA192/01, 10 September 2002, involved an appeal by the New Zealand Meat Board and Meat Industry Association against a High Court decision finding them liable in both contract and negligence following a change in the allocation of European sheep meat quota. The Court upheld the contract finding, overturned the negligence finding and dismissed the other grounds of appeal.

The case arose from a 1993 change to a 1991 Agreement between the parties for the allocation of European sheep meat quota. As a result of the change Paramount, a meat works, and Ronnick, its marketing company, claimed they did not receive the EU quota which they expected to receive in 1995/96 and 1996/97. They sued the Board and Association in negligence, under equitable estoppel and for breach of contract.

The Court held that the Board and Association had failed to show that the Agreement had been amended in 1993. The Agreement set out clear procedures for amendment including notice and consultation. That procedure was not followed in this case. As such the amendment was not properly made and could not be relied on by the appellants.

Although the amendment point disposed of the question of liability the Court went on to consider the other matters relating to liability raised in the appeal. The High Court's alternative ground for finding breach of contract, an implied contractual obligation to allocate on a fair, equitable and pro rata basis was rejected as being without basis in the Agreement or otherwise. The High Court's negligence finding was overturned because, even assuming a duty of care existed and that proximity and foreseeability were established, none of the particular breaches alleged were established. Further, all of the arguments under the negligence cause of action required a duty to achieve a result – a fair and proportional share of the quota - but such a duty had not been identified and the Agreement imposed no such duty. Equitable estoppel was rejected as no actionable representation or assurance was made out.

The High Court's findings on causation, contributory negligence (none), and damages were upheld subject to the deletion of an interim judgment relating to the deficiency on liquidation so that only an inquiry into those damages was provided for.

Employment Law

Union access to the workplace

Carter Holt Harvey Ltd v National Distribution Union Inc [2002] 1 ERNZ 239 provided the Court with its first opportunity to consider scope of the rights of union access to the workplace under the Employment Relations Act 2000. In this case the union had sought and been refused access to monitor compliance with s97 of the Act and to explain union membership to non-striking workers.

A Court of five held that ss19-25 of the Act constitute a code governing access by union representatives to workplaces. In construing the code it is necessary to keep in mind the

purpose of the Act. Section 3(a)(ii) makes it clear that one of the objects of the Act is to address the inherent inequality of power in employment relationships. Which parts of the workplace may be accessed must be dictated by the purpose for which the entitlement to access is exercised. The Court concluded that in this case it was entirely appropriate for the union representatives to require access to the plant area for the purpose of monitoring compliance by the company with s97. The union had been wrongfully denied access where the employer had sought to impose conditions beyond compliance with ss20 and 21 of the Act.

The Court also upheld the finding of lack of good faith by the employer. However, it noted that it is quite possible to postulate circumstances in which person acting in good faith might engage in conduct that amounts to a breach of statutory rights.

Employment Relations Authority jurisdiction

In *Canterbury Spinners Ltd v Vaughan* [2003] 1 NZLR 176 the Court considered the jurisdiction of the Employment Relations Authority to determine levels of redundancy payments. The respondent had been made redundant by the appellant employer. The contract required the employer to negotiate the level of redundancy with the employee and to make an offer of compensation. An offer was made and when the parties were unable to reach agreement the company paid Mr Vaughan the sum offered. Mr Vaughan applied to the Authority to determine the level of redundancy to be paid. The question before the Court was whether the Authority had jurisdiction to make that determination.

The Authority has the jurisdiction under the Employment Relations Act 2000 to make decisions about employment relationships generally, including disputes about the interpretation, application or operation of an employment agreement (s161(1)(a)). Section 161(2) of the Act expressly excludes from the Authority's jurisdiction determinations about any matter relating to bargaining or the fixing of new terms and conditions of employment. The Authority decided it had no jurisdiction to determine the redundancy compensation under that provision. A full bench of the Employment Court decided to the contrary.

On appeal the Court distinguished between bargaining for and endeavouring to settle new terms and conditions and the process of trying to reach a consensus over the meaning and effect of an existing contractual term already binding on the employer and employee (disputes of interest and disputes of rights under the pre-1991 legislation). The distinction between disputes of rights and disputes of interests under the Labour Relations Act 1987 was essentially the same as the difference between the situation envisaged respectively in s161(1)(a) and s161(2). The Authority has jurisdiction over the former as the disputed provision is one which already creates rights which are legally enforceable. There is no jurisdiction over the latter as a mere agreement to agree or direction to a procedure without sufficient indication of an end result is incapable of creating contractual rights therefore any determination would in law create a new term or condition. Given the similarity between the 2000 and 1987 Acts the Court found there was nothing to stand in the way of the Court's rulings under 1987 Act again being law.

The Employment Court concluded that the Authority had jurisdiction without itself actually interpreting contractual clause, thereby determining what the clause actually obliged the

parties, particularly the employer, to do. It was not appropriate for the Court to attempt any definitive interpretation of the clause therefore the matter was remitted to the Employment Court so that it can give its interpretation and then decide whether the Authority is precluded by s161(2) from resolving the dispute.

Contracts and Agreements-Collective Interpretation Variation

In *Australasian Correctional Management Ltd v Corrections Association of New Zealand Ltd* [2002] 3 NZLR 250 the Court discussed the correct interpretation of a collective employment contract (CEC) entered into under the regime of the Employment Contracts Act 1991, and the effect on a CEC of the transitional provisions of the Employment Relations Act 2000 (ERA).

In 1999 the appellant employer entered into a CEC with the New Zealand Public Service in accordance with the ECA. The CEC required the employer to employ all employees under that contract. When the ERA came into force, some employees in another union voted for the CEC to expire early for them in accordance with the transitional provisions. They then sought to initiate bargaining for a collective employment agreement (CEA) under the ERA to cover themselves and all new employees. The appellant considered that it could not bargain without being in breach of the CEC, which remained in force for all other employees.

The Court held that the CEC could not be interpreted as if it had been entered into under the ERA and not the ECA as the Employment Court appeared to have done. Accordingly, as the ECA was a contractual regime where the parties were free to negotiate and agree any terms they wished, the CEC's meaning was clear. The CEC was the only contract that could be offered to, and entered into, with any employee, both current and future.

The appellant was however obliged to bargain with the union because the transitional provisions of the ERA operated to amend the CEC so that the employer could bargain without breaching the CEA. The amendments extended to allowing the employer to agree to a collective agreement with the union with different terms from the CEC and with a coverage clause including new employees.

Commercial Law

Fair Trading Act 1986

In *Specialised Livestock Imports and Ors v Borrie and Ors,* CA72/01, 28 March 2002, the appellants were shareholders and directors of a family owned company which had contracted to sell ostriches to the respondents. The Court had to consider whether the appellants were in "trade" at the time they were alleged to have made the representations said to be in breach of ss9 and 13 of the Fair Trading Act 1986. It was not disputed in the appeal that the company was "in trade" and liable for misleading conduct of its agents.

The Court held the confinement of the prohibitions in ss9 and 13 to conduct "in trade" is not intended to focus on the general trading status of those acting contrary to its terms and that status is not of itself determinative of whether persons are "in trade" in terms of ss9 and 13 in

the course of their activities on behalf of a company. Each of the shareholders and directors was held to be "in trade" in their dealings on behalf of the company.

In the later decision in the same appeal of *Specialised Livestock Imports & Ors v Borrie & Ors*, CA72/01, 20 September 2002, the Court had to consider, under s43(1)(b) and (d) of the Fair Trading Act 1986, when accessories are liable for breaches of s9 and the degree of influence that is required on affected persons where the misrepresentation was not sole factor causing loss. The issue here was whether the appellants were "aiding, abetting, counselling or procuring" the contravention of s9 by the company. The Court held that s43(1)(b) and (d) imports the requirements of criminal law and as such accessories will only be liable under that provision for their "intentional help" in the contravening acts – that is they must know of the contraventions and intentionally participate in them.

Damages – Fair Trading Act 1986

In *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 the Court considered whether a misrepresentation could give rise to a claim under s43 of the Fair Trading Act 1980 for expectation damages against a vendor's agent when the agent was under no obligation to perform the representation.

The case involved a sale of a property, which contained a driveway partially built on an unformed paper road owned by the local council. The vendors were aware of this, but remained silent on the matter. The vendors' agent, the appellant, was not aware of the position, but was fixed with the vendors' misrepresentation. The respondent purchasers settled and brought an action against the appellant for misleading and deceptive conduct under the Act. The claim succeeded in the District Court and High Court and damages were assessed as being the cost of relocating the entrance and driveway. The agent appealed, arguing that no damages should have been awarded because there was no evidence of any loss.

The Court allowed the appeal. It held that expectation damages are not available under the Act against an agent who is under no obligation to perform the representation. The purchasers had to prove that they had suffered a loss as a result of the misrepresentation. There was no evidence of any loss because the market value of the property was equal to the purchase price, notwithstanding the existence of the paper road.

Validity of resolutions appointing a liquidator

In *Rodewald v Aqua-Agriculture Farms Ltd* [2002] 3 NZLR 501 the Court was asked to consider the validity of a special resolution appointing the appellant a liquidator of a company. The Master in the High Court had held that the appointment was invalid because neither the text of the resolution, nor the minute recording it, stated the time at which the resolution was passed. This is required by s241A of the Companies Act 1993.

The Court made a declaration that the appellant was validly appointed. Section 241A(1)(a) referred to the record of the resolution as found in the minute not the text of the resolution

itself. The chairperson is required to sign the resolution. Where a resolution is made in lieu of a meeting it was sufficient for the chairperson to record the time on a copy of the resolution. Just because the time is omitted does not mean the resolution is invalid. Often there will be other evidence available to establish the actual time of the resolution.

Casino Control Act 1990 – trespass notices – doctrine of common calling

Sky City Auckland Ltd v Wu [2002] 3 NZLR 621 concerned the interpretation of s67 of the Casino Control Act 1990 and the common law doctrine of common calling or prime necessity. Acting under s67, Sky City had issued a trespass notice to the respondent, banning him from entering its premises for two years. The respondent sought an interlocutory injunction in the High Court restraining Sky City from enforcing the trespass notice. The Court granted the injunction because, as Sky City held itself out to the public as willing to serve all, it was under a duty not to act unreasonably towards people who come onto its premises. This duty qualified the power of ejectment in s67. The High Court considered that it was arguable that the two year period was unreasonable or that there was no reasonable basis for the ban, which the respondent alleged was imposed because he was a successful gambler.

The Court allowed the appeal. The common law principle under which operators might be prevented from excluding patrons without good reason was abrogated by s67 of the Act. That provision made it clear that there was no entitlement to enter casino premises just because casino operators have a license. Blanchard and Anderson JJ accepted that the doctrine of common calling or prime necessity was part of New Zealand law and might affect a casino operator which enjoys a monopoly where s67 is not in question. In a concurring judgment, McGrath J expressed reservations about the application of such a doctrine in the context of the Act. The public necessity element would need to be removed to apply the doctrine in this context, and it would be strange to broaden the scope of an anachronistic doctrine with limited relevance in a modern political economy.

Takeover proposals – reimbursement for expenses

In *Kiwi Property Holdings Ltd v Shortland Properties Ltd* [2002] 2 NZLR 645, the Court considered whether a company which has been notified of a proposed takeover can recover expenses incurred in relation to that proposal. The appellant, Kiwi, had given the respondent company notice of its takeover scheme, a pre-requisite to a takeover under the Companies Amendment Act 1963. The takeover bid was unsuccessful and the respondent was subsequently acquired by a third party. The respondent sought to recover expenses incurred as a result of the bid under s11 of the Act.

Kiwi argued that s11 did not apply because it was not an "offeror" within the statutory definition of that term. It was argued that Kiwi merely gave notice of its takeover scheme and never made an offer. The Court rejected this argument and allowed the claim for expenses. It held that the ability to recover expenses was not conditional on the actual making of an offer under a notified scheme. The offeree company was obliged to take certain steps when it received notice and was likely to incur expenditure in anticipation of the offer.

Intellectual Property

Trade Marks

In *Advantage Group Ltd & Ors v Advantage Computers Ltd* [2002] 3 NZLR 741 the Court dismissed Advantage Group Ltd's (ACL) appeal from the High Court decision that Advantage Computer Ltd (AGL) trade mark ADVANTAGE was correctly registered and had been infringed by Advantage Group.

The Court held that the ADVANTAGE mark was not wholly unregistrable as a purely laudatory epithet. It suggests desirable attributes not of the goods or services themselves but of outcomes if they are used. The evidence of distinctiveness at the date of application was sufficient to justify the grant of registration for the broad statements of goods and services they cover. It is not necessary that registration be limited precisely to the goods and services on which the mark has been used. Reasonable generalisation does no more than recognise the reality of the market place. In any event, it was not appropriate on appeal to pare back the statements of goods and services as to do so would be, in effect, to enter upon an attack on the ground of non-use before that is open under s35 of the Trademarks Act 1953.

The Court confirmed that lawfulness of registration is to be determined as at the deemed date of registration and not the date on which the mark is actually entered on the Register. While not reaching a final view as to whether the Commissioner has a discretion to refuse registration if, between the date of application and the date of grant, circumstances develop bringing the use of the mark within the prohibition in s16(1), the Court was satisfied that no grounds existed to support its use in this case.

On the issue of infringement the Court upheld the High Court's finding of fact that any use of AGL's own name under s12(a) was not bona fide, continuing as it did after obtaining legal advice that their own wish to register the mark was unlikely to succeed because it would conflict with ACL's. In any event, the manner of use of ADVANTAGE by AGL was not of the respective corporate names of the companies but as a trademark. The Court commented that bona fide use within s12(a) is not to be tested wholly subjectively and that confusion and deception of the public is not to be encouraged.

In *McCain Foods (Aust) Pty Ltd v Conagra Inc* [2002] 3 NZLR 40 Conagra applied under the Trade Marks Act 1953 for Part B registration of the word combination HEALTHY CHOICE. McCain opposed the registration principally on the ground that the word combination lacked the necessary inherent distinctiveness to qualify for registration as a trade mark (s15). The Court allowed McCain's appeal, reversing the decisions of the Assistant Commissioner and the High Court.

The Court held that Conagra's application could not succeed because the word combination was descriptive and not capable of distinguishing the goods or services in respect of which it was proposed to be registered. The Court observed that the quality of being capable of distinguishing under s15 of the Trade Marks Act must be present before the date of registration. Thus the meaning to be given to that concept must involve an existing capacity

rather than merely a capability for becoming distinctive in the future. Accordingly, to be capable of distinguishing, a mark must at the date of registration have that as an inherent quality or have it demonstrated in fact by prior use or "other circumstances". Without evidence of actual distinctiveness acquired through use the words HEALTHY and CHOICE do not have the quality of being capable of distinguishing the goods of the applicant as to be registrable.

Intellectual property and contract law – whether copyright could be assigned without consent

The main issue in *New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd & Attorney-General* CA9/02, 11 December 2002, involved copyright in computer programmes. There was, however, a prior issue concerning the validity of an assignment whereby the copyright in question was purportedly transferred to NZPSS from the Crown.

AMS (a provider of computer software) entered into a contract (contract P2085) with the Secretary for Defence acting to develop a specification for a new computerised payroll system to be called LEADER. Clause 31.1 of the contract provided that neither party shall assign its rights etc. under the agreement without the prior written consent of the other party. Some years later the Crown, without having given any prior notice to AMS, purported to assign to NZPSS all its interest in LEADER and in its agreements with AMS. AMS then took proceedings to assert its rights. The High Court determined various issues and held that the copyright was owned beneficially as to 75% by AMS. NZPSS appealed but the Crown did not. The first issue was whether NZPSS was entitled to appeal as the owner of the copyright. That depended on the validity of the assignment.

Assignment of copyright was expressly permitted by the Copyright Act 1994. The essential question in this case was therefore whether the Crown had agreed with AMS, either expressly or by clear implication, not to assign the copyright in question without consent. (It was assumed for these purposes that the Crown was at the time of the purported assignment the sole beneficial owner of the copyright in LEADER. This was the primary matter in dispute on the copyright aspect of the case.)

Clause 31.1 was not textually clear as to its reach. The question was whether the copyright in LEADER was a right which belonged to the Crown "under this agreement", that is under P2085. The wide view was that in using the expression "rights…under this agreement" the parties meant to include all rights which flowed to either party, directly or indirectly from the agreement. This view was supported by the words of clause 22.1 of P2085 which provided that neither party would, without the written consent of the other, disclose any information concerning the terms of the contract P2085. The Court thought that it had to follow that the disclosure about LEADER, being part of the subject matter of P2085, which would inevitably be involved in an assignment by the Crown of the copyright, could not take place without the written consent of AMS, even if the copyright was not part of the "rights under this agreement". The Court concluded that when clauses 22.1 and 31.1 were read together, as was appropriate, it became tolerably plain that the parties to P2085 could not have intended the copyright in LEADER to be assignable by the Crown at any time without the written consent of AMS. That conclusion was strengthened when reference was made to the LEADER Marketing Rights Agreement (LMRA), a further agreement entered into by the

parties. By one clause of that agreement, the Crown bound itself to treat certain information with the utmost confidence. The proposition that the Crown could assign the copyright in LEADER and its rights and interests under the LMRA without the consent of AMS could not sensibly be reconciled with the Crown's confidentiality obligation. Similar implications of non-assignability derived from other clauses of the LMRA. The Court concluded that the Crown could not assign either P2085 or the LMRA or the copyright in LEADER without the consent of AMS which was not given.

The next question for the Court was what effect a purported assignment had against a party whose consent was required but had not been given. The Court agreed with the approach taken by the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85. An agreement, express or implied, not to assign contractual or other rights in personam, or not to assign them without consent, should generally be specifically enforced as between the immediate parties, unless there was some very strong reason why that course should not be adopted. A non-assignability clause had a clear commercial purpose. The parties did not wish, without consent, to be obliged to deal with a party not of their own choosing. The identity of the other party mattered to them, so they expressly or implicitly agreed to reverse the general rule that contractual rights could be assigned. If the law did not enforce such an agreement the legitimate commercial reason for agreeing not to assign would be defeated. Similarly the legitimate commercial expectations of the parties would be defeated. Therefore, the Crown's attempt to assign to NZPSS its copyright in LEADER and its other contractual rights was ineffective. The consequence had to be that NZPSS never had any title to the copyright enabling it to contest the High Court's decision.

The Court noted that even had NZPSS been able to appeal, it would have upheld the Judge's substantive conclusion that the copyright was owned beneficially as to 75% by AMS. The matters in respect of which NZPSS appealed in its own right were also dismissed.

Tort

Strikeout of negligence counterclaim

In *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767 the Law Society (WDLS) appealed successfully from the High Court decision refusing to strike out Price Waterhouse's counterclaim in negligence. In the course of its judgment the Court made a number of observations concerning the approach to establishing the existence of a novel duty of care.

The substantive proceedings in this case were directed to determining who should contribute to the losses allegedly incurred by certain clients of a law firm. The losses arose from major misappropriations of funds by one of the partners. Price Waterhouse was the auditor of the firm's trust account having been appointed on the nomination of the firm by the Council of WDLS under r5 of the Solicitors' Audit Regulations 1987. Price Waterhouse served third party notices on WDLS alleging that it owed duties of care to the clients of the law firm and to Price Waterhouse.

The issue before the Court was whether a common law duty of care existed between the WDLS and solicitors' clients or auditors upon receipt of audit reports showing breaches of

trust account regulations. The claim rested on the foundation that on receipt of reports from Price Waterhouse of matters that were discovered in the course of audits WDLS should have initiated investigations that would have uncovered the matters which the auditors negligently did not uncover and would have taken steps to prevent further losses for which Price Waterhouse might be liable in negligence.

In considering the issue of duty of care, the Court stated that there can be considered first the relationship in which a duty is said to arise and then, after ascertaining that the parties are sufficiently close to give rise to obligations to take care, the scope of that for which it is reasonable that they should bear legal liability and whether that extends to what occurred. Alternatively, the claimed cause of liability can be identified and then examined to determine whether the "proximity" of the parties is such that the law should impose that liability.

The Court concluded that there was no duty of care owed by a district law society to act to protect clients of solicitor's firms from losses suffered as a result of matters not brought to the attention of society merely because an investigation would have disclosed those matters. District law societies' responsibilities were founded in the regulatory regime and there was no statutory contemplation of additional common law duties to solicitors' clients. Where the information received by the district law society did not relate to particular clients, the prohibition on disclosure was a significant factor in the assessment of whether there was a duty of care upon the WDLS to clients. Any such duty necessarily would have been to all clients of the firm and would have required investigation of all matters that might bear upon their affairs. Such wide indeterminate duties would not readily be imposed on a regulatory (but not closely controlling) body which received no fees from solicitors' clients, had limited resources and had no links with solicitors' clients.

Neither was there a duty extending to protect the auditor of solicitors' trust accounts from losses which would not have occurred "but for" a district law society not instituting an investigation. The regulatory regime did not contemplate that district law societies should owe common law duties of care to save auditors from liability for which, under the regulations, they were required to carry professional indemnity insurance.

Causation and limitation periods for defective building work

Questions of causation and limitation periods for defective building work were raised in *Johnson v Watson* CA294/01, 5 December 2002. The Johnsons engaged Mr Watson to build them a house. The work commenced in March 1990 and was substantially complete by December 1990. The Johnsons contended that the building work was defective principally because of leaks from the roof and elsewhere. They further contended that in the period from 1991 to 1998, Mr Watson did remedial work on a number of occasions on each of which he claimed to have fixed the problems. In March 2001 the Johnsons commenced proceedings claiming damages from Mr Watson on several causes of action. Mr Watson applied in the High Court for summary judgment and to strike out the Johnsons' proceeding on the basis that the claims against him were time barred. The Judge accepted that contention, entered summary judgment for Mr Watson and also struck out the claims against him. The Johnsons appealed.

The Court held that the claim for the original construction work was barred by s91(2) of the Building Act 1991. The Court rejected the notion that if there was concealment by fraud, as was alleged, then s28 of the Limitation Act 1950 operated so as to extend the ten year period prescribed by s91(2). Section 91(2) was a statutory bar which was self-contained, both as to the commencement of the period allowed and its duration. A plaintiff could not in any circumstances sue more than ten years after the act or omission on which the proceedings were based, if the case involved, as this one clearly did, building work associated with the construction of a building.

The Johnsons' second head of claim was that the remedial work carried out was defective. The Court had no doubt that Mr Watson did owe the Johnsons a duty of care in tort when he returned on each occasion for the purpose of fixing the leaks. The primary issue was causation. Only such further or additional loss or damage which resulted from a negligent prevention act or omission which could be the subject of a claim on the present basis. To be recognised as a cause in law, the allegedly causative circumstance did not have to be *the* cause. It was enough if it was *a* cause which was substantial and material. Here negligence in carrying out the prevention work, be it act or omission, if established, was a concurrent cause of the damage which it failed to prevent. Its purpose was to prevent such damage and it would be unrealistic to take the view that it was not *a* substantial and material cause of that damage. It was therefore clear that the Johnsons were not absolutely barred by s91(2) of the Building Act in relation to prevention work carried out by Mr Watson after 19 November 1991, being ten years prior to the date (19 November 2001) when the Johnsons first raised the issue of defective repair/prevention work.

For claims before that date (but after 19 November 1991) the Johnsons would have to establish their contention that their causes of action were concealed by fraud or their discovery was delayed until at least 21 November 1995 so as to extend the accrual of their cause of action to within the necessary six year period under s28 of the Limitation Act. The Johnsons had the onus of proof in that respect. As a cause of action for faulty prevention work was separate and distinct from a cause of action for faulty original workmanship, it followed that in pursuing the former, the Johnsons had the onus of establishing what loss or damage they had suffered on its account.

The Johnsons' third claim was that representations made by Mr Watson that his remedial work would fix and had fixed the problems caused the substantive claims to fall foul of the ten year limitation prescribed by s91(2). The Court noted the Johnsons became aware in six months before the period of limitation expired that extensive problems remained. As from that point Mr Watson's representations must have ceased to have causal effect as a reason for the Johnsons not suing him and the other parties. Therefore, as regards Mr Watson and the Council, Mr Watson's representation did not cause the Johnsons' claim to become statute barred. The claim against the architect was also so speculative that it was appropriate to say that it could not possibly succeed.

Therefore the first and third heads of claim asserted by the Johnsons were rightly struck out. But the Johnsons could continue with their proceeding in relation to such of the prevention work carried out by Mr Watson as they could show was not statute-barred in terms of the foregoing discussion.

Land Law

Distinction between tenancies and licences

The key issue in *Fatac Ltd (in liquidation) v CIR* [2002] 3 NZLR 648 was the distinction between tenancies and licences. The law that had widely stood was that exclusive possession of land for a term was the necessary and sufficient condition for a lease. However, English authorities departed from this approach, primarily under the influence of Lord Denning, and held that while exclusive possession remained important, the paramount consideration was the intention of the parties. The Court reviewed the English, Australian and New Zealand authorities following Lord Denning's revision of the previous law and adopted the English reversion to the preceding law (*Street v Mountford* [1985] AC 809) and the Australian authorities refusing to follow Lord Denning.

The Court held that in New Zealand, as elsewhere, the fundamental distinction between a tenant and a licensee was that the former alone had the right to exclusive possession, allowing the occupier to use and enjoy the property to the exclusion of strangers. Whether the occupier had the right to exclusive possession turned on the effect of the contract or grant. Because the tenancy/licence distinction turned on those substantive rights granted to the occupier, it remained unaffected by the label which the parties chose to place upon their transaction. The Court identified other refinements to the exclusive possession test. For exclusive possession to be meaningful, there had to be a minimum finite term, whether fixed or periodic. Rent was an important indicator of an intention to be legally bound but its absence did not per se negate a tenancy. Further, limitations on the purposes for which the land could be used did not negate a tenancy. On the other hand, a tenancy would be not recognised where there was power in the owner to terminate the occupation for reasons other than those arising from the relationship of landlord and tenant, or for reasons extraneous to the occupation of the land. There would also be no tenancy where there was no intention to enter into a legally binding relationship or where a tenancy was precluded by statute. The Court considered that it added nothing to the exclusive possession test to say that the Court must search for the intention of the parties on that subject. It was for the Court alone to determine the legal classification of the transaction. The utility of the "dominant purpose" test was also questioned. The appellant in the present case was a license only and its appeal was dismissed.

Change of status orders and bona fide purchasers under the Te Ture Whenua Maori Act 1993

In *Bruce v Edwards* CA19/02, 18 November 2002, the Court considered the consequences of a Maori Land Court (MLC) order changing the status of farmland from Maori freehold land to General land. The Maori landowners, the Edwards, had agreed to sell their Maori freehold land to the appellants, subject to an order from the MLC changing its status. The order was obtained, but the Edwards' solicitor did not tell the MLC of the intention to sell the land. The effect of this was that the preferred class of alienees (PCA), who had a right of first refusal under the Te Ture Whenua Maori Act 1993, were not notified. The appellants subsequently paid a substantial deposit, confirmed the sale of their farm, and purchased extra livestock. When the change of status order was registered against the title the land ceased to be Maori freehold land and the right of first refusal no longer applied.

The sale came to the attention of the PCAs who then sought a rehearing of the MLC decision. The MLC had jurisdiction to annul the change in status order. It decided that there should be a rehearing, but this decision was quashed by the High Court in review proceedings because the PCAs application was out of time and this had not been taken into account by the MLC. The High Court then referred the application for rehearing back to the MLC, refusing to allow the appellants claim for specific performance. The appellants appealed from the High Court decision arguing that even if the order was annulled their interest was protected by the bona fide purchaser provision in s88 of the Act.

The Court held that the appellants were entitled to specific performance. The bona fide purchaser provision in s88 applied to decisions made by the MLC to annul a previous change in status order. The appellants obtained an equitable interest in the property, at the latest from when the change of status order was registered, and acquired that interest in good faith. There was no evidence that they knew the Edwards' solicitor had misled the MLC.

Family Law

Role of charities in family protection litigation

Auckland City Mission v Brown [2002] 2 NZLR 650 concerned the appropriate role of beneficiary charities in family protection litigation and discussed *Williams v Aucutt* [2000] 2 NZLR 479 (CA).

The case concerned an estate worth approximately $4.6 million. The testator had one surviving adult daughter and three grandchildren. His will made substantial bequests to a female friend and to her daughter and specific bequests to former employees and to a nephew. The bequest to his daughter was considerably smaller than the bequest to the female friend. The remainder of the estate, a substantial amount, was left to three charities. On appeal, as in the High Court, it was common ground that there had been a breach of moral duty by the testator to his daughter. At issue were the amount required to remedy the breach and the incidence of the award. In the High Court, the claimant had been awarded $1.6 million from the residuary estate. The High Court had also commented on *Williams v Aucutt*, indicating that the case should not be read as authority for the proposition that claims by adult children should be viewed more conservatively than in the past. Rather, that the Court of Appeal in that case had emphasised that the need for further provision should not turn on abstract notions of fairness or the ideal of equality but on principles from case law.

On appeal, the Court stated that *Williams v Aucutt* is not to be read and applied in the limited way explained by the Judge and reiterated that the test to be applied in family protection cases is whether adequate provision has been made for the proper maintenance and support of the claimant. In many cases the question whether adequate provision has been made for proper maintenance and support is likely to involve a compendious inquiry into the combined elements of the composite expression. It is where it is accepted that the claimant has adequate provision from his or her own resources and the existing testamentary provision for the proper maintenance of the claimant that the inquiry will focus on the adequacy of the provision for proper support in the circumstances.

In respect of the involvement of the beneficiary charities the Court held that it was entirely proper for the charities to oppose the applications, draw the attention of the Court to their work and the benefits for the public they could achieve and test the claims. This was particularly so as there was no other beneficiary defending the will. The Court noted that in other circumstances, as where competing claimants were expected to test the respective claims, it might be appropriate for the charities simply to provide relevant information and abide the decision of the Court.

In the result, the Court awarded the claimant a sum equivalent to just under 20 per cent of the net estate, the cost being borne by the residuary estate.

Testamentary promises – amount of award to be within the bounds of reasonableness

In *Powell v Public Trustee* CA283/01, 7 October 2002, a middle aged woman (the appellant) performed work and services for an elderly deceased man during the last nine or so years of his life. She worked in his home, on his farm, and provided companionship and support. The deceased promised the appellant that he would leave her his farm, valued at the date of hearing at $350,000. The deceased's will, however, made in 1964, left his whole estate to his nephew, who had no significant moral claim. There was independent evidence that the deceased wanted to leave everything to the appellant because "she had done so much for him". The High Court Judge determined that the deceased did promise to make testamentary provision for the appellant but failed to do so, and awarded the appellant $30,000 from the estate. The appellant appealed to this Court on the basis that the award was too low.

It was first noted by the Court that whenever a claim for relief was made out, s3(1) of the Law Reform (Testamentary Promises) Act 1949 demonstrated that the criterion as to the relief to be granted was reasonableness. As was recognised in *Re Welch* [1990] 3 NZLR 1, if the deceased promised a certain sum or a certain property, that was a relevant consideration but not necessarily decisive. Hence, although the deceased's assessment of the worth of the appellant's services should not lightly be departed from, there was nonetheless a need for ultimate reasonableness.

The Court held that the High Court assessment of what was a reasonable award was plainly too low. Insufficient weight was given to the substantial part of the appellant's claim that she had rendered services of an intangible kind in the nature of companionship and support that enabled the deceased to live out his days on the farm. Further, the High Court had unconsciously depreciated the value of the appellant's claim due to her misconduct in fraudulently exaggerating the substance of what she had done by making false entries in her diaries. Having penalised the appellant in costs for this conduct, it was incorrect in principle to penalise her again in relation to the claim itself once its validity had been established without regard to her evidence.

What was reasonable had to be informed by all the circumstances including the amount of the promise. The Court had to give as much weight to the promisor's own assessment as it was reasonable to give in all the circumstances. The Court added that if departure from the promise was necessary to bring the award within the bounds of reasonableness, the figure assessed should be at the upper end of what was perceived to be the reasonable range. The

appropriate amount was fixed at $120,000. Although this was a lot less than the value of the promise, anything more would be beyond the bounds of reasonableness.

Tax Law

Charitable business income tax exemption

In *Dick v CIR* (2002) 20 NZTC 17,961, the primary issue was the interpretation and application of the charitable business income exemption in s61(27) of the Income Tax Act 1976. Other issues were whether the income received from the Trust in question came from a "business" and whether the instigator of the Trust was a "settlor" of the Trust, either in the primary meaning of that word, or in the extended meaning given by paragraph (e).

The Court held that the purpose of the second proviso to s61(27) is to prevent tax exemptions from being obtained in cases where those in particular positions of influence in respect of the charity are able to derive benefits for themselves. Although the primary purpose of the subsection was to address the case of charities set up or operated as a means of tax avoidance the subsection will also catch those cases where there is a mix of motivation. The broad meaning the second proviso to s61(27) was that income derived by any business carried on by trustees for charitable purposes loses its exemption for taxation in any income year where, in that income year, a benefit or advantage or income is able to be obtained by one of the specified persons and that person is able, by virtue of his position to determine or materially influence the nature or amount of that benefit. The Court rejected the submission that the exemption was only lost in respect of a benefit actually received and only to the extent of such benefit. The section is directed to the ability to influence benefits rather than the receipt of them.

The Court reiterated that the "business" test is the two-fold inquiry set out in *Grieve v CIR* [1984] 1 NZLR 101 (CA) as to the nature of the activities carried on, and as to the intention of the taxpayer in engaging in those activities. Applying that test, the Court held that the property-related transactions clearly constituted a business.

Section 61(27)(e) of the Act provided an expanded meaning of the term "settlor" than that which would normally be applied in the case of a trust. The instigator of the trust, while not named as the settlor in the Trust deed, was a deemed settlor in terms of s61(27)(e) because he had disposed of assets to the trust (money in the form of a loan) and had retained or reserved an interest in that asset (because he was entitled to be repaid). He was also a settlor in the ordinary sense of the word because he was the principal benefactor of the Trust: *Tucker v CIR* [1965] NZLR 1027(SC). Although not directly raised on appeal the Court noted that he was also a shareholder in terms of paragraph (b).

The appeal was dismissed.

Late request for reassessment of income tax

In *Lawton v CIR* CA26/02, 19 December 2002, the Court held that the Commissioner of Inland Revenue does not have a statutory duty to assess omitted income for the purposes of income tax. The case arose from proceedings filed by the appellant seeking judicial review of the Commissioner's decision not to exercise his discretion to reassess the appellant's income for the year 1986 to 1992 following a request made in 1993. The Court accepted that while the correctness of an assessment cannot be challenged outside the statutory objection procedures, the legitimacy of the process employed in making the decision not to reassess and not to accept a late objection is justiciable on traditional administrative law grounds.

The Court considered that the scheme of the Income Tax Act 1976 is that the Commissioner makes an assessment for an income year based on the returns and other information he has at the time and is obliged to make that assessment. Later he may make such alterations or additions to the assessment as he thinks necessary to ensure the correctness thereof. Section 23 and 30 are the relevant sections for reassessment, s 19 has no application. While, the Commissioner can reassess under s23, either on his own motion or if a taxpayer requests, there is no obligation for him to do so.

The Commissioner is entitled to treat any request to reassess in these circumstances as a late objection. In deciding whether to accept a late objection the Commissioner is required to weigh the particular circumstances which exist in any individual case rather than adhering to policy. The merits of a proposed objection must be considered unless the explanation for the lateness of the objection is so inadequate this is unnecessary. The merits should have been weighed in this case and were not, either in the initial decision or subsequent reviews. The decision not to accept the late objection was therefore not a valid exercise of the Commissioner's discretion. The appeal against the High Court's dismissal of the application for judicial review was allowed and the Commissioner was ordered to reconsider the application for acceptance of the late objection in accordance with the terms of the Court's decision.

The income tax exemption for charitable trusts

The question in *Latimer v CIR* [2002] 3 NZLR 195. The question on appeal was whether interest income derived by the Crown Forestry Rental Trust was exempt from income tax under s61(25) of the Income Tax Act 1976 as a charitable trust income. The Trust was established to receive and administer rental proceeds from forestry licences granted by the Crown in respect of land subject to claims before the Waitangi Tribunal. The interest earned on these proceeds was to be made available to assist Maori making claims. It was also relevant that the Trust Deed provided for any surplus (unused) income to be paid to the Crown on winding up.

It was held in the High Court that the charitable exemption did not apply because the Trust was not established exclusively for charitable purposes. The Trust had two purposes, one charitable (assisting Maori claimants) and one non-charitable (retaining and investing capital funds).

The judgment for the Commissioner in the High Court was confirmed, but for reasons that differed from those given in the High Court. It was held that s61(25) did not require that the Trust be established for charitable purposes. The provision required only that the relevant *income* be derived exclusively for charitable purposes. The exemption applied even where the Trust's capital (rental proceeds) could be applied for a non-charitable purpose, so long as the income must still be used for a charitable purpose.

The Court considered that the relevant income was derived for two purposes. First, to assist Maori claimants. This was considered charitable because it fell within the fourth limb enunciated in *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 and satisfied the public benefit test. The second purpose was to derive income for distribution on winding up, under the Trust Deed, which was found to be non-charitable. As the income was not derived exclusively for charitable purposes the income tax exemption did not apply.

GST priority on mortgagee sales

The decision in *CIR v Edgewater* (2002) 20 NZTC 17,984, concerned competing priorities between mortgagees and the Commissioner of Inland Revenue with respect to sale proceeds arising from a mortgagee sale. The respondent was the second mortgagee of a property which was sold by the first mortgagee exercising its power of sale. There was a shortfall on sale and the Commissioner was paid the GST component in priority to the respondent's secured debt. The respondent claimed the amount paid to the Commissioner, arguing that it had priority.

The Court held that the Commissioner was entitled to the GST component. The effect of s27 of the Goods and Services Tax Act 1985 was to shift the burden of the GST liability onto the mortgagee. This liability was an expense occasioned by the mortgagee sale and under s104(1)(a) of the Land Transfer Act 1952 the Commissioner's claim took priority over any secured debts. There was no settled policy discernible from s104 that a mortgagee had priority over any tax payable arising from a mortgagee sale.

Company and Tax Law

In *CIR v Chester Trustee Services Ltd* (2002) 20 NZTC 17,725, the Commissioner appealed against the judgment of a Master setting aside a statutory demand against Chester for, inter alia, unpaid GST. Chester was an insolvent limited liability company acting as trustee of 35 trusts. It was in this context that the Court considered the basis upon which statutory demands could be set aside "on other grounds" under s290(4)(c) of the Companies Act 1993.

At the time the GST was incurred, Chester was the sole trustee of two family trusts. Chester later resigned from both trusteeships. The Commissioner had made a single joint tax assessment against the two trusts, and claimed that Chester (having been a trustee of each trust through the period covered by the assessment) was liable under s57 of the Goods and

Services Tax Act 1985 to pay the assessment. The statutory demand not having been met, the Commissioner submitted that winding up procedures against Chester be permitted to proceed.

Before looking at the s290(4)(c) issue, the Court determined that Chester was liable to pay the tax, as the liability of a trustee to pay the tax due upon provision of goods and services by the trust fell on the trustee in office at the time of issue of the notice. That trustee was Chester. Secondly, the Court held that the trustee was liable for all tax *that became* payable by the trust while that trustee remained a trustee. Thus, Chester could not avoid liability simply by the fact that it had resigned at a time prior to judgment.

The important question for the Court concerned the basis upon which statutory demands could be set aside on "other grounds" under s290(4)(c). The Court held that if the company upon which the demand was served could not show a substantial dispute concerning the debt, or that it had a qualifying cross-claim, the creditor was prima facie entitled to have the company put into liquidation. The creditor was not, however, entitled to liquidation as of right, as that view would not be consistent with Parliament's direction that there could be other grounds upon which the statutory demand could be set aside. Although it was helpful to identify circumstances which had been held to qualify in the past, it was important not to regard those circumstances as comprising an exhaustive or exclusive list. The Courts should not seek to fetter the general discretion which Parliament had given them in s290(4)(c).

It was held that the general policy of the Act that insolvent companies should be put into liquidation, if a creditor sought such an order, should not be departed from lightly. In this case Chester's grounds were not sufficient to deprive the creditor of its prima facie entitlement to winding up. It was not plainly unjust to place Chester in liquidation if it, or its backers, were unable or unwilling to pay the debt owed to the creditor. The appeal was therefore allowed and the order setting aside the statutory demand was itself set aside.

Income Tax Act 1976 - Anti-avoidance

In *Dandelion Investments Ltd v Commissioner of Inland Revenue* CA204/01, 5 December 2002, the issues before the Court were: (1) whether a hearing before the Tax Review Authority (TRA) cured flaws in the Departmental assessment process; (2) whether the Departments' assessment was time barred; (3) whether the Commissioner was bound by a policy statement as to procedures to be followed in applying the anti-avoidance provision of the Income Tax Act; and (4) whether the application of the anti-avoidance provision to disallow the interest deduction in this case was incorrect.

In dismissing all the grounds of appeal the Court held: (1) any defects in the Commissioner's administrative processes had been cured by the extensive hearing before the TRA; (2) The assessment had been properly made within the stipulated time even if notice of it was received by the taxpayer outside of that time; (3) the Privy Council in *O'Neil v CIR* (2001) 20 17,051 had determined the point when it held that the Commissioner's policy statement on s99 was no more than an administrative reassurance to the public. It could not be elevated to the character of conditions which restricted the Commissioner's statutory duty to apply s99 in any appropriate case; and (4) the arrangement in this case was an artifice involving a pretence; it was not a real group investment transaction at all. It was the type of arrangement which s99 was enacted to counteract. The purpose and effect of the composite arrangement was one of tax avoidance and the arrangement was accordingly void under s99(2). The

consequent liability of the subsidiary to pay tax on interest it received did not involve any element of inappropriate double taxation.

The Court also reviewed the limited circumstances in which the validity of the Commissioner's assessment process can be challenged by way of judicial review rather than through the statutory procedures under revenue legislation. It held that in this case the TRA exceeded its statutory powers by undertaking a lengthy examination of the departmental processes. The TRA's role was principally concerned with the correctness of the assessments. While questions of validity could be raised the role did not extend to conducting a broad-based judicial review of the process leading up to the assessment and disallowance of an objection, and the subsequent conduct of the proceedings before the TRA.

Validity of test case designation

In *CIR v Erris Promotions & Ors* (2002) 20 NZTC 17,977 the issue was whether the test case designation for the Erris Promotions cases (representative of over 400 investors in a joint venture) was valid so that the cases would have to be heard by the High Court rather than by the Taxation Review Authority (TRA).

The investors and the Commissioner disputed the taxation treatment of computer software. Erris and 5 other investors completed the disputes resolution procedures and filed challenges in the TRA. The Commissioner applied to the High Court under s138N(2)(a)(ii) of the Tax Administration Act (TAA) to have the Erris cases transferred to the High Court and was refused. Shortly after, another group of investors filed proceedings (the Wilson Black Proceedings). The Commissioner then designated the Erris cases as test cases under s138Q of the TAA and issued a notice of stay to the taxpayers in the Wilson Black Proceedings. The investors argued that the designation was invalid because leave was not sought from the TRA and was required under the District Court Rules (r431) because the cases had been set down for hearing.

The Court held that the statutory criteria for designation as a test case were met as it was agreed that the determination of the Erris Promotions cases would be determinative of all the issues involved for all the investors in the joint venture. The Court accepted the Commissioner's submissions that the test case designation could not have been made before the Wilson Black Proceedings were filed, requiring leave of the TRA would be inconsistent with s138Q which does not require leave to be sought, and that the designation is not a step in the proceeding but rather the exercise of a statutory power that is not governed by the rules of the court. Therefore the court ordered the Erris cases transferred to the High Court.

The Commissioner had also appealed against the decision denying the transfer the High Court. Although this issue did not now need to be dealt with, the Court made some observations as to the transfer of proceedings. The scheme of the legislation for resolution of tax disputes is that there are two first instance courts – the TRA and the High Court. There is no presumption that the TRA will normally be the first instance court because the High Court is the court of first instance jurisdiction for major litigation especially where matters are complex and involve matters of major legal significance, including taxation litigation.

Administrative Law

Offer back obligations under the Public Works Act 1981

In *Waitemata District Health Board v The Sisters of Mercy* [2002] 3 NZLR 764 the Court upheld the High Court's dismissal of an application to strike out a claim that the obligation under s40 of the Public Works Act 1981 to offer back land acquired in 1956 for the purposes of the North Shore Hospital had been breached. The land in question was initially held by the Auckland Hospital Board and then by the Auckland Area Health Board. Under the 1993 reform Area Health Boards were abolished and the land was transferred to Waitemata Health, a Crown Health Enterprise. On 1 January 2001 the CHE was dissolved and its property was vested in the Waitemata District Health Board, the present appellant. Clause 3 of the First Schedule of the Health Sector (Transfers) Act 1993 which modified the provisions of the Public Works Act was replaced at this time with a clause enacted by the Health Sector (Transfers) Amendment Act 2000 providing wider protection against the obligation to offer back the transferred land.

The Sisters of Mercy submitted there was an obligation to offer the land back in 1993 or alternatively in 1996 or 1997 as at those times the land was no longer required for the purpose for which it was taken. Waitemata unsuccessfully sought to strike out those parts of the statement of claim on the basis the 2000 provisions precluded the claim as long as Waitemata continues to hold the land for its purposes. Further causes of action seeking damages for negligence and breach of statutory duty were not challenged.

The Court held that the 2000 provision did not apply retrospectively to preclude a claim in respect of existing offer back rights. Therefore the appeal was dismissed and the claim seeking offer back was not struck out.

Professional discipline – procedures and penalties

In *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154, the Court dealt with questions of professional misconduct and the suitability of the penalty of suspension.

Charges of misconduct in a professional capacity and breach of the Institute's Code of Ethics were brought against Mr Bevan, an accountant. The principal basis for the charges was Mr Bevan's 11 week delay in responding to a complaint made by one of his clients to the Institute and forwarded to him. The Disciplinary Tribunal determined that the charges had been proved and imposed a penalty of suspension for 12 months, a fine of $2000, a review by the Practice Review Board of accountant's practice, attendance at a new practitioners' course, censure and costs of $4,422.80 plus GST. The Appeals Council dismissed Mr Bevan's appeal against both the finding and the penalty. Mr Bevan sought judicial review of the finding including penalty. The High Court dismissed the application so far as it related to the finding but quashed orders for suspension and for attending the new practitioners' course. The justification for the quashing was that the penalty of suspension is for the protection of the public not punishment. Imposing the penalty as a matter of deterrence was one of several errors of principle in this case. The Institute appealed against the penalty finding and Mr

Bevan cross-appealed in respect of his failure to obtain judicial review of the finding that the charges were established.

The Court allowed the cross-appeal against the High Court's dismissal of Mr Bevan's application for judicial review of the professional misconduct finding on the basis the professional misconduct. The Court held that Mr Bevan was not in breach of an obligation under the Institute of Chartered Accountants of New Zealand Rules to reply to letters from the Institute. The letters were presenting an opportunity to be heard on the complaint, not a requirement to provide information so as to trigger the Rule. The only remaining ground for the finding of guilty of professional misconduct was a breach of the Code of Ethics. The finding of professional misconduct and penalties were therefore altogether excessive and out of proportion to the occasion.

Although of no practical consequence given the findings on professional misconduct, the Court rejected the High Court's primary reason for quashing suspension and new practitioners' course penalties. The Court agreed with the position adopted in *Bolton v Law Society* [1994] 2 All ER 486 (CA) that suspension may have a punitive and deterrent purpose. In the result the finding of professional misconduct was quashed and the High Court's decision to quash the penalties of suspension and attendance at new practitioner's course was upheld on different grounds. The Court did not enter into the wider question of whether proportionality is a distinct head of review.

Fisheries management – ICE and QMS

In *Kellian and Ors v Minister of Fisheries and Ors* CA150/02, 26 September 2002, the Court upheld, for different reasons, the High Court's decision to refuse applications for judicial review of the Minister of Fisheries' decision to introduce certain species into the Quota Management System. The challenge centred on the possibility of making the stocks subject to Individual Catch Entitlements (ICEs) before introducing them to the QMS. This two stage approach would mean a much larger allocation of quota to the fishers appealing than if the stocks went directly into QMS and quota was therefore determined on the basis of the catch histories for the 1990-92 fishing years. The major questions arising from the judicial review applications were whether the Minister's decision to go directly to QMS was in fact based on the view that it was not open to him to consider the introduction of ICE regimes for those fisheries as a matter of law and whether in law such a view was correct. The decisions were also challenged on the basis that the Minster was erroneously advised that to use the ICE method would "subvert" the allocation mechanisms under the Act and that other errors of law invalidated the decisions.

The Court held the Minister did not in fact make his decision on that confined basis, that the law does not confine him in that way and that in other material respects the advice was lawful and did not give rise to reviewable errors. The Court differed from the High Court in finding the Minister was advised that it was open to him to consider ICE and that he proceeded on that basis. ICE regimes have a place as an allocative tool as well as a fisheries management tool. It was open to the Minister and the Ministry it have a policy strongly supporting the introduction of stock and species into the QMS over other methods of administration and control. The impact on individual fishers need not be considered under this legislation. The Court reached its conclusions without examining the High Court's conclusion that to

introduce ICE for the purpose of affecting quota allocation on the introduction of the QMS immediately thereafter would have been outside the statutory purpose for ICE. The other errors of law alleged were each rejected.

Judicial review of medical tribunal decision

In *Wislang v Medical Council of New Zealand* [2002] NZAR 573 the Court dismissed an appeal against an unsuccessful application for judicial review in the High Court. The appellant, Dr Wislag, was suspended by the Medical Practitioners Disciplinary Tribunal pending a hearing for practising without a certificate. Prior to the hearing this charge was altered to include a more serious charge of professional misconduct. However, during the substantive hearing the Tribunal reverted to the original charge, to which Dr Wislang pleaded guilty. The Tribunal suspended his registration for two months and imposed a fine, the quantum of which was challenged unsuccessfully in the District Court. Dr Wislang subsequently applied to the Medical Council of New Zealand for a practising certificate, which was granted on the condition that he nominate an overseer.

Dr Wislang sought judicial review of the interim decision of the Tribunal on the basis that the charge was not valid. He also challenged the final decision to suspend on the basis that an irrelevant consideration was taken into account, namely, the potential consequences to innocent third parties. Dr Wislang also sought a review of the quantum of the fine imposed by the Tribunal and the Council's decision to impose the condition on the grant of his practising certificate.

The Court dismissed Dr Wislang's appeal. In relation to the interim decision, the fact a charge was added, and subsequently removed, did not invalidate the original charge. In relation to the final decision, the potential consequences to third parties was not an irrelevant consideration, and the appellant could not challenge the quantum of the fine in review proceedings after contesting the matter by exercising a right of appeal. The Council's imposition of the condition under s54 of the Medical Practitioners Act 1995 to ensure competency was a valid exercise of its powers. The Council was entitled to consider how the appellant's conduct might affect his clinical performance.

Justiciability of decision to disband Air Combat Force

The appellant in *Curtis v The Minister of Defence* [2002] 2 NZLR 744 appealed against the striking out of his application for judicial review of the decision of the Minister of Defence to disband the air combat force of the Royal New Zealand Air Force. The Court identified three issues for determination. First, did implementation of the Minister's decision effectively mean that there had ceased to be a Royal New Zealand Air Force, a consequence which the Minister was not empowered to achieve? Secondly, did each constituent element of the Armed Forces, that is the Navy, the Army and the Air Force have to be an armed force? Thirdly, if that was so, and the Air Force must remain an armed force, was it reasonably arguable that the Minister's decision resulted in the Air Force ceasing to be an armed force?

In relation to the first issue, the Court held that s11(2) of the Defence Act 1990 defined "Armed Forces" in the particular sense as referring to the NZ Army, Navy and Air Force collectively, which must continue to include each force whose composition was specified in the Act. The Minister was thus not allowed to abolish the Air Force. However, for the purposes of s11(2) there was no doubt that the Air Force continued to exist, albeit without the air combat force, and the Minster's decision had not had the effect of so altering it as to cause it no longer to exist as an air force.

As for the second issue, the Court thought that there were clear indicators that Parliament saw the Armed Forces as a unitary whole, albeit having three constituent elements. The Act did not require each component of the Armed Forces to be armed. It was sufficient if it could fairly be said that the New Zealand Defence Force as a whole was armed.

In relation to the third issue the Court considered that if the Air Force had as a matter of law to be armed, the unchallenged evidence precluded a finding that it was unarmed. In the present case the only issue was whether his decision had left the RNZAF insufficiently armed. But that was par excellence a non-justiciable question. A non-justiciable issue was one in respect of which there was no satisfactory legal yardstick by which the issue could be resolved. Furthermore the question was one of Government policy into which it was constitutionally improper for the Court to go. It was therefore appropriate that the appellant's application for judicial review was struck out. The appeal was dismissed.

Resource management – coastal permits - whether permit excluded public use of private jetty

The right of the public to use a private jetty was considered in *Hume v Auckland Regional Council* [2002] 3 NZLR 363. The Humes had obtained a coastal permit to construct a jetty to give access to their property. A condition to which the permit was subject stated that the rights, powers and privileges conferred by it applied only to the jetty's placement on and over the foreshore and/or the seabed under s12(1)(b) and (c) of the Resource Management Act 1991. Disagreements arose between the Humes and others about public use of their jetty.

The case came before this Court on two related questions of law. The first was whether the public could use a jetty because they had a right to use the coastal marine area in which it was constructed. The second was whether the permit holder could exclude the public or any class of persons in the absence of a coastal permit expressly limiting the class of persons who could access that portion of the coastal marine area to which the permit related and such exclusion was necessary to give effect to the permit.

A coastal permit was a consent to do something in a coastal marine area that would otherwise contravene provisions of the Resource Management Act, s 12 in this case. While land could be used in any manner under s 9(1) unless such use contravened a rule in a plan, the reverse was the position with the coastal marine area where nothing could be done unless expressly allowed by a rule in a plan or a resource consent.

The Court considered the relationship between subs (1) and (2) of s12 and concluded that subs12(1) was directed at activities in the coastal marine area generally, in this case the erection of the jetty. Section 12(2) was directed at occupation rights on Crown or regional council land in the coastal marine area. Strictly speaking, the Humes needed permits under

both subsections. No implication of a subs (2) permit arose from the granting of a subs (1) permit.

In construing the Resource Management Act, the Court stated that it was appropriate to be guided by matters which Parliament had said were of national importance for resource management purposes. Section 6(d) specified that the maintenance and enhancement of public access to and along the coastal marine area was a matter of national importance, and the Humes' exclusion of the public from their jetty did not fit comfortably with this.

The Court turned to s122(5) which, prima facie, required that a coastal permit gave its holder an occupancy right on terms that did not permit the exclusion of the public from lawful use and occupation of the coastal marine area. The order in which paras (a) and (b) of s122(5) appeared, and the language of para (b), indicated that the word "and" had a disjunctive rather than a conjunctive meaning. Section 122(5) could therefore be viewed as stating the principle that unless expressly or implicitly provided otherwise in a permit, the public was not excluded from that part of the coastal marine area in or on which a permitted structure was found; nor was public use of the structure excluded, unless and to the extent expressly stated or unless such exclusion arose by necessary and reasonable implication. Section 108(2)(h) specified that a resource consent could include a condition "detailing the extent of exclusion of other parties", signalling that the starting point was no exclusion.

Therefore, the Court held that the public could use the jetty in a reasonable manner for the purpose of gaining access to, from and along those parts of the coastal marine area that were adjacent to the jetty. In doing so they could not unreasonably impede the Humes' access to and use of the jetty. The legislation was designed on the basis that public and private access would reasonably and peacefully co-exist.

Local government – rating powers

In *Brockelsby & Ors v Waikato Regional Council* CA117/01; and *Luxton v Waikato Regional Council* CA195/01, 10 July 2002, the various appellants challenged by way of judicial review the validity of a differential rate made by the Waikato Regional Council. The Council had resolved, under the Rating Powers Act 1988 (RPA), to make a separate rate on a differential basis for the purpose of maintaining the Piako River Scheme. It was made on the area system of rating and was levied on all rateable property within the Piako River Scheme Separate Rating area, as defined on an identified plan. The challenges were based on the premise that the Council's rating decision was unlawful for failure to comply properly with certain statutory requirements, and for irrationality.

It had been argued that the Council had made three rates not one, and that the Council had thereby made a separate rate based solely on contribution to the need for the work and this it had no power to do. The Court rejected this argument and held that paragraphs (a) and (b) of s41(1) of the RPA, though joined by "and", were not cumulative in the sense that contribution issues were parasitic on benefit issues. The Council made a single rate with a complex series of differentials analysed as layers within which there were further differentials. The legal effect of the Council's actions was a single rate on a differential basis to fund a single specified work, namely the maintenance of the Piako River Scheme. As the

Council neither in fact nor in law made a separate rate limited to the contribution aspect of s41(1), the rate was not invalid on that basis.

The Court also rejected the argument that the Council was legally required to address the relevant matters under Part VII of the Local Government Act 1974 (LGA) as a separate exercise and in advance of addressing itself to the RPA issues. The inter-relationship between the LGA and the RPA contemplated a concurrent rather than a sequential approach. And on the evidence, the Council had taken into account the necessary LGA and RPA criteria, as was required.

The Court held that s41(1)(b) of the RPA empowered the local authority to rate people when the use or the characteristics of their property contributed to the need for the work. A historical contrast of the situations before and after the work was not necessary, and the fact that there was lower land onto which the appellants' land drained did not mean that their land's characteristics did not contribute to the need for the work. Therefore the Council committed no error of law nor was it acting irrationally when it formed the opinion that s41(1)(b) applied to the appellants' properties.

The final point for determination was whether it was irrational for the Council to come to the view that the appellants' land enjoyed a direct drainage benefit from the works in question, given that the drainage of the appellants' land was not enhanced in any tangible way by the works to whose funding they were required to contribute. The Court concluded that the Council was entitled to regard the appellants as deriving a direct benefit, by dint of s42(2)(a)(iv) of the RPA which implicitly expanded the ordinary connotation of the expression "direct benefit". The appellants' higher land gained such direct benefit because the works allowed the lower land onto which the appellants' land drained to accommodate that water. Hence it was not irrational for the Council to determine that some direct benefit accrued to the appellants' properties from the maintenance of the scheme.

Public Works Act 1981

In *Attorney-General v Morrison* [2002] 3 NZLR 373 the Court considered the effect of s40 of the Public Works Act 1981. The respondents were the successors in title to the owner of land that had been compulsorily acquired by the Crown who had accepted an offer made under s40 of the Public Works Act 1981 to purchase back land, the purchase price being "the market value of the land as at the date when the land should have been offered back to the offeree and family pursuant to the provisions of [the] Public Works Act 1981". A disagreement over the date lead to proceedings in the High Court.

The land in question had been acquired for defence purposes. Temporary housing was constructed during World War II and in 1947 the land was set aside by proclamation for "housing purposes" and later "state housing purposes." The houses were tenanted and administered by the Crown. By 1986 the houses were in a state of disrepair, and in February 1988 the decision was made by the Housing Corporation to sell the land after relocating the tenants and demolishing the buildings. Negotiations for the sale began with the local authority. This plan ran into opposition from tenants' organisations, leading ultimately to judicial review proceedings of the notices to quit. The notices were set aside by consent and

the last tenant vacated her house in 1992. Despite this, the Minister did not approve the sale to the respondents until April 1999.

Before the Court, the Crown contended for the date of the ministerial approval in 1999. The Crown contention rested on the argument that any sale of land in accordance with the 1988 decision would have been for "state housing purposes" under the Housing Act 1955 and therefore until 1999 the land was still held for the purpose it had been acquired.

The Court agreed with the High Court that the meaning and scope of the public work was to be ascertained from the original proclamation, interpreted in its contemporary context. Subsequent statutes could not affect the scope of the designated public work, although they may affect the detailed uses to which the land may be put. The public work for which the land was held was the provision of housing. When the decision to sell was made the land became merely a marketable asset. To hold otherwise would mean that s40 of the Public Works Act could never apply to land held for state housing purposes. The Court also noted that the same outcome would have arisen under the Housing Act 1955 because s15 of the Housing Act 1955 did not deem the sale of state housing land to be a disposal for "housing purposes". The statute gave a bare power to sell. Therefore, the decision in 1988 to sell the land was a decision that the land was no longer required for housing purposes. It could not be revisited. Rather, the Housing Corporation, after satisfying itself that the land was not required for a purpose set out in either s40(1)(b) or (c) and that neither of the exceptions in s40(2) or (4) applied, was required to offer the land back to the original owner.

However, the Court considered that a reasonable time to prepare the land for sale and to locate the original owner or successor in title was allowed. Thus, in this case, no obligation to offer the land back arose until the tenants vacated. As a public agency, the Housing Corporation was entitled to attempt to find alternative accommodation and meet the concerns of the tenants' organisations, rather than simply relying on its legal rights. Since the land was still being used for the authorised public work, even though the decision had been taken that it was no longer required for that purpose, it would take longer to be ready for disposal than vacant land. Therefore, the operative date was when the last tenant vacated, in 1992.

Civil liberties

Bill of Rights and censorship

Moonen v Film and Literature Board of Review [2002] 2 NZLR 754 (*Moonen* (*No 2*)) was a sequel to *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (*Moonen* (*No 1*)) which concerned the role of the New Zealand Bill of Rights Act 1990 in the interpretation and application of the provisions of s3(2) of the Films, Videos, and Publications Classification Act 1993 and advanced a five step approach in weighing the relevant provisions. In *Moonen* (*No 2*) a bench of five judges considered the second decision made by the Film and Literature Board of Review concerning the publications in issue in the light of the directions in *Moonen* (*No 1*). The Court was also asked to revisit and modify the five-step approach advanced in *Moonen* (*No 1*).

The Court declined to revisit the five-step approach, indicating that it was too late in the particular proceeding to allow the argument and emphasising that the approach was clearly

not intended to be prescriptive. The Court stated that while the five-step approach may be helpful, other approaches are also open. With regard to the publications in issue, the Court was satisfied that that Board had stated and applied the law as directed in *Moonen* (*No 1*) and upheld its classification.

Invalid search warrant under the Commerce Act 1986

In *Tranz Rail Ltd v The District Court at Wellington and the Commerce Commission* [2002] 3 NZLR 780 a Court of five found a search warrant issued under the Commerce Act 1986 to be invalid on account of both its generality and the failure to show it was "necessary". Having overturned the High Court's refusal to declare the warrant invalid, the Court substituted declarations that the warrant was invalid and the Commission was not entitled to retain the documents seized under it.

The Commerce Commission had sought a search warrant under s98A(2) of the Commerce Act "for the purpose of ascertaining whether or not Tranz Rail Limited or any of its related entities or any employee of theirs have engaged in or are engaging in conduct that does or may constitute contraventions of sections 27 and/or 36 of the Commerce Act 1986". Being satisfied that there were reasonable grounds to believe that it was "necessary" for that purpose as required by s98A(2) a District Court Judge issued the warrant. The warrant was executed and material was seized under it.

Tranz Rail sought a declaration that the warrant was invalid on the grounds that the warrant had not been "necessary" for the purposes of the investigation, that there had been a material non-disclosure in the affidavit used to obtain the warrant and that the terms of the warrant were too widely drawn.

The Court held that underlying the word "necessary" in s98A(2) were four linked but separate considerations. First, there must be evidence giving rise to at least a reasonable suspicion that a contravention of the Act is taking place or had taken place. Secondly, access to the material the subject of the proposed search must be reasonably required for the purposes of the Commission's investigation. Thirdly, the proposed search warrant must have a realistic prospect of bearing fruit as regards its proposed subject-matter and location. Fourthly, there must be no other reasonable way of gaining access to the subject-matter of the search.

In considering application for search warrants the Court is heavily reliant on the way in which applications are presented. Candid and full disclosure will enable the Court to understand the Commission's concerns and its reasons for seeking the warrant. In particular, the Commission in its evidence in support of the application for a warrant should advise the judicial officer of any specific concerns about concealment or destruction of evidence in the particular case. The absence of specific evidence of that kind would not necessarily be fatal to an application if there was sufficient other evidence to establish the requisite necessity. Search warrants under s98A must be reasonably attainable but it must be borne in mind that corporations as well as human beings have legitimate privacy expectations.

Applying those principles to this case the Court concluded the warrant was not necessary. The Commission moved directly from voluntary co-operation to a search warrant without

giving any satisfactory explanation of why the intermediate step of a s98 notice would not have been sufficient. In the circumstances such a notice would have been a reasonable alternative to a s98A warrant. Hence the warrant was not necessary according to the proper meaning of the word.

Further, the Court found the warrant had been too widely drawn, general and lacking in specificity. A warrant has to be as specific as the circumstances allowed. Both the person executing the warrant and those whose premises are being searched need to know, with the same reasonable specificity, the metes and bounds of the authority granted by the Judge as evidenced in the warrant. Anything less would be inconsistent with the privacy considerations inherent in s21 of the New Zealand Bill of Rights Act 1990.

Having found the warrant had been doubly invalid the Court held it was not appropriate to refuse the relief sought.

Discrimination – marital status – racing rules

Director of Human Rights Proceedings v Thoroughbred Racing Inc [2002] 3 NZLR 333 concerned the rules of racing promulgated by the New Zealand Thoroughbred Racing Inc, in particular r103(2)(c)(vii) which prohibited the training and racing of horses by the husband or wife of any person prohibited by its rules from entering a racetrack. The complainant was the wife of a prohibited person and had been fined for breaching this rule. She complained to the Human Rights Commission that the rule was contrary to s44 of the Human Rights Act 1993 (HRA) because it discriminated on the grounds of marital status. The complainant's case was taken to the Complaints Review Tribunal.

The respondent applied to the Tribunal to strike out the claim, and when this was unsuccessful appealed to the High Court. The High Court allowed the appeal. It held that the HRA did not apply because the racing rules were recognised and validated by s30 of the Racing Act 1971 (re-enacted in a slightly amended form by the Racing Amendment Act 2000), and s151 of the HRA provided that nothing in that Act shall limit or affect the provisions of any other Act or regulation.

The appeal from the decision of the High Court was allowed. A Court of five held that the HRA did apply and that Rule 103(2)(c)(vii) infringed s44. Section 151 did not apply because the rules of racing were not part of an Act or regulation as defined in s29 of the Interpretation Act 1999. By re-enacting s30 of the Racing Act 1971 Parliament had not intended to validate rules which were in conflict with anti-discrimination provisions of the HRA. In a separate judgment Keith J added that s151 should be read narrowly in light of the Commission review provision in s5(1) of the HRA and the sunset provision in s152.

Civil procedure

Discharging Anton Piller orders after execution but before trial

Fujitsu General NZ Ltd v Melco & Ors CA295/00, 8 May 2002, was an appeal against an order for the discharge of executed Anton Piller orders. In allowing the appeal the Court applied the well established principle set out in *D B Baverstock Ltd v Haycock* [1986] 1 NZLR 342, 345 (HC).

In the High Court the Judge adopted the rare course of discharging executed orders prior to trial on the grounds of material non-disclosure, particularly in respect of the hearsay nature of some of the affidavit evidence. The Judge concluded that "if the correct picture had been before the Court the orders would not have been made ex parte".

On appeal the Court criticised the approach of counsel as being erroneously directed more to whether the Anton Piller orders should have been made and to whether, in light of the "total picture" now available such orders could be justified. The Court stated that neither represented the correct approach – the "total picture" would emerge only at trial and an application to discharge an executed Anton Piller order does not present an occasion for the parties to contest, by affidavit, the very issues that are for trial.

The Court held that the evidence later accepted as hearsay but not acknowledged at the time was of limited significance and the non-disclosure of its hearsay nature did not justify discharge of the executed orders before trial. The Judge may rightly have had reservations as to whether orders should have been made now that more evidence is available. But that was yet to be tested and the issue on an application for discharge is different. The appeal was therefore allowed and the order for discharge quashed.

Jurisdiction to apply new High Court costs regime

The Court in *Russell v Russell* [2002] 3 NZLR 752 held the High Court has jurisdiction to award costs against the appellant under the new costs regime introduced by the High Court Amendment Rules 1999 even though some steps in the proceedings occurred before 1 January 2000. However due to the Judge's mistaken understanding that counsel had agreed that all costs should be awarded on the new basis it was necessary to consider afresh the submissions which counsel would have wished to advance as to the pre-1 January 2000 steps. At counsel's request this Court considered those submissions taking the starting point that the costs must follow the event unless there are reasons to the contrary. The Court was satisfied that the just solution was to substitute costs according to scale 2B in the High Court Rules for all steps subject to reduction to one days allowance for discovery and inspection.

Fees

Re Wiseline Corporation Ltd and Spaceways Holdings Ltd, (2002) 16 PRNZ 347, concerned the review of a refusal by the Registrar to waive the court fee on filing a notice of appeal. Under s100B "any person…aggrieved by any decision of a Registrar" on waiver of a fee can

apply for a review by a Judge. The issue was whether an appellant which was a body corporate could apply for waiver. The Judge of the Court who reviewed the Registrar's decision held that "any person" included a Corporation sole under s29 of the Interpretation Act 1999 as the enactment did not provide otherwise. The word "person" appeared in s100A(d)(i) and (da)(i) and in s100B(1) of the Judicature Act 1908 in a context giving no indication that a meaning narrower than the presumptive meaning was intended. Furthermore the statutory purpose of the fee waiver provision was to promote access to justice which pointed strongly to "person" having the broader meaning which included a corporate body.

Refusal of leave to appeal out of time

Ngati Tahinga Ngati Karewa Trust, Clark and Ors as Trustees v the Attorney-General and McKinnon CA73/02, 27 June 2002, confirmed that special leave to appeal out of time under the Court of Appeal (Civil) Rules 1997 can be refused if the prospects of appeal are hopeless, as they were here. The overall consideration is the justice of the case.

Revisiting questions of law considered in earlier proceedings

In *Attorney-General and The Speaker of the House of Representatives v Beggs and Ors* [2002] NZAR 917 the Court was asked the following question under r419 of the High Court Rules.

> Is the authority of the Speaker of the House of Representatives, as occupier of the grounds of Parliament, to warn persons pursuant to s3 of the Trespass Act 1980, to leave those grounds, subject to any applicable right under the New Zealand Bill of Rights Act 1990 being exercised by those persons or any of them, as it was decided that the Speaker's authority was so limited in *Police v Beggs* [1999] 3 NZLR 615?

The question arose from proceedings brought in 2000 against the Attorney-General sued in respect of the police, the Speaker and a senior police officer by protestors arrested in parliament grounds for breach of the Trespass Act 1980 in 1997. The charges against the protestors had been dismissed in the District Court because the failure to individually warn the protestors they were trespassing meant the police would not be able to prove they were in fact trespassing. The decision was upheld on appeal to the High Court. In the course of that decision the High Court spelled out some of the limits on the Speaker's powers and rights as occupier of Parliament grounds.

The Court held that it was inappropriate to answer the question referred as the Crown was seeking to revisit a question essentially resolved in earlier proceedings and not appealed. Also, given the earlier decision, it was not appropriate for the Court to be engaged in wide ranging inquiry into difficult constitutional matters.

Summary judgment, third party proceedings, discovery

In *Friedlander and Ors v Stari Holdings Ltd* CA285/01, 8 August 2002, the Court dismissed the appellants' challenge to a summary judgment requiring them to make payment to the respondent under a term loan contract. In breach of the contract the borrower failed to repay the monies to the lender respondent. The respondent then demanded payment by the three appellants as convenantors and as additional convenantors under the loan contract. The Court found no arguable defence was established. No collateral contract to satisfy the debt by transferring certain land could be established. The respondent did not breach any duty to disclose information or concerns about the financial position of the individual instigating the transaction, borrowing and co-guaranteeing. Whatever duty may lie on the lender, it does not absolve the guarantor from undertaking prudent inquiries. The possibility of an independent claim against a third party would not be an appropriate reason to deny summary judgment, at least in the vast majority of cases. Further discovery was also not a reason to deny summary judgment in this case. The appeal was dismissed. An adjustment to the High Court judgment to limit liability to the terms of the contract was agreed between the parties.

Eligibility for legal aid – the body of persons exclusion

In *Edwards v Legal Services Agency* [2003] 1 NZLR 145, the Court considered eligibility for legal aid in the context of s27(1) of the Legal Services Act 1991. That section provides that legal aid is not available to a body of persons, incorporated or unincorporated. The appellants had brought separate proceedings in the High Court seeking relief against decisions of the Treaty of Waitangi Fisheries Commission. They were refused legal aid on the basis that the proceedings were essentially taken on behalf of the appellants' iwi which attracted s27(1).

The Court held that the appellants were not eligible for legal aid. They had no relevant rights greater than that derived from their membership of their iwi, so their claim was, in substance, for the benefit of their iwi. The iwi were bodies of persons in terms of s27(1) because they had a structure, membership, and tribal territory with associated rights. The Court rejected the appellants' argument that granting legal aid would not lead to any abuse because this could be controlled by s71(1). It was held that s71 was not concerned with eligibility for legal aid, but with the existence of parallel claims.

Leave to appeal to Privy Council on costs award

In *White v New Zealand Stock Exchange* [2002] 3 NZLR 37, the Court considered whether to grant leave to appeal to the Privy Council on a matter concerning the quantum of costs. The appellant had been refused membership of the New Zealand Stock Exchange. This decision was upheld by the Membership Appeal Committee, which ordered the appellant to pay $30,000 in costs. The appellant then obtained judicial review of the Committee's decision in the High Court, but this was quashed on appeal. The Committee's award to cover legal expenses, entered into judgment by the High Court, was also quashed on appeal.

The NZSE sought leave to appeal the Court decision quashing the Committee's order for expenses, but under Rule 2(a) of the Privy Council Rules it had to show the amount in dispute exceeded $5,000. Leave was refused because this threshold was not met. The Court held that the sum relied upon was to be ignored when making the calculation. It was of the same character as an award of court costs, namely a contribution ordered to be paid towards the legal expenses of a party to a legal dispute.

Employment law - discovery and inspection of documents

In *Airways Corporation of New Zealand Ltd v Postles & Ors* [2002] 1 ERNZ 71, Airways appealed from an Employment Court decision ordering it to discover and produce for inspection all the documents it had concerning its development, operation, review and extinguishing of a certain employment policy. The policy concerned Airways' approach to rehiring staff who had earlier been made redundant. The respondent air traffic controllers claimed the policy was applied to them in breach of their employment contracts. Airways contended it did not apply the policy to them. The critical issue for the Court was whether the impugned policy, which was admitted by Airways to have been in force at an earlier time, was applied to the respondents.

Regulation 48(1) of the Employment Court Regulations 1991 provided that in proceedings to which this regulation applied, parties could require disclosure and inspection of documents which were relevant to any disputed matter in the proceedings. The Employment Court Judge had concluded that the words "relevant to any disputed matter in the proceedings" contemplated disputes that went beyond the case as strictly pleaded. This Court found that the Judge erred in law in drawing for present purposes a distinction between pleadings and proceedings. The pleadings defined the ambit of the proceedings and thereby defined the issues to which questions of relevance had to be related. While the concept of relevance should not be looked at narrowly, it could never be divorced from the issues raised by the pleadings. That was what was meant by the reference in Regulation 48 to any disputed matter in the proceedings.

With that point in mind the Court did not consider the development of the policy had any relevance to the key issue beyond what was inherent in the concepts of operation, review and extinguishing of the policy, after the amendments which should be made to the other parts of the Judge's order were brought to account. The order, as made, went beyond the proper scope of relevance, no doubt because of the Judge's erroneous distinction between pleadings and proceedings which were, for this purpose, coterminous. The appeal was therefore allowed by amending the order for discovery accordingly.

Mortgage guarantors – default notices

The appellant in *Bryers v Harts Contributory Mortgages Nominee Company Ltd* [2002] 3 NZLR 343 was the guarantor of various loans secured by mortgages over a number of properties. When the debtor companies fell into arrears the respondent served default notices under s92(1) of the Property Law Act 1952 requiring the defaults to be remedied by 21 January 2000. However, the notice to one debtor company, Auckland City Apartments Ltd

contained a clerical error demanding the default to be remedied "on or before 2 March 1999". This was a date before the defaults had occurred.

The respondent sold the relevant properties then obtained summary judgment against the appellant for the shortfall. The appellant appealed on the basis that the demand notice was defective and that there had been a breach of the obligation owed to him as mortgagor under s103A of the Act to obtain the best price.

The appeal was dismissed. The Court held that the clerical error did not render the notice required by s92(1) invalid because a reasonable recipient would have understood the meaning of the notice notwithstanding the error. There was no suggestion that the recipient had misunderstood or been misled. It was also held that the appellant was not entitled to the protection of s103A because he was not a "mortgagor". The definition of "mortgagor" in the Act requires that the person claiming this status have an interest or right in the mortgaged property. The appellant did not possess such rights and there was no question of subrogation.

Jurisdiction to grant leave to appeal to the Privy Council in employment cases

Brittain & Ors v Telecom Corp of New Zealand (No 2) [2002] 2 NZLR 556 concerned an application for conditional leave to appeal to Her Majesty in Council. The principal question was whether the Court had jurisdiction to grant leave to appeal notwithstanding s135(5) of the Employment Contracts Act 1991.

The applicants had brought claims in the Employment Court against the respondent alleging breaches of express and implied terms of their employment contracts. The respondent made interlocutory applications for orders determining two questions before the substantive hearing. The Court heard two appeals on the matter, one by way of case stated under s122 of the Employment Contracts Act 1991 and the other from a ruling of the Employment Court. The applicants were unsuccessful and applied to the Court for leave to appeal to the Privy Council under rule 2(a) of the 1910 Order in Council.

The Court refused the application on the ground that an order on an interlocutory application is not regarded as a final order for the purposes of rule 2(a). Neither is a decision on a case stated on a question of law posed at a preliminary stage of proceedings easily read onto either limb of the remainder of the rule. However, even if the rule had been satisfied it would not have been available in respect of proceedings commenced in the Employment Court. Section 135 of the Act was the over-arching substantive provision dealing with the Court's jurisdiction on appeals of the type in question. There was no logical distinction between a question of law that came before the Court by way of case stated under s122 and one that was taken directly under s135 that would allow the former a further right of appeal to the Privy Council where the latter was denied one. Accordingly, the Court had no jurisdiction to grant leave to the Privy Council.

✧✧✧✧

B. IMPORTANT CRIMINAL CASES

Elements of Offence

Meaning of "offer to supply"

The issue in *R v Jones* CA412/01, 31 May 2002, was whether an indication of a willingness to supply or to facilitate supply by another is sufficient to constitute an offer to supply in terms of the Misuse of Drugs Act. By reference to *R v During* [1973] 1 NZLR 366, 373 and *R v Marr and Wilkinson* CA130/78 and 139/78, 11 April 1979, the Court held that it was.

Theft – money received for investing but applied for personal use

In *R v Prestney* [2003] 1 NZLR 21, the Court considered theft under s222 of the Crimes Act 1961 (the Act). Section 222 is satisfied when money is received on "terms" requiring the payee to pay it to "any other person", but instead the payee converts that money to his own use. The appellant had been convicted on four counts of theft under s222 for receiving money to invest in Korean stocks on behalf of the complainants, but instead using that money to pay off personal debts and to purchase a motor vehicle.

The appellant appealed on the ground that the verdicts of the jury were unreasonable or against the weight of evidence. It was submitted that the appellant may have acted less than honestly using the money for his own purposes, or that he may have misrepresented what he was going to do with it, but that there was no "term" requiring him to invest the money in Korean stocks. It was further submitted that the money was advanced in the form of a loan which contained no direction as to how it was to be used.

The Court dismissed the appeal and concluded that the verdict was reasonably open to the jury. The reference to "any other person" means merely a person other than the accused. It was not necessary that the payer stipulate, or even know, the "other person" by name. It was sufficient that the appellant understood that the money was to be invested in Korean stocks. It was also a "term" of the payment that money be invested in Korean stock. The term was implicit from the nature of the transaction and arose from the appellant's representation that the money would be applied in a particular way. Even if the form of the transaction was a loan there was still an obligation to utilise the money as the appellant had represented. This obligation was of fiduciary character and arose from the representation, similar to the way fiduciary obligations arise under a Quistclose trust.

Maritime transport – classification of offences

In *Tell v Maritime Safety Authority* CA230/02, 27 November 2002, a Court of five considered the classification of two offences under the Maritime Transport Act 1994. The appellant fell asleep at the wheel of his fishing boat. The boat subsequently ran aground. The appellant was charged with two offences under s65(1) of the Maritime Transport Act, of operating a vessel in a manner which caused unnecessary danger or risk to persons and to property.

The court held that the operation of which s65(1) spoke had to be a voluntary and conscious operation of the ship concerned. Thus, given that the ship must have been consciously operated, the issue was whether the prosecutor had to prove that the operator consciously appreciated that the manner of operation was causing unnecessary danger or risk.

The Court accepted that mens rea should be regarded as a necessary ingredient of all offences unless Parliament had made it clear, expressly or by necessary implication, that proof of mens rea was not necessary. Looking at s65 itself, the Court considered that there was a clear and necessary implication from the terms of s65 that such knowledge or recklessness was not a necessary ingredient of the offence. While the absence of any reference to knowledge or recklessness was not of itself decisive, the statutory method of expression in the section led to the conclusion that the subjectivity of the offence was confined to the "operates" element, and that the question whether the manner of operation caused unnecessary risk had to be judged from an objective standpoint. This conclusion was reinforced when consideration was given to the provisions surrounding s65. In ss 61 and 67, Parliament clearly signalled the need for knowledge or recklessness when that was intended, whereas s65 contained no such words. The provision in s66 that in a prosecution for breach of s65, breach of a relevant maritime rule was presumed to have caused unnecessary danger or risk also pointed against s65 being an offence of strict liability. Although s82 was headed strict liability, it did not follow that the offence created by s65 was therefore incapable of having elements of strict liability.

The legislative history and theauthorities further supported the conclusion that s65(1) created an offence of strict liability. *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA), a leading case in this area, concerned s24(1) of the Civil Aviation Act 1964, which was in materially the same terms as regards aircraft as s65 of the Maritime Transport Act 1994. The Court held that as s24(1) was held to create an offence of strict liability, so too should s65(1). This conclusion was also supported by the principle purpose of s65(1), which was not so much to punish knowingly reprehensible conduct but rather to provide a sanction in a case where the safety of persons or property was unnecessarily put in danger or at risk.

Female rape

The issue in *R v A and B* [2003] 1 NZLR 1 was whether a woman could be charged with unlawful sexual connection occasioned by the penetration of her genitalia by a penis without the male's consent. The High Court had quashed a charge to that effect against the appellant as not stating in substance a crime. The Solicitor-General appealed.

Section 128 of the Crimes Act 1961, combines two separate types of behaviour, namely rape and unlawful sexual connection, both of which could amount to the crime of sexual violation. Sections 128(1)(a) and 128(2) define the long-standing and gender-specific offence of rape by a male having sexual connection with a female. That offence could only be committed by a man. Sections 128(1)(b) and 128(3) created what was in 1985 a new offence of sexual violation. That offence occurred when a person had unlawful sexual connection with another person by having sexual connection with that other person without their consent and without believing in consent on reasonable grounds. This form of sexual violation was gender-neutral in its terms. Both modes of commission comprehended in the offence of sexual violation under s128 depended on proof of "sexual connection" as defined in s128(5). Section 128(5)

was also gender-neutral. Therefore no gender limitation arose from the statutory language in respect of a charge of sexual violation arising out of unlawful sexual connection under ss128(1)(b) and 128(3).

As a matter of statutory interpretation it had to follow that a person, whether male or female, could be charged with unlawful sexual connection with another person, again whether male or female, if, without the consent of that other person or without the actor believing in the other person's consent on reasonable grounds, the actor did acts which came within the definition of "sexual connection" in s128(5). In this case there was, in terms of s128(5), penetration of the genitalia of any person (the accused) by any part of the body (the penis) of any other person (the complainant). The fact that penetration of the male genitalia would only arise in most unusual circumstances did not affect the question of interpretation.

In cases of this kind, the issue came down to what conduct could amount to the actus reus of sexual violation. All that was necessary was that the conduct with which the accused was charged came within the definition of sexual connection. Here it did because the accused had sexual connection with the complainant, occasioned by the penetration of her genitalia by his penis. If such connection was without his consent, and without her believing in reasonable grounds that he consented, she committed the crime of sexual violation.

Rights to give and receive legal advice

In *Sullivan v Ministry of Fisheries* [2002] 3 NZLR 721 the appellant, a practising barrister and solicitor, appealed successfully against a conviction for encouraging the obstruction of a Fishery Officer. The High Court had taken the view that the appellant encouraged obstruction by providing the answers to questions asked of his client during an interview by Fishery Officers. At issue on appeal on questions of law was the right of the appellant's client to seek and receive legal advice while detained and questioned under s79(1)(c) of the Fisheries Act 1983 and the relevance of this right to the appellant's actions in advising his client.

The Court held that the statutory pre-emptions of the right to silence and the constraints on cross-examination of detainees contained in s79 of the Fisheries Act should not be construed expansively, having regard to s6 of the New Zealand Bill of Rights Act 1990. Rather where rights have been truncated by statutory provisions, the residuary rights of the subject should be fully emphasised. Therefore, where the Fisheries Act gives a power to detain and question, and a duty to answer questions asked, the person questioned is not to be denied the right to legal consultation and advice.

As the client in this case had a right to receive and follow legal advice and as the questions by Fishery Officers did not tend to incriminate and the answers given had not been shown to be false, the client could not have been convicted of obstruction. It followed that the appellant lawyer could not be liable for encouraging obstruction when he had advised the course followed. Even if the appellant had been tried for actual obstruction rather than for encouragement, the prosecution should have failed because the client's right to legal advice had a concomitant right on the part of a lawyer instructed to give the advice sought. The appeal was allowed and the conviction quashed.

Defences

The relevance of self defence to s202A(4)(b) Crimes Act 1961

R v Haquiqzai CA158/02, 18 December 2002, concerned the application of s202A(4)(b) of the Crimes Act 1961 when self defence is in issue. The appellant was convicted on one count of having in his possession an offensive weapon, a brass rod, in circumstances that prima facie showed an intention to use it to commit an offence involving bodily injury or the threat or fear of violence, contrary to s202A(4)(b). The appellant asserted that he had acted in self defence and the trial judge had directed the jury that the Crown had to negative the possibility of self defence.

The Court discussed *Tuli v Police* (1987) 2 CRNZ 638 (HC) and *R v Busby* CA211/01, 26 September 2001, and concluded that the application of s202A(4)(b) is not without difficulty in cases where self defence may be in issue. In such cases the jury should be directed to decide whether the apparent circumstances show, prima facie, an intention to use the offensive weapon to commit an offence involving bodily injury or fear of violence. If there is a reasonable possibility that the circumstances show that the person was in possession of a weapon in order to defend himself, the Crown will not have proved the offence. If however, the accused asserts at some later time that the possession of the weapon was justified on the basis of self defence, it would be in error for the judge to direct the jury, as occurred in this case, that the Crown had to exclude that possibility. However, the Court held that the misdirection in this case was in the appellant's favour and that no miscarriage of justice had therefore arisen. The appeal was dismissed.

The Court also questioned the aptness of this particular charge in circumstances where there is conflicting evidence as to who was the aggressor in a violent situation.

Evidence

Similar fact evidence where identity is in issue

In *R v Holtz* CA149/02, 18 December 2002, the Court reviewed the principles applicable to similar fact evidence where identity is in issue.

The appeal was against convictions for murder and aggravated robbery. The appellant was charged with four aggravated robberies (in the course of one the shopkeeper was murdered) and another attempted robbery of the victim of the subsequent murder. The Crown relied on similar fact evidence. Two of the appellant's previous robberies had resulted in convictions. The Crown relied on these earlier robberies and also the others charged in the indictment as indicating a pattern. The similar fact evidence was relied on to prove identity on some counts and to undermine a defence of coincidental presence at the scene of the murder.

The Court reviewed the relevant authorities and concluded that there was no separate requirement of "striking similarity" for the admission of similar fact evidence where identity is the issue. It further held that juries do not need to be directed as a matter of universal

application that a pattern must be proved beyond reasonable doubt before similar fact evidence can be relied on. However, the Court noted that this might in practical effect be the requirement when there is no other evidence identifying the accused as the offender in the count under consideration. It was noted that the views of the Supreme Court of Canada in *R v Arp* (1998) 129 CCC (3rd) 321 are to similar effect.

Arbitrary detention – exclusion of evidence

In *R v Koops* (2002) 19 CRNZ 309 the Court excluded evidence obtained in breach of s22 of the New Zealand Bill of Rights Act 1990. The appellant had been accompanied to a police station and interviewed by a detective where she admitted selling morphine sulphate tablets. The interview had lasted approximately two hours and the appellant was never cautioned or advised of her rights. At the conclusion of the interview the Detective told the appellant she was likely to be charged, at which time she refused to sign a copy of the interview record. The case was an appeal against a pre-trial ruling that the evidence obtained during the interview was admissible. The appellant argued that the evidence was not admissible because she had been arbitrarily detained in terms of s22.

The Court held that there is a detention where an accused reasonably believes, as a result of police conduct, that he or she is not free to leave. The Court rejected the appellant's argument that she was detained from the time she was taken to the police station, but accepted that the appellant was detained after admitting she had sold the morphine sulphate tablets. From this time the tenor of the interview had changed and it was probable that the appellant believed she was no longer free to go. As the police had no power to detain, the detention was arbitrary and in breach of s22.

The Court was satisfied that this breach justified the exclusion of the contents of the interview recorded after the admission. The consequence had been that the appellant had been effectively denied the opportunity of being advised of her rights which must be given to a person lawfully arrested or detained. The Detective had not, at the police station, advised the appellant of her right to a lawyer nor of her right to refrain from making any statement.

Bill of Rights – admissibility of evidence

The first application of *Shaheed* [2002] 2 NZLR 377 in this Court was in *R v Maihi* (2002) 19 CRNZ 453. The Court first summarised the *Shaheed* approach. It was emphasised that the question of whether a search was reasonable or unreasonable was separate from (and prior to) the question of whether the resulting evidence should be admitted. The two topics should not be examined together. The fact and basis of any unlawfulness was relevant to whether the searches were unreasonable but not determinative of that question. It was only if a search was found to be unreasonable that admissibility questions had to be addressed. It was also observed that following *Shaheed* there should not, save perhaps in unusual circumstances, be any need for judges to address the search and seizure jurisprudence of other countries. Both the balancing test, and the prior question of reasonableness, were matters which should be informed primarily by New Zealand values.

In this case the Court held that the searches were unreasonable and thus constituted a breach of s21 of the New Zealand Bill of Rights Act 1990. It was at this point that the question of admissibility and the *Shaheed* balancing test had to be undertaken. No prima facie exclusion now followed from the finding of a breach of s21. As the starting point was to give appropriate and significant weight to the breach of the suspect's rights, the ultimate inquiry would generally come down to whether vindication of that breach by exclusion of the resulting evidence was outweighed in the particular case by the competing public interest in bringing offenders to justice. After considering all the circumstances, the Court concluded that the exclusion of the evidence, and hence the inability to prosecute the appellant, would not be a remedy disproportionate to the breach. The vindication of the appellant's rights did not undermine the need to maintain a credible and effective system of criminal justice. It followed that the High Court erred in the conclusion that the evidence should be admitted.

Admissibility of a statement by a youth

In *R v K* (2002) 22 FRNZ 319, the Court held that in failing to ask the appellant who was aged 12 years and 4 months, to choose which family member or adult he wished to support him, the police dispensed with a procedure that was central to the scheme of the Children, Young Persons and Their Families Act 1989. A failure to that degree put the police outside the scope of the broad coverage of reasonable compliance with s221(2)(c) of the Act. Under s224 of the Act the support role that could reasonably be expected of a fair minded stranger was not what the legislature had in mind, other than in situations where the young person refused or failed to nominate some-one to whom he or she was close to or at least knew. Nor was it accepted that the Act contemplated that judgment should be made by the police as to the suitability of family members for the role by reference to whether they had custody or care of the child or not. The appellant faced a police interview without the particular type of special protection, in relation to the vulnerability of a person of his age, that Parliament intended he should have. The lapse was such a major departure from the scheme of protection, involving a 12 year old boy being investigated as a suspect on a murder charge, that it could not be cured by the reasonable compliance provision. The appeal was allowed.

Exceptions to the hearsay rule

R v M-T [2003] 1 NZLR 63, involved a case where a pregnant complainant had changed her mind and had been excused from giving evidence at trial on charges of domestic violence under s352 of the Crimes Act 1961. The issue for the Court was whether her statement to police and deposition evidence was admissible. The Court held that one of the three elements of the residual exception to the hearsay rule in *R v Manase* [2001] 2 NZLR 197 (CA), inability to give evidence, had not been met. The *Manase* decision recognised "that a principled approach to a residual category of exception to the hearsay rule requires a qualifying criterion of need to resort to hearsay evidence rather than one of mere convenience". Concern expressed by the Law Commission that to extend the concept of unavailability to cover those who refuse to give evidence would tend to encourage witnesses to opt out of testifying was noted. The Court concluded that if there is to be a further inroad into the fair trial right to accommodate evidential problems in prosecuting domestic violence that is a matter for legislative intervention rather than common law development.

Admissibility of evidence to rebut suggestion of recent invention

In *R v I* [2002] 3 NZLR 477 the Court considered the circumstances in which evidence of a prior consistent statement by a complainant in a sexual offending prosecution can be admitted to rebut a suggestion of recent invention.

The appeal was against convictions for unlawful sexual connection and rape on the grounds that recent complaint evidence had been wrongly admitted and that the complainant had recanted. The complainant had disclosed abuse first to three school friends, then to a teacher, and then to the school nurse. At trial the Crown called the teacher and nurse as witnesses, but did not call the three school friends. On appeal the Court held that successive complaints to different witnesses could have been parts of a single process of disclosure. However, to establish an evolving complaint, it was necessary to call evidence of what was said on the first occasion and to show that any development in the complaint had been prompt. The evidence of the teacher and the nurse should not have been admitted without evidence of the complaint to the three friends and evidence of the timing of the disclosures. However the Court held that a prior consistent statement was admissible in order to rebut a defence allegation of recent invention of the evidence given at trial. In determining the question of admissibility the trial judge must ensure that the complainant's testimony has been attacked on the ground of recent invention reconstruction, that the contents of the statement are of like effect to the account given in evidence and that, having regard to the time and circumstances in which the statement was made, it tended to answer the attack.

As to recantation, the Court found that this was properly a matter of confusion, rather than recantation. The appeal was dismissed.

Evidential protection of identity of informers

In *R v Strawbridge* CA140/02, 19 December 2002, the issue was whether the evidential privilege protecting the identity of informers should apply to a prosecution for an offence under s49(1) of the Domestic Violence Act 1995. The appellant, in breach of a protection order, had knowingly made false allegations which constituted harassment amounting to psychological abuse of the protected person. He appealed against his conviction on the ground that evidence of his letter containing the false allegations could not be given against him because that would disclose his identity as an informer. The immunity from prosecution under the Act in relation to disclosures of child abuse does not apply if the information is supplied in bad faith.

The Court, in dismissing the appeal, held that the common law evidentiary immunity afforded to informers did not apply. It was not in the public interest to allow those who commit an offence in the course of knowingly supplying false information to be allowed to shelter behind an evidentiary immunity to avoid conviction. Furthermore, the common law privilege is implicitly abrogated by statute in cases where under s16 of the Children, Young Persons and Their Families Act 1989 immunity from proceedings is not available because the informer acted in bad faith. The circumstances were not analogous to the true informer situation.

Obligation on Officer requesting evidential breath test to advise suspect that compliance required without delay

In *R v Deam* [2003] 1 NZLR 57 the Court was required to determine whether there was an obligation on an enforcement officer on requesting an evidential breath test to advise the suspect that the suspect is required to comply with the request without delay.

The Court, differing from the High Court Judge, held that the clear words of ss72(1)(a) and 72(2) in the Land Transport Act 1998 imposed an obligation to advise that compliance was required without delay. Although it would be preferable for the words "without delay" or their equivalent to be used when an enforcement officer requires a suspect to undergo an evidential breath test or similar procedure, the actions and conduct of the officer or the context may convey that compliance is required. If the requirement to undergo the test is made when the officer is proffering the device to the suspect then that would suffice.

Criminal Procedure

Conviction appeal after a plea of guilty on legal advice

In *R v Clark* CA59/02, 28 May 2002, the Court reviewed the principles applicable to the exercise of the High Court's inherent jurisdiction to vacate a plea of guilty prior to sentencing. The principal ground of appeal was that the Judge applied the appellate test rather than the test applicable to an application made before sentencing.

The Court stated that prior to sentencing leave to vacate a plea of guilty is a matter for the discretion of the Judge in the exercise of the Court's inherent jurisdiction. It is a broad discretion. While the most common circumstances which warrant leave are that the accused has not really pleaded guilty, that there has been some critical mistake, or that there is a clear defence to the charge, these are no more than examples. The underlying objective is to avoid a miscarriage of justice, or, perhaps in the prospective context better viewed from the opposite end, to consider the interests of justice. Such a test incorporates not only the interests of the accused but also the interests of victims or witnesses. The grounds on which a change of plea may be allowed prior to sentence are less restricted than those that apply at the appellate stage. The Court reiterated the well-settled principle that a change on appeal will be allowed only in exceptional circumstances.

Abuse of process and laying of fresh charges

In *Fox v Attorney-General* [2002] 3 NZLR 62 the Court considered whether it was an abuse of process for police to lay fresh charges against an accused with whom agreement had been reached about the charges that he would face in respect of alleged offending. Before the police decision to lay fresh charges the accused had pleaded guilty to, and been convicted of, the agreed charges but had not been sentenced. This Court, bearing in mind the constitutional principle of restraint in supervision of prosecutorial decision, held the threshold test for abuse of the Court's processes was not made out merely because a public prosecuting agency decided to backtrack on an agreement it reached as to the charges a defendant would face.

A circumstance which could result in continuation of a prosecution being an abuse of process was if the change of course by the police created prejudicial consequences for the person charged. The fact that leave of the Court had been sought by police to withdraw charges that were later re-laid did not in and of itself have any bearing on whether the Court's powers were abused in relaying the withdrawn charges. There was no question of bad faith or of improper motive on the part of the police. The change of mind was the result of receiving a different view of what police responsibilities in the prosecution process required. The circumstances in which the police came to be so advised and elected to take that advice reflected a proper, indeed sound, governmental practice. In the circumstances the appellant had not suffered prejudice which gave rise to an abuse of court process. But because of the process followed at sentencing (when the facts relating to the one remaining related charge were taken into account) it would be important for the appellant to face a trial on that charge, the appeal was allowed to the extent of setting aside the relief granted to the Crown in the High Court.

On the papers mode of determination without representation

In *R v Hiroti* CA384/01, 25 September 2002, the Court considered the proper approach in a situation when appellant is not represented in an appeal heard on the papers and written submissions have not been filed. The issue was whether there had been a miscarriage of justice arising from Judge's direction to the jury as to the making of inferences. The Court considered it was sufficiently apprised of the appellant's grievance to fairly determine the appeal on the papers. The grounds of appeal were prepared at a time when appellant had legal assistance and succinctly and effectively isolated the point of appeal. The defence case was straightforward and not one in which the jury would have been assisted by a more complex direction on inferences as suggested in the Notice of Appeal. The appeal was dismissed.

Jury directions

Removal of self defence from the jury – psychiatric evidence

In *R v Bridger* CA126/02, 12 December 2002, a bench of five considered self-defence in an appeal against conviction for grievous bodily harm and a sentence of four years imprisonment. The appellant had struck a complainant with a rake and was found guilty at trial. The appellant appealed his conviction on two grounds. First, that the trial judge was wrong to remove self-defence from the jury on the basis that the force used was not reasonable in the circumstances the accused believed them to be. It was submitted that this was always a question for the jury and that the trial judge's role was confined to making an assessment of the circumstances and concluding whether it was reasonably possible that in light of those circumstances the accused was acting in self defence. The second ground was that evidence of a psychiatric disorder was relevant to assessing the circumstances as the appellant believed them to be in the context of self defence. This was not put to the jury because it came to light only after trial.

Blanchard J delivered the judgment of the Court. It was held that a trial judge could remove self defence from the jury where there is no reasonable possibility that the force used in the circumstances was reasonable. The Court affirmed its earlier decision in *R v Wang* [1990] 2 NZLR 529 on this point and upheld the trial Judge's finding that no reasonable possibility existed on the facts.

The Court left open the more difficult question, arising on the second ground of appeal, of whether psychiatric evidence was admissible only in support of an insanity defence. This was because there was no evidence that the appellant's mental disorder affected his subjective perception of danger. However, the Court recognised the disorder was a factor relevant to the appellant's culpability and reduced the sentence from four years to three years imprisonment.

Possibility of contamination of jury by jury escort and members of the public

In *R v Walker* [2002] 3 NZLR 468, the Court considered the correctness of procedures undertaken by a trial judge after an allegation of jury contamination. The appeal was based on an incident during the jury's retirement when the jury escort was observed to be holding the jury in an area outside the courthouse, to which the public had access, and to be engaged in conversation with two jury members. Counsel raised the matter with the trial Judge who questioned the escort as to what had taken place and then recorded a summary of the outcome of that inquiry. On the basis of the inquiry the Judge declined to intervene.

On appeal it was submitted that the escort may have contaminated the jurors concerned. It was also submitted that the escort had exposed the jury to potential contamination from members of the public and that the trial Judge was in error in not quizzing the escort more closely and in not discharging the jury and ordering a new trial. The Court held that while the escort's actions could be regarded as imprudent, the Judge's actions had met the situation appropriately. As to the possibility of interference from members of the public, the Court held that in the absence of actual evidence of interaction between members of the jury and the public, the possibility of interference was speculative. The appeals were dismissed.

The Court also made some general comments about the jury management. It was suggested that where a judge is obliged to carry out such an inquiry as was necessary in this case it is desirable that the content be recorded in a manner akin to a transcript of evidence, and that such enquiries should take place in the presence of all counsel and the accused. The judge's reasons for the action decided upon, however brief, should also always be recorded, dated and, preferably, timed.

Miscarriage of Justice

Whether trial unfair by reason of length and complexity

The issue *R v Tukuafu and White* CA34/02, 39/02, 40/02, 46/02, 48/02, 52/02, and 56/02, 18 December 2002, was the fairness of a long and complex trial. The appellants appealed against convictions and sentences for burglary and conversion of motor vehicles. The High

Court trial had taken 90 and a half days over six months and concerned numerous burglaries of commercial premises on a persistent and sometimes more than daily basis over a period of 15 months. The Crown case was that the *modus operandi* employed in the offending identified a small group of participants. The issue for the jury was which particular members of that small group were criminally implicated in any particular offence. This approach required a large amount of evidence in order to demonstrate signature features of previous and present offending.

On appeal it was argued that the length and complexity of the trial resulted in such unfairness to the appellants as to amount to a substantial miscarriage of justice warranting the quashing of the guilty verdicts. The Court held that though an initial view might suggest difficulty, the case was not one of unmanageable complexity and the jury had been provided with adequate management systems to cope with the number of counts, which, though numerous, were not complex. In addition, the evidence was laid before the jury progressively, permitting an orderly, sequential valuation. There had been no complaint by the jury about difficulty in following the evidence. Accordingly the Court held that there had been no miscarriage of justice and, further, that none of the individual grounds of appeal had been substantiated.

The Court also dismissed the appeals against sentence, holding that the sentences were severe but that fairly punitive and deterrent sentences were needed in relation to major offenders who had not been adequately deterred by previous sentences of imprisonment.

Sentencing

Sentencing - cannabis cultivation - inference of a commercial purpose

The principal issue in *R v Pattison* (2002) 19 CRNZ 407 was whether a commercial purpose in cannabis cultivation could be inferred from the presence of harvested cannabis where the accused had not separately been charged with possession for supply.

The Court held that harvested cannabis could be taken into account as evidence of prior cultivation and as evidence of aggravation on a charge of cultivation. The Court cited *Lane v Auckland City Council* [1975] 1 NZLR 353 as authority for the proposition that even though factors of aggravation may constitute separate offences that does not mean that they cannot be considered as part of the sentencing exercise.

New sentencing principles – effect on sentencing levels – retrospectivity

In *R v Afamasaga* CA271/02, 21 November 2002, the Court considered the new sentencing principles under the Sentencing Act 2000 (the Act). The case was an appeal by the Solicitor-General of a sentence of ten years imprisonment for sexual violation on the ground that it was manifestly inadequate. The offending had occurred prior to the commencement of the Act, but sentencing occurred afterwards raising the question of retrospectivity, which was prohibited by s6 of the Act. Under s6, if a penalty was varied by the Act the respondent was entitled to the lesser penalty.

The trial judge imposed the period of ten years imprisonment on the basis of the principles that existed prior to the commencement of the Act. The Judge observed that under the new sentencing principles the sentence may have been 14 years. The Crown submitted that a sentence of 12 years was appropriate and that although an application of the new principles may result in a higher sentence this did not mean that the legislation had retrospective effect.

The appeal was dismissed because the Crown could not show that the sentence was manifestly inadequate. The Court disagreed with the trial Judge's suggestion that by applying the new sentencing principles the sentence might have been 14 years. It was observed that the new sentencing principles were unlikely to lead to a general increase in sentences, but that in some cases sentences may be increased. Only in one of these cases would it be appropriate to consider the effect of s6.

Minimum non-parole periods (Criminal Justice Act)

In *R v Alder* CA430/01, 25 June 2002, the Solicitor-General sought leave to appeal against a minimum non parole period of 15 years imprisonment on the basis that this length was manifestly inadequate. Mr Alder had deliberately run down the victim in his car whilst she was jogging. The victim was then raped and sodomised over a two hour period and then killed by blows to her head with a drainage pipe. Mr Alder then proceeded to stab the victim at least 35 times. He pleaded guilty to a charge of murder, three charges of sexual violation, and a charge of abduction with intent to have sexual intercourse, and was found guilty of assault using a motor vehicle as a weapon. The minimum non parole period was imposed on the murder conviction.

The mitigating factors were few in this case. Mr Alder had no previous convictions, had been a good worker and a supportive son and had, albeit belatedly, pleaded guilty to all but one of the charges. The aggravating features were self-evident. The initial running down was for the premeditated purpose of sexual assault. The victim's life was then brutally and callously brought to an end after she had endured persistent sexual assaults. The purpose of the ultimate killing was then to silence the victim forever in an attempt to escape responsibility.

The Court concluded that against the exceptionally grave combination of circumstances in this case, the minimum non parole period ultimately fixed by the sentencing Judge was manifestly inadequate. It could not realistically have been less than 17 years. This term reflected s80(3) which provided that the duration of any minimum non parole period shall be the minimum period the Court considered to be justified having regard to the circumstances of the case including those of the offender. The lowest tenable starting point, in the Court's view, was one of 18 years and the most that could be allowed for the mitigating matters, primarily the pleas, was one year. The minimum non parole order made by the Judge was therefore quashed, and substituted with a period of 17 years.

The mitigating effect of mental or physical illness

In a series of three cases, the Court discussed the relevance of mental or physical illness in sentencing an offender. In the first of these cases, *R v de la Hunt* CA416/01, 8 May 2002, the

appellant appealed against a sentence of three and a half years imprisonment for offences of dishonesty, arson and attempted murder committed while she was suffering from bipolar affective disorder. She appealed against her sentence on the grounds that it was excessive having regard to her early guilty plea and the mitigating effects of mental illness. The Court recognised that mental disorder is a significant mitigating factor, but that other factors must be brought into account in sentencing the offender. These may include denunciation of violence and public safety. In the circumstances of this case, where no injury had been caused and much of the financial loss had been made good, insufficient allowance had been made for the guilty pleas and the episode of serious mental disorder. The appeal was allowed and the sentence reduced by one year to two and a half years imprisonment.

In *R v Verschaffelt* [2002] 3 NZLR 772, the Court considered the appropriate sentence discount for an unusual medical condition resulting in increased subjective severity of sentence. The appellant had been sentenced to four years imprisonment for drug related offences. At sentencing the Judge was provided with extensive evidence relating to an unusual medical condition suffered by the appellant which rendered him unusually susceptible to cold temperatures. This condition necessitated that he be resident in the special needs unit at the prison, where conditions as to social contact, exercise and stimulation differ from those which normally apply. The Court recognised that where, due to a medical condition or disability, prison would constitute a more severe penalty for a particular offender, some leniency may be shown in sentencing. The Court held that because of the conditions in which he must be kept, the appellant was subjectively receiving much more severe punishment than would otherwise be the case. That justified a further reduction in the appellant's sentence, from four to three years imprisonment

R v Tuia CA312/02, 27 November 2002, concerned the weight to be given to psychiatric illness when sentencing violent offenders. The appellant had been sentenced to five years imprisonment for aggravated bank robbery. One of the grounds of appeal was that insufficient weight had been given to the appellant's circumstances, particularly his psychiatric illness of schizophrenia. There was evidence that the bank robbery had been committed at a time when the appellant was not complying with his medication regime, was exhibiting symptoms of illness relapse and functioning maladaptively.

The Court considered that the relevance of mental disorder in sentencing follows from the principle that any general criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend. The lesser the moral capacity for constraint, the lower the moral culpability of the offender. In this case the appellant was predisposed by his psychiatric condition to commit the offence. He must therefore be sentenced as a person whose offending had been contributed to by a medical condition for which he bears no responsibility, requiring a recognition of lesser moral culpability. The Court reduced the appellant's sentence by one year.

Whether preventive detention is arbitrary detention in contravention of the International Covenant on Civil and Political Rights, the New Zealand Bill of Rights Act

In *R v D* [2003] 1 NZLR 41 an accused, who was sentenced to preventive detention following conviction for a sexual assault, submitted that the sentence of preventive detention involved

arbitrary detention in breach of the International Covenant on Civil and Political Rights (ICCPR), to which New Zealand was a signatory, and the New Zealand Bill of Rights Act.

A Court of five reiterated that statutes could only be interpreted consistently with international obligations if the words of the statute allowed it. Parliament had retained the sentence of preventive detention in the new Sentencing Act 2002 after Select Committee consideration of the consistency of the sentence with the ICCPR. The criteria laid down as to the imposition of the sentence could not be departed from by the Court.

The Court held that the report of a psychologist who was treating D should not have been admitted as part of the sentencing process. Section 35 of the Evidence Amendment Act (No 2) 1980 protected the report and there was no specific and informed consent to disclose in circumstances where there is a proper choice given as required by s33.

Extradition

Offences under Extradition Treaty between New Zealand and United States

The issue in *Edwards v United States of America* [2002] 3 NZLR 222 was whether the counts on indictment for which extradition was sought constituted extradition offences under the Extradition Treaty between New Zealand and the United States. The Court considered the approach adopted to the interpretation of extradition treaties specifically and the general approach to the interpretation of treaties now stated in the Vienna Convention on the Law of Treaties. The question was whether the charges fell within the ordinary meaning of the treaty in their context and in the light of the purpose and object of the treaty. Applying that test the counts were clearly extradition offences and the appeal against the dismissal of the application for judicial review was dismissed.

The test for an extradition offence and double criminality

The Court in *Government of the United States of America v Cullinane* CA417/01, 18 December 2002, held that the test in the United States and New Zealand Treaty on Extradition replaced the definition of "extradition offence" in s4 of the Extradition Act 1999 and that double criminality was not required.

In the courts below it was assumed by all concerned that, because the definition of extradition offence in s4 of the Act is made subject to the Treaty, a three-part test results. It was assumed that the Court must be satisfied that:

(1) the offence charged against the person in the country seeking extradition is one of the offences mentioned in the Treaty (Articles 1 and 2).

(2) The offence is one which is punishable under the law of the country seeking extradition carrying a maximum penalty of not less that 12 months imprisonment (s4(1)(a) of the Act).

(3) Had the conduct of the person whose extradition is sought occurred in NZ it would have constituted an offence in NZ for which the maximum penalty is not less than 12 months imprisonment (s4(2) of the Act).

The Court held that this three-stage test was not applicable in this case. The Court considered that as s11 of the Extradition Act required that the Act be construed to give effect to the applicable extradition treaty it is not appropriate to simply add the Treaty definition to the s4 definition. Rather the test in Article 2 of the Treaty replaces the test set out in s4. The proper inquiry for a court faced with an extradition request made by the United States is therefore whether the alleged conduct satisfied the requirement of the Treaty, and the Court should no longer concern itself with the three-stage test that has been utilised to date in the case.

The Treaty lists the offences for which extradition is permitted and does not contain an explicit double criminality requirement. Since the definition of extradition offence in s4 of the Extradition Act is subject to the treaty, it follows that the double criminality requirement in s4(1)(a) is excluded when the Treaty applies and does not itself require double criminality. The three-stage test is therefore inapplicable.

The Court endorsed the approach for interpreting Article 2 set out in *Edwards v US* [2002] 3 NZLR 222. Applying that approach neither of the offences for which extradition was sought - visa fraud nor racketeering - were covered by the Treaty. The need to prevent extradited persons from being listed for crimes which are not listed in Article 2 – and for which they cannot be extradited – justifies a restrictive and cautious approach to umbrella crimes such as racketeering.

The High Court's finding that the surrender of Mr Cullinane was not in accordance with the provision of the Treaty was therefore upheld and the appeal was therefore dismissed.

✧✧✧✧

C. INDEX OF COURT OF APPEAL CASE NAMES

Appellant v Respondent **Page No**

Respondent v Appellant

✧ ✧ ✧ ✧