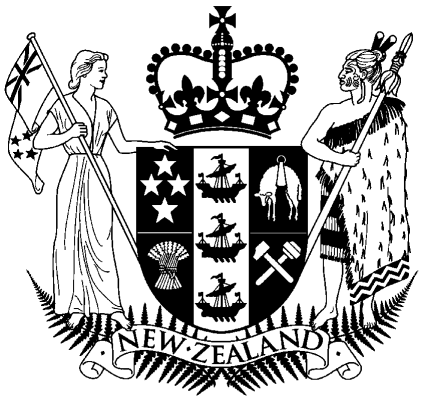
MARCH 2006



Court of Appeal Report for 2005

JUSTICE HAMMOND - MALCOLM BIRDLING

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1 INTRODUCTION

The Court

The Court of Appeal, located in Wellington, has existed as a separate court since 1862. Until 1957 it was composed of Judges of the then Supreme Court (now the High Court) sitting periodically in panels. In that year the Court of Appeal was reconstituted as a permanent court separate from the Supreme Court. The Court now consists of the President and six other permanent members. Before the entry into force of the Supreme Court Act 2003 on 1 January 2004, the Court also included the Chief Justice by virtue of office.

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

Before the Supreme Court was established, civil decisions of the Court on first appeal from the High Court could in general be appealed to the Judicial Committee of the Privy Council, in some cases as of right, in others with the leave either of the Court of Appeal or the Committee. Criminal decisions could be appealed with the leave of the Judicial Committee. Appeals in cases heard after 1 January 2004 lie to the Supreme Court with the leave of that Court. Savings provisions in the Supreme Court Act leave appellants whose appeals were heard by the Court of Appeal before January 2004 with whatever rights they had to appeal to the Privy Council.

Caseload

The number of cases dealt with by the Court in its criminal jurisdiction remained steady this year, however there was an increase in civil cases dealt with in 2005. The Court dealt with 477 criminal cases and 125 civil cases. In 2004 the Court dealt with 506 criminal cases and 113 civil cases. Judgments in nineteen cases were reserved at the end of the year.

In addition to the 125 substantive civil appeals mentioned above, the Court dealt with 140 miscellaneous motions, compared with 192 in 2004. At the end of 2005 there were 4 matters still to be heard by the Privy Council, some of which have confirmed dates.

Notices of discontinuance received in 2005 decreased again with only 46 such applications being processed, compared with 57 in 2004 and 77 in 2003. A further 21 appeals were abandoned for lack of prosecution under the Court of Appeal (Civil) Rules, one more than in 2004.

The number of civil appeals filed rose again in 2005 with 288 appeals accepted compared with 273 in 2004 and 247 in 2003. The number of applications for fixture

also increased this year with 149 received in 2005 compared with 129 in 2004. A comparison of figures capturing details of civil appeals over the past seven years has been included with the attached statistics. At the end of 2005 in the civil jurisdiction 26 appeals had fixture dates and 39 were waiting to have a date confirmed.

In the criminal jurisdiction there were a total of 521 appeals filed, very similar to 2004 (528) but still significantly more than in 2003 (486) and 2002 (457). Of the 384 matters which received an oral hearing in 2005, only 9.64% (37 matters) were listed in the permanent court, compared to 24% (93 matters) in 2004 and 21% (62 matters) in 2003. Once again, a number of the hearings were pre-trial matters which required an urgent hearing due to the closeness of the allocated trial date. As noted in last year's annual report, the Court is finding it difficult to deal with these requests as the numbers increase, and not all requests for urgency could be met during 2005.

At the end of 2005, 266 criminal appeals remained on the hearing status list; of those 165 had a fixture date. The caseload position at the same time in 2004 was 218 appeals with 98 having a confirmed fixture date.

Programme for Court sittings

The Court sat in benches of three and five Judges and continued to benefit from the contribution of a number of High Court Judge weeks in the divisional Courts. The benefit includes the immediate experience of the trial process brought by those Judges to the appellate process.

The monthly cycle followed allowed for three or five permanent Judge matters to be set down in the first two weeks of the month, followed by a fortnight for three-Judge Courts and divisional sittings in either Wellington or Auckland. One sitting was also held in Christchurch during May.

Procedural developments

The Court of Appeal's statutory functions in the criminal and civil jurisdictions remained unchanged throughout the year.

New civil rules, and amendments to the criminal rules for the Court both came into force on 1 May 2005.

Accommodation

2005 saw the completion of the extensive renovations to the Court building. This was celebrated at a function in late May, where former President Lord Cooke of Thorndon unveiled a statue he presented to the Court upon his retirement.

During January 2006 one of the courtrooms was fitted with audio-visual technology to allow those not able to be physically present in Court to appear via video.

Members of the Court of Appeal

The members of the Court of Appeal in the year under review were the President, Hon Justice Anderson, and seven permanent Judges: Hon Justice McGrath (who took up an appointment as a Judge of the Supreme Court in May 2005), Hon Justice Glazebrook, Hon Justice Hammond, Hon Justice William Young, Hon Justice Chambers, Hon Justice O'Regan and Hon Justice Robertson (from May 2005).

Justice Anderson graduated from the University of Auckland in 1967 and was a partner in the Auckland firm Martelli, McKegg & Adams-Smith until commencing practice solely as a barrister in January 1972. He was appointed a Queen's Counsel in May 1986, to the High Court in May 1987, and to the Court of Appeal in September 2001. He became President as from January 2004 and, in June 2004, was awarded the DCNZM for services to the judiciary.

Justice McGrath graduated 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 a Queen's Counsel in 1987 and he was Solicitor-General between 1989 and 2000. In July 2000 he was appointed to the Court of Appeal, and in May 2005 he was appointed to the Supreme Court.

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

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

Justice William Young graduated from the University of Canterbury and Cambridge University. He joined the Christchurch firm of R A Young Hunter and Co in 1978, leaving in 1988 to practise as a barrister. He was appointed a Queen's Counsel in 1991, to the High Court in 1997 and to the Court of Appeal in January 2004.

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

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

Justice Robertson graduated from Otago University and the University of Virginia. He was a partner in the Dunedin law firm Ross Dowling Marquet & Griffin from 1969 to 1987 and was a Harkness Fellow in 1972–73. He was appointed a Judge of the High Court in 1987, and was President of the Law Commission from 2001 to 2005. He was appointed to the Court of Appeal in May 2005.

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2 STATISTICS

Criminal appeals

	Hearing	Allowed	Dismissed	Allowed On The Papers	Dismissed On the Papers
Conviction & Sentence	72	27	49	0	3
Conviction	71	27	48	0	0
Sentence	120	35	89	2	12
Solicitor-General Appeals	25	23	13	0	0
Pre Trial	70	22	44	0	0
Other	26	9	20	0	2
Sub total	384				
Abandonments/No jurisdiction	76				
Total	**477**	**143**	**263**	**2**	**15**

NOTE: The number of cases heard does not equal the number allowed and dismissed.

The following table shows comparisons with earlier years

Year	Appeals or applications for leave filed	Oral Hearing	On the Papers (s392B Crimes Act)	Allowed	Dismissed / Abandoned / No jurisdiction
2001	428	372	34	123	288
2002	457	321	47	122	293
2003	486	370	29	128	324
2004	528	392	21	99	396
2005	521	384	17	143	339

Criminal caseload

	2001	2002	2003	2004	2005
Permanent Court – seven judges	1	Nil	Nil	N/A	N/A
Permanent Court – five judges	17	5	3	2	5
Permanent Court – three judges	24	51	59	91	32
Criminal Appeal Division	285	265	309	299	345
On the papers	34	47	29	21	17

Civil appeals

	2001	2002	2003	2004	2005
Motions filed	296	276	247	273	288
Appeals set down	203	163	146	129	149
Appeals heard	185	153	148	113	125
Appeals allowed	76	60	56	34	53
Appeals dismissed	107	83	91	69	71

NOTE: the number of cases does not equal the number allowed and dismissed. Judgments in 19 cases were reserved at the end of the year.

Civil caseload

	2001	2002	2003	2004	2005
Permanent Court – seven judges	Nil	Nil	Nil	N/A	N/A
Permanent Court – five judges	25	18	14	8	2
Permanent Court – three judges	79	71	92	96	105
Civil Appeal Division	58	62	42	8	18
Discontinued	70	50	77	56	46
Abandonments	49	58	20	42	21

Year end workflow

	2001	2002	2003	2004	2005
Criminal appeals awaiting hearing as at 31 December	134	168	191	218	266
Civil appeals awaiting hearing as at 31 December	55	59	55	57	65

Privy Council appeals and petitions for leave to appeal

Date PC judgment	Parties	Result	Whether NZ Judge sat
23.02.05	Contact Energy Ltd v The Attorney-General	Dismissed	No
28.02.05	Commissioner of Inland Revenue v Peterson	Allowed	No
	Peterson v Commissioner of Inland Revenue		
18.07.05	Chief Executive of the Ministry of Fisheries v Challenger Scallop Enhancement Co Ltd & Ors	Dismissed	No
19.07.05	Bruce Thomas Howse v The Queen	Dismissed	No
14.11.05	The Attorney-General v PF Sugrue Ltd	Dismissed	No

Total Heard	5
Total Dismissed	4
Total Allowed	1
Appeals from Courts of more than 3 Judges	1
Appeals from Courts of 3 Judges	4

Supreme Court appeals and applications for leave to appeal

Leave applications

Year	Applications for leave to appeal	Leave granted	Leave declined / abandoned	Undetermined at end of period
2005	69	22	38	9

Note: this includes only applications for leave to appeal against decisions of the Court filed with the Supreme Court during 2005 – it does not include applications for 'leapfrog' appeals from the High Court, or applications for leave to appeal to the Supreme Court where leave to appeal to the Court of Appeal has been declined.

Substantive appeals

Year	Appeal allowed	Appeal dismissed / abandoned	Reserved at end of period	Unheard at end of period
2005	1	7	5	9

In addition, five substantive appeals against decisions of the Court filed during 2004 were allowed by the Supreme Court during 2005, and five substantive appeals were either dismissed or abandoned.

APPENDICES

A IMPORTANT CIVIL CASES

Administrative Law

Habeas corpus

In *Morgan v Superintendent, Rimutaka Prison* [2005] 3 NZLR 1 the Court dismissed Mr Morgan's appeal against a decision of the High Court refusing his application for habeas corpus.

On 17 September 2001, Morgan was charged with cultivation of cannabis and possession of cannabis for supply. He was convicted on both charges on 20 November 2002. He was sentenced on 17 January 2003 to four years imprisonment on both charges. The sentence on the possession charge was quashed and the sentence on the cultivation charge reduced to three years imprisonment on appeal to the Court in 2003.

Between Morgan's arrest and trial, the Criminal Justice Act 1985 was repealed and replaced by the Sentencing Act 2002. Under s90(1)(b) of the Criminal Justice Act 1985, a prisoner serving a sentence of imprisonment of more than 12 months was entitled to be released on conditions on the expiry of two-thirds of his or her sentence. Under s 86(2) of the Parole Act, a prisoner sentenced to a determinate period of imprisonment longer than 24 months is not entitled to release until the expiry date of the sentence, but will be eligible for parole after serving one third of that sentence. Morgan was not granted parole.

The difference in the mandatory release provisions meant that Morgan was imprisoned at Rimutaka Prison for a year more than he would have been under the previously-applicable legislation. Morgan contended that he was entitled under s 6 of the Sentencing Act to the benefit of the earlier mandatory release date which applied at the time he committed the offence, and, consequently, he was unlawfully detained. He also argued that this view was in line with what was required by s 25(g) of the New Zealand Bill of Rights Act 1990 and art 15(1) of the International Covenant on Civil and Political Rights.

The majority of the Court (Hammond J dissenting) dismissed Morgan's appeal. The Court found that the principle against retrospective penalty contained in the above provisions is directed to the Courts in relation to their sentencing function, and not to the administration of custodial sentences once handed down. Changes in statutory provisions relating to parole vary the administration of the sentence, but do not vary the 'penalty' imposed upon the prisoner.

The Court referred to *Fulcher v Parole Board* (1997) 15 CRNZ 222 (CA) and *R v Secretary of State for the Home Department ex p Uttley* [2004] 1 WLR 2278 in relation to the application of the principle against retroactivity in sentencing. The principle is breached if the penalty imposed is more onerous than that open to the

Court at the time of the commission of the offence. In the case of alteration to parole, what is altered is not part of the penalty at all, but relates only to its administration.

Hammond J, dissenting, found that Morgan was unlawfully incarcerated. Hammond J stated that the term actually to be served was set down at sentencing, the required term being integral to the actual sentence passed upon him – what a three year sentence "actually represented".

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

Habeas corpus - Costs

Manuel v Superintendent, Hawkes Bay Regional Prison CA 195/04 23 September 2005 was an appeal against an order as to costs in the High Court following the withdrawal by the appellant of an application for a writ of habeas corpus.

In March 2004 the appellant made an application for a writ of habeas corpus which put in issue the legality of the procedures followed by the Parole Board. The application was dismissed by the High Court and Mr Manuel appealed. This Court dismissed the appeal and Mr Manuel sought leave from the Supreme Court for a further appeal. The day after the Supreme Court declined leave, Mr Manuel filed a new application for habeas corpus in the High Court based on a different alleged failure by the Parole Board. Mr Manuel consented to an adjournment on the morning of the hearing.

The respondent sought indemnity costs or alternatively scale costs on the basis that the second application for habeas corpus was an abuse of process. The High Court Judge held that this was a rare case in which a modest award of costs was justified, and made an order to that effect. The form of the order was that, but for the fact that the appellant was legally aided, the High Court would have awarded costs of $1,500 against him. Such an order had consequences in terms of s 41 of the Legal Services Act 2000.

On appeal, the Court held that it was unarguable that an award of costs against an applicant for the writ of habeas corpus was a rarity. The question was whether the case was sufficiently exceptional to justify a departure from the longstanding convention or practice not to award costs against applicants for the writ. The Court noted that although s 14(4) of the Habeas Corpus Act 2001 does not prohibit costs, it specifically mentions the fact that the judicial discretion may be exercised to refuse costs to a successful party or order a successful party to pay costs to an unsuccessful party. The Court said that the approach in s 14(4) is "entirely consistent with the authority and crucial importance of the great writ in the protection of liberty".

The Court held that the basis upon which the High Court Judge exercised his discretion was wrong in principle and the Judge had placed insufficient weight on the common law aversion to orders for costs against applicants for the writ of habeas corpus. The appeal was unanimously allowed.

William Young J made further comments in a separate judgment. His Honour accepted that exceptional circumstances are required before a Court should order costs

against an unsuccessful applicant in habeas corpus proceedings. William Young J said that, as the High Court Judge also accepted that statement of legal principle, the issue for this Court was whether the Judge's conclusion that the case was sufficiently exceptional to warrant an order for costs was fairly open to review on appeal. In the result, William Young J agreed that the appeal should be allowed, but only by a narrow margin given the fact that the second application was largely without merit.

Arbitration

Arbitration – Costs – Whether arbitrator had jurisdiction to entertain application for costs after award issued – Arbitration Act 1996

In *Casata Limited v General Distributors Limited* [2005] 3 NZLR 156, the Court considered whether the High Court was correct to remit the question of costs in an arbitration back to the arbitrators.

General Distributors leased land from Casata. The lease provided for a term of 20 years from 1993 with rights of renewal for three further terms of 20 years and for rental reviews at five-yearly intervals. The parties could not agree on the reviewed rental for the period commencing in 1998 and the matter was put to arbitration. It was agreed that the rental was to be assessed on the basis of a "hypothetical willing but not anxious (ie rational)" lessor and lessee.

The arbitrators decided the issue in an award, and made an order that the costs of the arbitration be borne equally by the parties. General Distributors then sought an award for its own costs against Casata. The arbitrators granted the order sought and made an award of costs against Casata.

General Distributors applied to the High Court to set aside the first costs award made against it, and to increase the second costs award made in its favour. Casata sought to set aside the substantive award, alleging that it had been made applying the wrong test, and to set aside the second costs award against it. Casata also sought leave to apply to set aside the award if required.

In the High Court the appeal by General Distributors against the first costs award was remitted to the arbitrator for further consideration, the cross-appeal by Casata against the substantive award was dismissed and the second costs award against Casata was set aside. Casata appealed to the Court of Appeal against that decision.

In relation to the issue as to costs, the majority first held that the arbitral tribunal was *functus officio* as the scheme of the Arbitration Act is such that there can only be one award under art 31 of the First Schedule to the Arbitration Act 1996 (subject to referral back for errors of law and under arts 33 and 34). Further, cl 6 of the Second Schedule does not, the majority held, confer an independent jurisdiction to award costs.

Secondly, the majority held that the arbitral tribunal's failure to consider party/party costs amounted to an error of law, justifying the remission back to the tribunal of that issue.

Chambers J, dissenting in part, disagreed with the majority's reasoning on the question of costs. He would have found that General Distributors were entitled to ask the arbitral tribunal for an additional award to cover party and party costs; therefore the High Court was wrong to set aside the second award.

The Supreme Court has granted leave to appeal.

Civil Procedure

Enforcement of foreign judgment – Whether contrary to New Zealand public policy

In *Reeves v One World Challenge LLC* CA87/04 8 December 2005 Mr Reeves appealed against a decision of Associate Judge Sargisson upholding an application by One World for summary judgment in an action for the amount owed by Mr Reeves to One World pursuant to certain judgments of the United States Federal Court for the Western District of Washington at Seattle (which totaled just over a million United States dollars), interest and costs. The American Judge found that Mr Reeves breached a confidentiality agreement (which provided that the agreement be governed by the laws of the State of Washington, United States) he had with One World by retaining and/or disclosing certain hull designs, hydrostatic studies and emails, and awarded liquidated damages (pursuant to the agreement) and costs against Mr Reeves. The sole issue that arose on appeal was whether summary judgment ought to have been declined because Mr Reeves had an arguable defence that the enforcement of the US judgments would be contrary to the public policy of New Zealand. Mr Reeves argued that the agreement should not have been enforced because he had breached it to preserve evidence of wrongdoing by One World: he alleged that the hull designs were wrongfully copied or derived from designs owned by Team New Zealand. A majority of the Court (2-1) dismissed Mr Reeves' appeal, holding that enforcement would not be contrary to New Zealand public policy.

The majority first considered whether enforcement of the United States judgments would offend New Zealand's public policy. The majority held that a narrow approach should be taken to the public policy exception, that such an approach was supported by the authorities and was in line with the comity of nations principle. The Court adopted the test applied in the Canadian Supreme Court case of *Beals v Saldanha* [2003] SCC 72 - that enforcement would need to shock the conscience of a reasonable New Zealander or be contrary to "our basic view of morality". In adopting this test the majority rejected counsel for Mr Reeves' proposition that the public policy exception should be triggered where a New Zealand court would have reached a different conclusion to the United States court. The majority said that such a test would set the bar too low, and ran counter to the authorities: simply because a case could have been decided differently under the New Zealand law is not a weighty enough factor to invoke the exception.

The majority said that even if the confidentiality agreement would not be enforceable under New Zealand law if the assertions made by Mr Reeves were correct, the

submission by counsel for Mr Reeves that enforcement of the United States judgments would amount to an abuse of process of the New Zealand court would still have a number of difficulties. The Court would necessarily be reexamining the merits of the United States judgments; the argument would only apply to the hull designs and not the emails and hydrostatic studies; Mr Reeves could have, but chose not to, exercise his appeal rights in the United States; and in New Zealand disclosures of confidential information evidencing wrongdoing are governed by the regime set out in the Protected Disclosures Act 2000, and that Act represents the public policy of New Zealand. The majority thus concluded that the enforcement of the United States judgments in the New Zealand courts did not invoke the public policy exception: even if the outcome under the United States law differed from that under the New Zealand law (the majority choosing not to express a concluded view on this point) the Court held that enforcement of the United States judgments would not amount to an abuse of process of the New Zealand courts as enforcement would not shock the conscience of a reasonable New Zealander, be contrary to New Zealand's view of basic morality or constitute a violation of essential principles of justice or moral interests in New Zealand.

The majority also observed that, in any case, there was insufficient evidence from Mr Reeves to lead the Court to conclude that One World had not satisfied the Court that Mr Reeves had no tenable defence in the present case. The Court discussed the onus on summary judgment and the requirement that evidence must reach a threshold of credibility. One World had a foreign judgment in its favour that represented prima facie conclusive evidence of One World's claim and, as such, the onus shifted to Mr Reeves to demonstrate a tenable defence. He needed to provide an evidential basis for his assertion that One World could not satisfy the Court that he had no defence. On the evidence before it, the Court held that there was no tenable defence based on public policy.

William Young J dissented. He took the view that New Zealand public policy would preclude enforcement of a contract to maintain confidentiality in relation to iniquity. He also came to a different conclusion to the majority on the issue of tenable defence, finding that it was "distinctly arguable" that One World illegitimately obtained confidential copyright material from Team New Zealand. Overall His Honour said that it is reasonably arguable that enforcement of the agreement via the judgment is precluded as contrary to New Zealand public policy.

Strike out – Limitation – Reasonable discoverability – Fraud exception – Requirements for pleading

Murray and Ors v Morel and Co Ltd and Ors CA86/04 22 December 2005 was an appeal from a judgment striking out ten causes of action alleging breaches of the Securities Act 1978, knowing receipt, breach of trust, fraud and negligence.

In 1994, a scheme was developed under which the right to harvest trees on property would be sold to the public in the form of shares in a forestry partnership. The partnership would lease the forest from the owners for $2.4 million. $1.3 million of this money would be funded by public investors, the balance via a bank loan. The scheme engaged the provisions of the Securities Act. The task of Morels was to prepare and register a prospectus inviting subscriptions in the partnership.

The prospectus was issued and provided for a subscription of 25 units. At the close of the time for subscriptions, insufficient subscriptions had been purchased. The owners of the forest decided that they would purchase the remaining subscriptions and sent a cheque for $936,000 which was agreed to be held and later set off against the amount payable to the owners on settlement of the lease of the forest. Once settlement had taken place, the cheque was to be destroyed.

In 2001 the other investors discovered what had happened and brought a claim against Morels, its managing director and the statutory supervisor of the scheme. All ten causes of action were struck out by Master Lang (as he then was) in the High Court on an application by the defendants.

The primary issue on appeal was whether the scheme was in breach of s 37(2) of the Securities Act. The second main issue was whether all of the causes of action were time-barred.

The Court found that there was a breach of s 37(2). Applying *Trans Otway Ltd v Shephard* [2005] 3 NZLR 678, the Court concluded that the cheque arrangement was capable of being a payment, with each side "paying" the other at the time of set off. However, the set off did not occur within the four month period from the date of issue of the prospectus, as required by s 37(2). Furthermore, the situation did not fall within paragraph (a) of s 37(2) because the Morels knew that the cheque would not be paid (indeed, this was the condition on which the cheque was tendered). Accordingly, the scheme contravened s 37(2) because the $1.3 million had not been paid to the Morels within the statutory period for payment.

On the second issue, the Court rejected the investors' argument that time did not start running under the Limitation Act 1950 until 1999 rather than 1994. The investors submitted that the delay in time starting to run arises because of the "reasonable discoverability" doctrine, which now "ought to be applied generally". Under this doctrine, the cause of action does not accrue until the plaintiff knows or ought to know of the facts necessary to establish the cause of action. The Court had no hesitation in rejecting the submission, it being contrary to numerous prior decisions of the Court. The Court noted that *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) was authority for the traditional view that the cause of action accrues when all the elements necessary to support the cause of action are in existence. The "reasonable discoverability" doctrine is an exception to this rule. Any change to this position will have to wait for Parliament or the Supreme Court.

However, the Court reinstated eight of the ten causes of action, being the ones which were "based upon the fraud of the defendant" within s 28 of the Limitation Act. The Court noted that the onus was on the defendant to show that the plaintiff's claim was statute-barred. Evidence can be tendered by both sides by affidavit. In this case the defendants had made the mistake of not tendering any evidence concerning whether the claim was frivolous, vexatious or an abuse of process. They had accordingly failed to satisfy the onus of proof.

Leave to appeal to the Supreme Court has been sought.

Principles relating to strike out of pleadings – Fraud alleged – No reasonable cause of action – Abuse of process

In Shannon v Shannon (2005) 17 PRNZ 587 the Court upheld a decision striking out pleadings which alleged that a judgment had been obtained by fraud. The appeal was one of a series of proceedings dealing with preliminary issues relating to the division of Mr and Mrs Shannon's relationship property. In May 2000, Cartwright J (as she then was) issued a judgment on the date of separation. Accepting Mrs Shannon's version of events, she held that the parties separated in Easter 1997 and not in 1985 as Mr Shannon claimed.

Following various other unsuccessful proceedings, Mr Shannon issued separate proceedings in February 2002 alleging that Cartwright J's judgment was obtained by fraud. He discontinued these proceedings in August 2002 but in May 2004 again foreshadowed fraud proceedings, subsequently filing a statement of claim alleging that Cartwright J's judgment had been obtained by perjured evidence given by Mrs Shannon and their son. Mrs Shannon applied to strike out this statement of claim. After the hearing of the strike-out application, but before the judgment was delivered, Mr Shannon filed an amended statement of claim. Potter J struck out both the statement of claim and the amended statement of claim on the basis that they disclosed no reasonable cause of action and were an abuse of the process of the Court. Mr Shannon appealed against that decision.

The Court held that several prerequisites must be met in order for an action alleging that a judgment was obtained by fraud to proceed. First, the claim must be adequately pleaded. Next, the evidence must be newly discovered since the trial. Thirdly, the claim must be based on evidence that could not have been found at the time of trial by exercise of due diligence. The Court considered, however, that courts should have a discretion to allow actions to proceed, even if based on evidence that would have been reasonably discoverable at the time of the original hearing, if it is in the interests of justice to do so. Finally, the evidence must be so material that it would probably have affected the outcome. When the fraud alleged consists of perjury, the evidence must be so strong that it would reasonably be expected to be decisive at a rehearing, and if unanswered must have that result. A corollary is that new evidence must do more than corroborate evidence of a similar type given at the first trial. The Court found that none of these tests were met in this case.

The Court considered that the pleadings should also be struck out as frivolous and vexatious and as an abuse of process. Any amended pleadings should have been filed at the time of the hearing of the strike out application. It was open to Potter J both to have taken into account the delays in filing the proceedings after the alleged new evidence had come to light and to conclude that Mr Shannon was merely trying to avoid the finalising of the substantive relationship property case.

The Court, therefore, agreed with Potter J that that the fraud pleadings did not disclose a reasonable cause of action and were an abuse of process. The appeal was accordingly dismissed.

Stay of proceedings – Refusal to lift stay

In *Electricity Corporation of New Zealand v New Zealand Electricity Exchange Ltd and Ors* [2005] 3 NZLR 634, ECNZ appealed (with leave) a High Court judgment staying proceedings it had issued in order to recover losses caused by an electricity pricing error on the New Zealand Electricity Market (NZEM).

NZEM is a self-regulating private contractual arrangement by means of which its members voluntarily traded electricity. NZEM was governed by the NZEM Rules which were administered by the respondents. The Rules made extensive provision for the reporting and investigation of complaints and determinations on those complaints by the Market Surveillance Committee (MSC).

The Court found no reason to permit ECNZ to bypass the dispute resolution processes that ECNZ had agreed to. The processes were comprehensive and included provision for independent investigatory and appeal processes. Where parties have agreed to a particular dispute resolution process they should normally be required to adhere to it. In a specialised industry, it would have to be shown that the agreed mechanism was not workable in the circumstances before there was good reason to bring the dispute before the courts. ECNZ had fallen short of this standard.

The appeal was dismissed.

Indemnity costs – When appropriate

In *Peters v Television New Zealand & Ors* CA247/04 2 November 2005 the Court considered whether to order indemnity costs against Rt Hon Winston Peters in respect of an appeal abandoned a fortnight before it was due to be heard.

The Court noted that at the level of first principle, it has always been the case that indemnity costs may be ordered in relation to "misconduct" in a proceeding. The improper and abusive conduct of a proceeding of any character may give rise to indemnity costs. When indemnity costs are awarded on this basis, there is a distinct connotation of disapproval by the Court as to what has occurred, and the costs order is of a "penal" nature.

The Court was clear that indemnity costs are not restricted to misconduct deserving of moral condemnation, but can also extend to "unreasonable" conduct in relation to litigation, although such "unreasonableness" must be of a high order and not just something which, in hindsight, is wrong or misguided.

The Court concluded that the focus of the inquiry should not be on whether the successful party, or his lawyers, "deserve" a higher reward than the norm; the critical issue is whether the conduct of the paying party, or his or her lawyers, justifies an award of indemnity costs.

In the instant case the impugned conduct did not justify an award of indemnity costs.

Costs against judicial officers – When appropriate

In *Coroner's Court v Newton & Anor* CA245/04 30 November 2005 the Court considered when costs may appropriately be awarded against a judicial officer in judicial review proceedings.

Dr Newton successfully applied for judicial review of a Coroner's decision to lift a suppression order in respect of certain evidence she gave at an inquest. After a second hearing on the subject of costs (during which the Coroner was invited to, and did, provide a report explaining his actions) costs were granted against the Coroner.

Both parties accepted on appeal that costs could be awarded against a Coroner on judicial review proceedings. As to when it is appropriate to do so, the Court considered that it was important to keep first principles squarely in mind. Costs will only be awarded (even in judicial review proceedings) against judicial officers such as Justices or Coroners in the rarest of circumstances when such a judicial officer has done something which calls for strong disapproval. It is certainly not the practice to grant costs against Justices or a Coroner merely because that person has made a mistake in law. It must be shown that the judicial officer concerned has acted perversely, oppressively or in bad faith.

Errors of law will not by themselves support an award of costs; errors of process will normally not support an award of costs; and judicial misconduct in the way in which the hearing is conducted will normally have to be of a particularly egregious kind for costs to be awarded. The question is not whether the applicant is in some sense "deserving" of costs - in a large sense, such a person often will be. The critical point is that the order for costs is an expression of disapproval of the conduct of the judicial officer in character. There must be a clear basis for such an order.

In the instant case, the Court concluded that the Coroner's actions, when viewed in context, did not meet the "exceptional" test for the imposition of costs.

Discovery – Collateral or ulterior use of documents

In *Wilson v White* [2005] 3 NZLR 619 the Court considered the implied limited use undertaking owed to the Court by parties who receive documents through the discovery process.

In the High Court, Ronald Young J had held that the appellant, Dr Wilson, had acted in contempt of Court by sending the CV of another doctor, Dr Kukkady, to the Royal Australasian College of Surgeons. Dr Wilson had received these documents through the discovery process in relation to a judicial review proceeding where Dr Wilson challenged the appointment of Dr Kukkady to a position for which she had also applied.

Although the discovery was provided informally, the Court held that the whole process necessarily occurs in a context which is influenced by the coercive powers of the Court. The obligations associated with discovery are fundamental to the civil litigation process and the drift of authority is towards the position that the undertaking applies to any material obtained compulsorily in legal proceedings.

Importantly, the Court considered whether the evidential status of the documents made a difference. In this connection, the Court considered the leading English case *Harman v The Home Office* [1983] AC 280. The Court concluded that the prevailing New Zealand view and practice is that the limited use undertaking lapses once documents are in evidence. In that respect, the Court took a different view from the majority in *Harman* but noted that that approach had itself been abandoned in the United Kingdom through changes to the rules of civil procedure. Furthermore, the Court noted that the minority judges in *Harman* relied on provisions in the European Convention on Human Rights which are broadly comparable with ss 14, 25(a) and 27 of the New Zealand Bill of Rights Act 1990. The Court recognised that its approach involved giving priority to open justice (and freedom of expression) considerations over the reasons why the limited use undertaking is imposed.

However, Dr Wilson acted prematurely by making use of the documents for her own purposes prior to the commencement of the open court hearing. The next major issue was whether Dr Wilson was entitled to a public interest defence. The Court agreed with Ronald Young J that she was not. The appropriate interpretation of her actions was simply that she was seeking to open up another front against Dr Kukkady. In all events, she should have sought leave to put the documents before the Court. It was not open to her to decide unilaterally that the public interest warrants disclosure.

Commercial List – Eligibility - Transfer

Securities Commission v Midavia Rail Investments BVBA and Ors [2005] 3 NZLR 433 was an appeal by the Securities Commission relating to the eligibility of a proceeding for transfer from the High Court at Wellington to the Commercial List at the High Court at Auckland. The Court allowed the appeal in part.

The Securities Commission had issued proceedings against Midavia Rail Investments BVBA and others under s 18A of the Securities Markets Act 1988. The Commission claimed that Midavia had traded with inside information or was guilty of tipping contrary to the Act. The proceedings were filed in the Wellington registry of the High Court, which did not have a Commercial List. Midavia filed a statement of defence and a protest to jurisdiction in the Auckland registry of the High Court, which did have a Commercial List. Those documents were endorsed with the heading "Commercial List".

The High Court held that Midavia had successfully effected a transfer of the proceeding (under R 446C of the High Court Rules) from the Wellington registry to the Auckland registry, and to the Commercial List at Auckland. The Securities Commission appealed, arguing that the proceeding was not eligible for the Commercial List or, if it was, that, having been properly filed in Wellington, there was no jurisdiction to transfer the proceeding to the Commercial List in Auckland.

On appeal, the Court held that the proceeding was eligible for entry on a Commercial List, either under s 24B(1)(a) or s 24B(1)(e) of the Judicature Act 1908. In determining whether the words of s 24B(1)(a)(i) applied, that is whether the proceeding was one "arising out of or otherwise relating to the ordinary transactions of persons engaged in commerce or trade", it was necessary to look at the nature of

the underlying transaction, in this case the sale of shareholdings, which was an ordinary transaction between commercial entities. Further, a proceeding under s 18A of the Securities Markets Act was different from a normal regulatory proceeding, because the Commission was exercising the public issuer's right of action. If that public issuer had brought the proceeding, it would have been eligible for the Commercial List, and it was no different if the proceeding was instead brought by the Commission.

The Court held that Midavia and the others were not entitled to file their statements of defence or protests to jurisdiction in the Auckland registry, or to endorse them with the "Commercial List" intituling. Rule 446C of the High Court Rules was not available to transfer a proceeding between registries. If Midavia desired such a transfer, the proper course was for them to file in the same registry specified in the notice of proceeding, in this case Wellington, but then to apply to transfer the proceeding to the Auckland registry or the Commercial List under Rule 446L. Rule 446L(1) was to be interpreted as applying not only in the case of an eligible proceeding which might not be filed in a registry with a Commercial List, but also to an eligible proceeding which might have been, but was not, filed in such a registry

The Court held that the Commission's proceeding remained in the High Court at Wellington and its purported entry on the Commercial List at Auckland was declared invalid. However, the Court acknowledged that the proceeding was eligible for entry on the Commercial List.

Commercial Law

Construction Contracts Act 2002 – Meaning of "payment claims"

In *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177, the issue before the Court was the meaning of "payment claims" as defined in s 20 of the Construction Contracts Act 2002.

George and Canam had entered into construction contracts which came within the ambit of the Act. The Act was designed to facilitate regular and timely payments between parties to a construction contract. The issue was whether Canam's purported "Payment Claim 15" was a valid payment claim in terms of the Act.

The Court noted that the purpose of the Act needed to be kept at the forefront of the consideration so as to ensure cashflow in the building trade. An overly technical approach to the format and substance of a payment claim did not square with this purpose. The Court observed: "[t]echnical quibbles should not be allowed to vitiate a payment claim that substantively complies with the requirements of the Act."

The Court found that it was not contrary to the Act to include in a payment claim work in prior periods.

The Court also rejected a submission that the payment claim did not indicate the manner in which the payee calculated the claimed amount. For each component of the claim the form indicated the correct value, the percentage completed and the total claimed to date. The form totalled the amount claimed to date, and then subtracted

payments already received, leaving the "claimed amount". The Court said that although best practice may have required some improvements, the form was sufficient to comply with the requirements of the Act.

The appeal was dismissed.

Company Law

Voidable preference

In *Trans Otway Ltd v Shephard and Anor* [2005] 3 NZLR 678 the Court considered whether a set-off transaction amounted to a payment of money under s 292(1) of the Companies Act 1993, which provides that preference payments to creditors may be set aside on application by liquidators of a company.

Trans Otway Limited and Newman Carrying Limited were both involved in the freight business in which they dealt with each other on a regular basis. When their dealings eventually ended in 2003, Newman owed Trans Otway $94,996.73. In the course of obtaining payment of the debt, Trans Otway finally served a statutory demand on Newman in March 2003. At the time the notice was served, Trans Otway was negotiating to buy Newman's business. The companies reached an agreement which recorded an acknowledgment by Newman that it was indebted to Trans Otway in the sum of $94,996.73, and that Newman agreed to sell its client list to Trans Otway for the sum of $94,996.73 including GST. In effect, the amount owed was set-off against Newman's client list.

In May 2003, Newman was placed in liquidation. In September 2003 the liquidators filed and served a notice on Trans Otway to set aside the payment made by Newman by way of set-off against the debt owed to Trans Otway. The liquidators sought to recover the sum of $94,996.73 which was the agreed price of the client list Newman "sold" to Trans Otway.

Trans Otway applied under s 294(2) of the Companies Act 1993 to the High Court for an order that the payment made by Newman not be set aside. Sargisson AJ held that the proper approach to dealing with the case was to focus on the substance of the transaction. The judge found that there had been a payment of money by Newman for the purposes of s 292(1)(e) of the Act. The payment had been made at a time when Newman was unable to pay its debts and within the specified period, and the transaction had not taken place in the ordinary course of business.

Trans Otway unsuccessfully appealed to this Court. The issues to be determined were whether Newman had made a "payment of money" to Trans Otway for the purposes of s 292(1)(e), whether the requirements of s 292(2)(b) were met, and whether the Court should grant relief to Trans Otway under s 296(3) of the Act.

The Court held that the effect of the agreement was a classic example of a set-off transaction. Trans Otway agreed to pay Newman $94,996.73 including GST for its client list and Trans Otway and Newman agreed that the payment could be set-off against the debt owed to Trans Otway. The effect of the agreement was that both payments were made. Even though no money had changed hands, Newman had made

a payment of money for the purposes of s 292(1)(e) of the Act. The Court referred to *In re Mataura Motors Ltd* (1981) 1 NZCLC 95-008 (CA) at 98,092 as authority for the principle that the expression "payment of money" in s 292(1)(e) was not dependent on the physical passing of cash or a cheque.

The Court also noted that liquidators can pick and choose which transactions they wish to challenge. The fact that the liquidators in this case had not challenged the transfer of the client list bore no relevance to the assessment of whether the payment was made voidable under s 292(2) of the Act. It is necessary only to look at the transaction which is being impugned and analyse whether the transaction (a) was made at a time when a company was unable to pay its debts (s 292(2)(a)(i)); and (b) was made within the specified period (s 292(2)(a)(ii)); and (c) enabled another person to receive more towards satisfaction of its debt than it would have otherwise received in the liquidation (s292(2)(b)); and (d) did not take place in the ordinary course of business. The Court held that it was not appropriate to grant relief to Trans Otway under s296(3) of the Act. That defence could only be raised when the liquidator's application to recover the sum of $94,996.73 was heard.

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

Statutory demand – Definition of "debt due"

In *OPC Managed Rehab Ltd v Accident Compensation Corporation* CA149/04 4 October 2005, the Court considered whether a statutory demand issued by ACC claiming a "debt due" by OPC should be set aside. OPC had provided claims management services to ACC. Following the termination of their contractual relationship, ACC formed the view that OPC had been overpaid by $695,190, and filed a statutory demand for that amount.

OPC was not obliged to repay overpayments by contract or by statute, and as such OPC argued that the overpayments could not be considered a "debt due", which is a requirement for statutory demands under s 289(2)(a) of the Companies Act 1993. However, the Court said that overpayments could be the subject of a claim for money had and received. The Court concluded that if a payment is received in circumstances where the recipient is obliged to repay it, whether because of a contractual or statutory provision to that effect or because the circumstances give rise to an obligation to repay on the basis of money had and received, the amount can be treated a "debt due" for the purposes of s 289(2)(a). The Court went on to say that the complexities which may be inherent in an action for money had and received in many circumstances may mean that recourse to the statutory demand procedure will not be appropriate. However, in principle, where a payer has a clear entitlement to reimbursement of an amount overpaid to a recipient in an action for money had and received, it may have recourse to the statutory demand process if it is otherwise appropriate to do so.

In the end the Court set aside the statutory demand except for the sum of $377,530, finding that the $377,530 was a "debt due" that was not subject to a "substantial dispute". The statutory demand was, however, set aside in respect of the balance because "[t]here is a substantial dispute whether or not the debt is owing or is due" for the purposes of s 290(4)(a).

Licence agreement – Whether signed in dual role as director and shareholder

In *Trotter v Avonmore Holdings Ltd and Anor* (2005) 8 NZBLC 101,646, Avonmore licenced a system of offering educational courses to ACP Computer Solutions Ltd. The agreement included a shareholders' covenant guaranteeing Avonmore the timely payment of all monies owing from time to time and the performance of ACP's obligations under the agreement. The shareholders also indemnified Avonmore for any default in payment or performance.

The crucial question was whether Ms Trotter and Mr Webb, directors and shareholders of ACP, signed the agreement as directors, or in a dual capacity, with the result that they became liable also as guarantors under the shareholders' covenant. In the High Court, Gendall J had found that it was signed in a dual capacity.

The Court started from the position that it was certainly possible for a document to be signed by a person in a dual capacity. The question was whether Ms Trotter and Mr Webb did so in the circumstances of the case. On the face of the document, the Court could not find anything to indicate that they signed it in their dual capacity. In particular, their status as directors was clearly identified in the document beside the signatures, and the shareholder attestation clause was entirely blank. The initialling of each page of the document by Ms Trotter, including the page with the shareholders' covenant did not change the position. The initialling was done in the same capacity in which she signed the agreement.

In coming to this conclusion, the Court doubted that the decision of Gallen J in *Chiswick Investments v Pevats* [1990] 1 NZLR 169 was correctly decided, and even if it was correctly decided, it was very dependent on the particular circumstances of that case.

The appeal was accordingly allowed.

Reckless trading - Quantum

Löwer v Traveller [2005] 3 NZLR 479 was an appeal by Mr Löwer from the judgment of William Young J holding him personally liable under s 320 of the Companies Act 1955 to contribute to the assets of a company in liquidation, and a cross-appeal by the liquidators of the company in respect of the amount for which Mr Löwer was held liable.

South Pacific Shipping Co Ltd ("SPS") was formed in January 1992 to operate on trans-Tasman shipping routes. Mr Löwer became a director in May 1992, and became the controlling shareholder in June 1993. He subsequently became the sole shareholder. SPS traded at a loss at all times. It was able to continue trading only because of its liquidity position, being able to collect trade debts very quickly, while enjoying extended credit from its creditors.

In 1998, Mr Löwer resigned as a director and the company was put into liquidation. Its total liabilities were $41m. The liquidators sought orders holding Mr Löwer

personally liable for the company's debts. At the time of the High Court hearing, some $1m of assets had been realised.

The High Court noted that although the creditors had provided SPS with its working capital, they had never been fully informed of the company's financial situation. The Judge found that there had been no orthodox budgeting process, nor any analysis of variations between projections and performance. None of the projections warranted the decisions taken to expand the business, and the company had taken illegitimate business risks. He concluded that a decision should have been taken to cease trading by 18 April 1994. At a board meeting on that date, despite facing insolvency, the company decided to embark on an extraordinary programme of extensive expansion. The High Court held that Mr Löwer was personally liable under s 320 of the Companies Act 1955, as an officer of the company who was knowingly a party to the carrying on of the business of the company in a reckless manner. It ordered Mr Löwer to contribute a sum of $8.4m to the assets of the company.

On appeal, Mr Löwer argued that the High Court's findings were inconsistent with the liquidity position of SPS and with professional advice given to the directors in 1994; that the Judge had placed undue weight on the evidence of a competitor of SPS and insufficient weight on Mr Löwer's intention to provide financial support for SPS; and that the High Court had not adequately recognised the significance of the roles of the chairman and executives of SPS. A further question arose as to whether it was possible for the liquidators to rely on s 320 of the 1955 Act, as it had been repealed prior to the commencement of the proceeding. Mr Löwer also appealed against the quantum of the contribution ordered by the High Court. The liquidators cross-appealed, contending that the Court should not have made adjustments to allow for unavailability of assets in a notional liquidation and for creditors' appreciation of risk.

The Court held that the liquidity position of the company had facilitated the continuation of trading but did not justify it. Payment to creditors had been maintained at the cost of an increasing deficit. The director had taken illegitimate business risks in allowing the company to continue to trade in the absence of measures designed to ensure future profitability.

The Court considered that a right to bring a proceeding under the section had accrued before repeal. The liquidators' proceeding against Mr Löwer had been issued in 1998. Section 320 of the Companies Act 1955 was repealed with effect from 1 July 1994. However, all of the conduct found by the Court to constitute reckless trading had taken place before the repeal of the section. This was in accordance with the legislative purpose that reckless directors would be liable either under the Companies Act 1955 or under the Companies Act 1993, depending on when the wrongful acts took place.

The principal purpose of s 320 was to compensate those who had suffered loss as a result of illegitimate trading. The extent of contribution was a matter for the judgment of the Court, the factors of particular relevance being causation, culpability and duration. The figure arrived at by the High Court had been a fair assessment of the losses caused by the illegitimate trading of Mr Löwer. The High Court's assessment of Mr Löwer's culpability was correct: Mr Löwer was unreasonably optimistic about the risks faced by SPS, and must have known of the limitations in the company's

supervisory financial systems and planning capacity. Mr Löwer had put his own interests ahead of the unsecured creditors, and the wrongful trading had continued for a lengthy period. Overall, the approach taken to compensation was open to the High Court and accorded with principle. The cross-appeal was also dismissed.

The Supreme Court has granted leave to appeal.

Employment Law

Quantum – Non-economic loss

In *NCR (NZ) Corporation Ltd v Blowes* CA186/04 23 September 2005, NCR appealed against a decision in the Employment Court on the grounds that the Court made findings of fact without an evidentiary basis, that the Court erred in its interpretation of the redundancy provisions in Mr Blowes' employment agreement, and that the award to Mr Blowes of $15,000 was manifestly excessive.

NCR assigned Mr Blowes to a new position in Melbourne. He relocated there with the expectation, but no assurance, that the position would last two to three years. He was later made redundant and lodged a personal grievance against NCR.

The Court did not accept that the factual findings of the Employment Court lacked proper evidentiary basis. As a result it was unnecessary to consider the second ground of appeal, but the Court indicated that if it had been necessary, that ground would have been dismissed. The Judge's approach to the provisions of the employment agreement was correct.

The real issue of the case was the propriety of the award of $15,000 for unjustified disadvantage or non-economic loss under s 40(1)(c)(i) of the Employment Contracts Act 1991. The Court reviewed previous cases and concluded that the award of $15,000 was so excessive as to be wrong in law. The Court considered that the $20,000 award in *Telecom South v Post Office Union* [1992] 1 ERNZ 711 must have been at or near the upper end of the permissible range. The Court considered that the upper limit had now increased to $27,000 to allow for inflation. The circumstances of what happened to Mr Blowes were not half-way to two-thirds up the permissible range. Nor were they half as serious as what had happened to the employee in the *Telecom South* case.

The award was reduced to $7,000.

Unfair dismissal - Quantum of awards

In *Waitakere City Council v Ioane* (2005) 7 NZELC 98,049, the Court reduced a compensation award to an employee from $67,666 to $17,000. This was in recognition of the role of the employee in bringing about the impugned dismissal. The Court said that the employee was very much the author of his own misfortune and any award of compensation would be entirely unjust if it did not reflect that reality.

The Court reiterated the point made in *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 at [81] that the actual loss suffered by an employee sets the upper ceiling

on an award which can be made. If the employee has suffered no loss, no award of compensation is appropriate. It follows, therefore, that if a fair procedure would inevitably have resulted in a justified dismissal, procedural infelicities associated with the dismissal do not warrant an award of compensation.

Equity

Damages - Breach of fiduciary obligation – Quantum

In *Chirnside v Fay (No 2)* [2005] 3 NZLR 689 the Court considered how damages were to be quantified in a case where fiduciary obligations had been breached during negotiations towards a joint venture agreement. The Court had earlier concluded that "what Mr Fay 'lost' was the chance to come to satisfactory terms with Mr Chirnside or his interests" and that "compensation for this kind of loss should be approached primarily by reference to the Court's assessment of the prospect of success of the particular opportunity, had it gone forward".

The Court considered that the starting point must be that in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, where the Court indicated that a breach of an equitable obligation should allow the use of "a full range of remedies . . . as appropriate, no matter whether they originated in common law, equity or statute". The Court also said that "it is difficult to see why, in principle, loss of chance damages should not be available in a fiduciary claim, particularly where the particular opportunity had not yet ripened into a fully articulated agreement"; and that "even assuming resort is appropriately to be had to loss of chance assessments, it is important to appreciate that, around the common law world, there has been real difficulty in agreeing on what that approach should actually entail, in given kinds of cases".

The Court considered that it was best to use an "apportionment", rather than an "all or nothing" approach. The apportionment approach involves treating the prospect of a favourable outcome as a recoverable head of damage in itself, and in effect "apportioning" the approximation of the loss of chance, as assessed (say, 20 per cent), against the whole of the loss, as fixed. It is also open to a Judge, in assessing equitable compensation, to make an adjustment for additional work and labour to a party which is otherwise not properly taken into account. The Court also highlighted the equitable nature of the compensation, with the result that any relevant equitable discretionary considerations should come into play.

The Supreme Court has granted leave to appeal.

Evidence

Legal professional privilege – No "putting in issue" exception in New Zealand

Shannon v Shannon [2005] 3 NZLR 757 involved an appeal by Mr Shannon and the Forest Park Group of companies against a decision of Potter J in the High Court dismissing their application for disclosure of privileged communications. The Forest Park group sought to inspect the instructions given by Mrs Shannon to her solicitor relating to the lodging of caveats against the certificates of title of certain properties belonging to the group. The companies claimed compensation under s 146 of the

Land Transfer Act 1952, arguing that the caveats were lodged without reasonable cause, and claimed discovery of the instructions for this purpose.

The companies argued that since s 146 required an honest belief on reasonable grounds that a caveatable interest existed, Mrs Shannon had put the matter in issue and the instructions were therefore obtainable for inspection. The Court held that there was currently no "putting in issue" exception to legal professional privilege in New Zealand, as such an exception would be inconsistent with *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) and *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA). Nor did the Court consider that a "putting in issue" exception should be introduced in New Zealand. The Court saw no reason to depart from the above decisions and doubted, in any event, whether the exception is justifiable in policy terms. The exception would constitute a fundamental inroad into legal professional privilege and, further, misconstrues the type of unfairness that the waiver of privilege doctrine is designed to prevent.

The Court also rejected the proposition that, whenever an intention to defend an action under s 146 is signalled, legal privilege is necessarily waived with regard to instructions and advice regarding the lodging of the caveat. The inquiry for a court in any s 146 action is whether, on the objective facts as found to exist at the time the caveat was lodged, the caveat was lodged without reasonable cause. The inquiry does not depend on the instructions given to the solicitor. A caveatee asserting lack of honest belief or ulterior motive must look to material other than privileged material in order to prove his or her case.

Finally, the Court held that there had been no actual or implied waiver of privilege in this case. The Court considered that, where a person merely defends a claim made against him or her under s 146, this would not normally entail deliberately subjecting a relationship to public scrutiny while still seeking to preserve its confidentiality. Mrs Shannon was hardly deploying privileged material in an unfair manner simply by stating that she instructed her solicitor to lodge a caveat. In any event, Mrs Shannon did not need to rely on the content of privileged communications to prove that the caveats were lodged reasonably. Rather, she could give evidence of the objective facts that gave rise to what she asserted was a constructive trust.

The appeal was accordingly dismissed.

Family Law

Hague Convention - Meaning of "habitually resident" under the Guardianship Amendment Act 1991

SK v KP [2005] 3 NZLR 590 concerned an appeal from a decision of the High Court upholding a decision of the Family Court that, for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction, a child was not habitually resident in the United States at the date of his retention in New Zealand in September 2002. No order could, therefore, be made for his return to the United States. The issue was whether the finding that the child had ceased to be habitually resident in the United States by September 2002 was wrong in law.

After spending the first five months of his life in Illinois, S came to New Zealand and then returned to Illinois when he was ten months old. S returned to New Zealand with his mother, Mrs KP, in November 2001 when he was 16 months old, with the agreement and support of Mr SK, the father, because of Mrs KP's second pregnancy. The second child was born in April 2002 and the father visited on three occasions between May and September 2002. S was aged 26 months at the date of retention.

McGrath J considered that, although habitual residence is a factual concept, the underlying legal nature of the question of the meaning of the words "habitually resident" allows for appellate supervision by this Court of the identification and application of issues of principle concerning the concept of habitual residence. He agreed with the statement of the principles set out by Glazebrook J.

In McGrath J's view, as the circumstances did not indicate a shared parental intent beyond a limited stay, there could in general only be a loss of habitual residence as a result of the gradual weakening of connections with the former state. McGrath J was satisfied that the lower court judgments were in accordance with the underlying principles of habitual residence so that there was no error of law. The High Court and Family Court were entitled to view the relatively short period in New Zealand as sufficient to bring about a change in the child's habitual residence in Illinois as a very young child had spent a very substantial proportion of his life in New Zealand.

Glazebrook J set out the principles that have been developed by the courts in relation to habitual residence. The acquisition of a new habitual residence requires both a settled purpose and actual residence for an appreciable period. A settled purpose to leave the place of habitual residence causes that habitual residence to be lost immediately. Therefore, as the gaining of a new habitual residence requires a period of actual residence, a person can be without an habitual residence.

She pointed out that, where a young child is involved, the settled purpose is traditionally considered to be that of the parents. However, the courts should have regard not only to the subjective intent of the parents but also to the objective manifestations of that intent. Although the unilateral purpose of one parent cannot change the habitual residence of the child, a very lengthy period of residence in such a situation could eventually change a child's habitual residence.

The principles also indicate, in Glazebrook J's view, that a settled purpose to reside for a limited period can result in a change of habitual residence, as long as there is intended to be a sufficient degree of continuity for it to be properly described as settled. Relevant factors include length of stay in the new state, the purpose of the stay and the strength of ties to the existing state. As well as an immediate loss of habitual residence, there can be a gradual change of habitual residence and, in such cases, there may be an interval where a child is habitually resident in neither state.

In terms of the above principles, Glazebrook J noted that the visit to New Zealand was clearly for a temporary purpose and a limited period, that the living arrangements in New Zealand were temporary and that links with Chicago were maintained. On the other hand, the visit to New Zealand was intended to be a relatively long one. At the date of retention, S had spent nearly a year outside Chicago, which for such a young child is a significant period, with his primary caregiver and with other relatives in a

place where his mother had strong ties and which was his new sister's habitual residence. S had also spent about five months in New Zealand before the November 2001 trip. Taking all the circumstances into account, Glazebrook J did not consider that the High Court Judge was wrong to have upheld the Family Court Judge's decision.

William Young J, dissenting, thought that it was unreal to treat S as having acquired a habitual residence independently of the intentions of his parents. Mr SK never intended for S to be in New Zealand other than for a short period. Ms KP's actual intentions were far from clear, which put Mr SK in a particularly difficult position. Further S was not making associations with New Zealand which would be important in the case of an older child, such as going to school and making friends. He could, therefore, see no principled basis for finding that S lost his habitual residence in the United States at a time which predated his wrongful retention in New Zealand.

However, even if William Young J's views had prevailed, he had substantial reservations whether Mr SK could have realistically expected to obtain an order for the return of S to the United States. Returning S to pointless litigation in Illinois might be inappropriate given s 13(1)(c) of the Guardianship Amendment Act 1991 and, if returning S would result in separation from his sister, it might involve an "intolerable situation" for the purposes of s 13(1)(c) or a breach of human rights under s 13(1)(e).

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

Relationship property – Variation of maintenance agreement

In *Townshend v Bellamy* [2005] NZFLR 1129, Mr Townshend sought to vary an agreement for maintenance. The parties separated and, on 10 August 1994, entered into a deed dividing the relationship property and providing Mrs Bellamy with a lifelong annual tax free allowance of $24,000. The marriage was dissolved on 1 February 1999 and Mrs Bellamy remarried in October 2000. Upon application by Mr Townshend, the Family Court varied the agreement under s 182(2) of the Family Proceedings Act 1980 ("FPA") so that the allowance was payable until only 1 May 2008. Miller J allowed an appeal by Mrs Bellamy to the High Court, finding that the Family Court did not have jurisdiction to make an order varying the agreement.

The Court upheld the finding of Miller J that s 182(6) of the FPA provided a jurisdictional bar to the variation of the maintenance agreement since any orders would "vary or defeat" an agreement entered into under Part 6 of the Property (Relationships) Act 1976 (" PRA"). The issue was not whether the relevant clause of the deed was a maintenance agreement but whether any change to the clause would vary an agreement made under Part 6 of the PRA. The Court held that the form and content of the deed made it clear that it was an agreement entered into under Part 6. Further, the prior negotiations of the parties showed that the annual sum was in lieu of part of what was perceived to be Mrs Bellamy's property entitlement. Any change to that sum must therefore be a modification of the parties' property agreement and come under the s 182(6) jurisdictional bar.

However, even if there had been jurisdiction, the Court would have upheld Miller J's conclusion that Judge Aubin should not have varied the agreement. Given his finding that remarriage must have been in the contemplation of the parties at the time of the deed, he should not have taken it into account as a significant change of circumstances. Further, Judge Aubin appears to have been influenced by the fact that the arrangements, as they have turned out, appear to have favoured Mrs Bellamy. The Court considered, however, that a variation should not be made merely on the basis of a perception, based on hindsight, that Mr Townshend had made an unwise bargain.

The appeal was accordingly dismissed.

Relationship property - Section 21 agreement - Bankruptcy – Consequences

Johnson v Felton (2005) 24 FRNZ 717 concerned a matrimonial property agreement between Mrs Johnson (the appellant) and her husband Mr Johnson. In the High Court, Venning J had upheld a challenge by Mr Johnson's creditors to that agreement under s 47(2) of the Property (Relationships) Act 1976 ("PRA").

This Court was unanimous in its findings concerning issue estoppel and res judicata. In relation to this issue, the appellant submitted that she was not bound by the conclusions reached by Venning J. The basis of her argument was that, as she was the successful party in relation to Venning J's October judgment, she therefore had no right of appeal from those aspects of the October judgment that were unfavourable to her, particularly the conclusions that the franchisees were "creditors" and that the effect of the agreement was to defeat creditors.

This Court held that any potential injustice to Mrs Johnson in terms of appeal rights was addressed by this Court's willingness to allow her to challenge, if she wished, such findings in this Court. Given that she elected not to do so, the Court found that it there was no actual injustice to her in the course which was followed.

On the issue of whether the franchisees were creditors for the purposes of s 47(2) of the PRA, the Court was unanimous in finding that Venning J's approach to this issue was correct and that the franchisees were creditors for the purposes of s 47(2).

The Court disagreed on the issue of whether s 47(2) of the PRA applied to render the agreement void against the creditor respondents. The issue turned on whether the two year period in s 47(2) of the PRA is a limitation period or whether, as found by Venning J, it defines the group of creditors who can challenge the agreement.

A majority of the Court held that the phrase "during the period of 2 years after it is made" qualifies the word "void" and not the word "creditors", with the effect that the phrase refers to the time period during which the tainted agreement is void. In coming to this conclusion, Glazebrook J examined the legislative history of the provision and the wider context of the scheme of the PRA and the general insolvency regime.

William Young J, dissenting on this issue, found that the two year period defined the group of creditors who can challenge the agreement. William Young J considered the

law as to fraudulent conveyances to be of primary relevance in the interpretation of s 47(2).

William Young J thought that on his approach to s 47(2), subsequent creditors could be divided into two sub-classes: (1) creditors whose debts arise within two years of the impugned agreement ("sub-class (1) creditors"); and (2) creditors whose debts arose after the elapse of two years from the date of the impugned agreement ("sub-class (2) creditors"). The two year time period in s 47(2) operates to exclude claims under s 47(2) by subsequent creditors in subclass (2). This approach, William Young J thought, accorded with underlying policy considerations and the general insolvency regime.

The Supreme Court has granted leave to appeal.

Human Rights

New Zealand Bill of Rights Act 1990 – Compensation for breach of fair trial rights

Brown v Attorney-General [2005] 2 NZLR 405 concerned a claim for compensation for breach of the right to a fair trial.

Mr Brown was charged with attempted murder, wounding with intent to cause grievous bodily harm and aggravated robbery. A shirt found at his flat was determined by forensic experts at the Institute of Environmental Science and Research Ltd to have the blood of the victim on it. As part of his legal aid application to the Auckland District Legal Services Subcommittee, Mr Brown sought approval for the cost of having the shirt examined for DNA testing by an Australian laboratory. Legal Services declined his application, but indicated that it would consider providing funds for analysis by New Zealand based ESR. Mr Brown made further requests to Legal Services to reconsider that decision. By 6 September 1995 the ESR had confirmed that it lacked the technology to conduct the tests, but Legal Services maintained its refusal to approve the testing in Australia. Eventually, further DNA testing took place which supported the proposition that another resident of Mr Brown's flat had worn the shirt. Mr Brown applied for and received a discharge from conviction. He brought a claim for compensation under the New Zealand Bill of Rights Act 1990. He was unsuccessful in the High Court and appealed to this Court. The argument before the Court was in essence that Legal Services' refusal to approve testing of the shirt in Australia amounted to a breach of the right to a fair trial, as affirmed under s 25(a) of the New Zealand Bill of Rights Act 1990 ("Bill of Rights").

The Court found that the Bill of Rights could not override unambiguous legislation devised by Parliament to deal with the delivery of criminal legal aid. Where, as in this case, neither primary nor secondary legislation was challenged as to its validity, then the starting point in considering the claim must be that legislation, rather than the Bill of Rights. In this case that legislation provided a clear answer so that it was unnecessary to consider the more generalised Bill of Rights arguments advanced on behalf of Mr Brown.

The Court held that Legal Services' decision to refuse legal aid for the testing in Australia had not been unlawful or unreasonable. Under s 83(2) of the Legal Services

Act 1991 the usual maximum could be exceeded if Legal Services considered there were exceptional circumstances. In this case the claim was more than 20 times higher than the maximum allowed under the Legal Services Regulations 1991, and in addition, the application was incomplete in terms of setting out the circumstances claimed to justify such a large award. The reasonableness of Legal Services' decision had to be judged based on the information it had before it, and on that basis its concerns about the cost of using overseas experts and the speculative nature of the testing were understandable and its original decision could not be criticised. It could not be established that the decision, if lawfully made, would have been in favour of the grant. It followed that it could not be established that the decision breached Mr Brown's rights under the Bill of Rights. The appeal was dismissed.

The Court observed that even if the decision were unlawful, that would not necessarily have caused a breach of Mr Brown's rights under the Bill of Rights, still less a claim for compensation. The evidence did not establish that the Australian testing, even if carried out, would have raised a reasonable doubt about Mr Brown's guilt or had any material effect on the trial. In a separate judgment, William Young J stated that in his view New Zealand courts ought not to award compensation as a remedy for unfair trial process but rather should require such complaints to be raised with either the trial Judge or on appeal.

The Supreme Court has refused leave to appeal.

Mistreatment of prisoners – Breaches of New Zealand Bill of Rights Act 1990 – Human dignity - Disproportionately severe treatment - Quantum

Attorney-General v Taunoa CA82/04 8 December 2005 was an appeal from a High Court decision that found that the treatment of prisoners on the Behaviour Management Regime ("BMR") at Auckland Prison was in breach of the Penal Institutions Act 1954 ("PIA"), the Penal Institutions Regulations 2000 ("PIR"), and the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). BMR was a regime under which prisoners were held in isolation cells on conditions which involved a reduction in the conditions applying to other maximum security prisoners. The High Court Judge awarded Bill of Rights compensation to five of the plaintiff prisoners: Mr Taunoa ($55,000), Mr Robinson ($40,000), Mr Tofts ($25,000), Mr Kidman ($8,000), and Mr Gunbie ($2,000).

On appeal three issues were raised: whether the Judge was correct to find a breach of s 23(5) of the Bill of Rights, whether compensation was the appropriate remedy for breach, and whether the level of compensation awarded by the Judge was too high. The Court upheld the Judge's finding that there had been a breach of s 23(5) on the basis that the Judge was correct to find that BMR was unlawful in terms of the PIA and PIR, that with minor exceptions the Judge's findings as to the conditions on BMR were properly made, and on the basis that the Judge had approached the legal analysis of s 23(5) correctly. The Court held that Judge was not wrong to exercise his discretion in favour of making awards of compensation in this case as the breach of the Bill of Rights was serious and compensation was necessary to vindicate the prisoners' rights. In terms of the quantum of the compensation the Court held that while the awards could have been lower, and perhaps should have been lower, they

were not "wholly erroneous" and therefore were not in a category demanding intervention by an appellate Court. As such, the Court dismissed the appeal.

On cross-appeal the main issue that arose was whether the treatment of the prisoners on BMR and on administrative segregation (another form of segregation which did not have a number of the punitive features associated with BMR) constituted a breach of s 9 of the Bill of Rights. The Court found that the treatment of prisoners on BMR did not breach s 9 except in the case of Mr Tofts. Mr Tofts' psychological and psychiatric vulnerabilities meant that his placement on BMR was inappropriate and a particularly serious matter. The Court thus found the treatment of Mr Tofts was "disproportionately severe" treatment under s 9 of the Bill of Rights. While Hammond J (dissenting) would have increased Mr Tofts' compensation to $40,000 because the s 9 finding made him an "exemplar of state wrongdoing", the majority did not think his award should be disturbed because the High Court Judge had taken account of the aggravating factors applying to Mr Tofts in making the original $25,000 award. In regard to administrative segregation the Court found that solitary confinement was not, per se, a breach of s 9; and that whether treatment on solitary confinement would breach s 9 would depend on the circumstances of each case. In this present case the Court found that treatment on administrative segregation did not breach s 9. The Court also dismissed various other points on cross-appeal including a claim that s 27 had been breached, but increased Mr Taunoa's compensation to $65,000 to correct an error in the calculation of his award in the High Court.

Leave to appeal to the Supreme Court has been sought.

New Zealand Bill of Rights Act 1990 – Issue estoppel

In *Link Technology 2000 Ltd & Memelink v Attorney-General* (2005) 17 PRNZ 465, the Court considered an appeal from a High Court decision declining to enter summary judgment for the appellants on the issue of liability for breach of the New Zealand Bill of Rights Act 1990 ("Bill of Rights") and direct a trial on the issue of quantum of public law damages.

The appellants were charged with various offences under the Customs Act 1966. Charges against Link were discontinued but the prosecution of Mr Memelink continued. Mr Memelink challenged the admissibility of certain evidence obtained by Customs. In a voir dire hearing the District Court Judge excluded the evidence after concluding that the search of Link's premises was both illegal and unreasonable. The charges against Mr Memelink were consequently withdrawn. In 2000 the appellants commenced two separate civil proceedings against the Attorney-General claiming a breach of s 21 of the Bill of Rights, trespass to goods, trespass to land, and misfeasance in public office. At the time the proceedings were commenced, the appellants applied for summary judgment on the issue of liability and sought an order directing a trial to determine the amount of damages. Summary judgment was declined and the appellants appealed to this Court.

The main issue that arose on appeal was whether the voir dire decision that s 21 of the Bill of Rights had been breached gave rise to a res judicata and/or issue estoppel between the parties to the proceedings (or their privies), and whether the issues determined in the voir dire were determinative of the issue of liability for the purposes

of the civil proceedings. Also considered was whether it would be an abuse of process for the respondent to relitigate matters that had previously been determined at the voir dire.

The Court decided a number of issues. First, the Court held that a finding of a breach of the Bill of Rights does not, of itself, establish liability on the part of the respondent to pay monetary compensation because such compensation is discretionary. Second, the Court rejected the respondent's submission that issue estoppel does not apply in public law proceedings, but held that in the circumstances of the case issue estoppel did not apply as between the findings made in the voir dire and the civil proceedings. Third, that the judgment in the voir dire was not a judgment in rem but rather a ruling as to the admissibility of evidence in the course of a summary criminal proceeding, and was not an acquittal. Fourth, the Court did not think, in the circumstances of the case, that it would constitute an abuse of process for the respondent to contest the finding made in the voir dire (that the search of Link's premises was unlawful and unreasonable) in the context of the civil proceedings. Fifth, the Court rejected the respondent's argument that the appellants' action for damages was, in substance, an action for defamation. Sixth the Court dismissed the appeal against the costs award made against the appellants in the High Court: the fact that one of the claims made by the appellants was based on the Bill of Rights did not alter the fact that the proceeding was a civil claim for compensation and an application made in the course of that litigation failed.

Bill of Rights – Natural justice – Right to counsel – Right to be treated with humanity and with respect for the inherent dignity of the person – Appropriate level of compensation

Attorney-General v Udompun [2005] 3 NZLR 204 was an appeal against a finding that Mrs Udompun's rights under the New Zealand Bill of Rights Act 1990 ("Bill of Rights") were breached when she was denied entry to New Zealand upon arrival at Christchurch airport and then, about a year later, at Auckland.

Upon arrival in Christchurch, an immigration officer took the view that Mrs Udompun and her husband were part of a group of five Thai nationals and directed all his questions towards the only English speaking member of the group. An interpreter was not available. The officer formed the view that the explanation given for the visit was not genuine and all five were denied entry. Mrs Udompun's evidence was that she and her husband were not travelling in a group but had come to see a relative.

At Auckland, Mrs Udompun was refused entry after an interview conducted through an interpreter and detained under s 128 of the Immigration Act 1987 until the next available flight back to Thailand. While in custody at the airport, the police explained, through an English speaking Thai national, that they were being detained for immigration reasons, and each was given a form in Thai explaining their Bill of Rights rights, which Mrs Udompun signed. The detainees were not offered any food and the only drinking water was from a washbasin tap. Mrs Udompun was experiencing a heavy menstrual period, which had started unexpectedly on the plane. She had no sanitary pads with her and had not asked the Thai airhostesses for any.

Mrs Udompun was transported to the police station where she was placed in an individual cell and offered food. Detainees are not given information as to the availability of showering facilities or to procedures to follow if they had particular needs. The police declined to take Thai food and sanitary products provided by her relatives to Mrs Udompun but told them that sanitary products could be provided upon request. However, although her need was conveyed to the Duty Sergeant, she was not provided with any such products.

In the High Court, Heath J held that the Immigration Service in Christchurch had breached its natural justice obligations under s 27(1) of the Bill of Rights by not providing Mrs Udompun with an interpreter. He also held that she was not properly advised of her right to counsel when she was detained in Auckland, contrary to s 23(1)(b). Finally, he held that she had not been treated with humanity and with respect for the inherent dignity of the person, as required by s 23(5). Heath J awarded Mrs Udompun compensation of $50,000, prejudgment interest and indemnity costs. The Crown appealed.

The Court held that, although it is not desirable to lay down rigid rules as to what the natural justice obligation requires of immigration officials when granting permits at the border, as a general rule, the requirements of fairness cannot be met if a person does not understand questions put to them. Where large groups were concerned, individual questioning would not be consistent with efficient processing of travellers but individual travellers should normally still be given an opportunity to explain their own circumstances. In this case, it was reasonable for the officer to assume that the five Thais were travelling in a group and to rely on the English speaker as spokesperson and interpreter for the group. It was not unreasonable for the officer to conclude that the responses were the collective (if incomplete) agreed answers of the group. There was, therefore, no breach of natural justice.

The Court held that there was also no breach of s 23(1)(a) at Auckland because the reason for Mrs Udompun's detention was adequately brought home to her. Regarding s 23(1)(b), the Court considered that the evidence showed that Mrs Udompun either subjectively understood her rights with regard to a lawyer or that she would have understood her rights had she read the form which she signed. Further, the factors which called for obvious care, namely her foreign language and possibly that she was suffering from a headache, had been effectively dealt with. The form was in Thai; the right to a lawyer was clearly set out in the form; Mrs Udompun signed that she had read it; she had access to an interpreter; she did not ask questions or make comments indicating a lack of understanding; and she had been given medication for her headache.

The issue under s 23(5) was whether the standards of administration applied to Mrs Udompun during her detention were satisfactory in light of the guarantees provided in s 23(5). The Court held that the police breached Mrs Udompun's rights under s 23(5) due to the failure to provide her with sanitary products after having been informed of her need. This breach was exacerbated by the failure to provide a shower, a change of clothes and a means for detainees to communicate any need for items that are necessary for dignified and respectful detention, and by the delay in providing food.

The Court considered that it was difficult in the circumstances to see that any remedy other than damages would sufficiently vindicate the s 23(5) right. The right, relating as it did to human dignity, was an important one and the breach was also serious. The Court considered, however, that Mrs Udompun must bear some responsibility for her predicament as she did not source sanitary products before she was at the police station. The Court did not consider that the inadvertent nature of the breach should have a major effect on the level of damages. Taking all the relevant matters into account, the Court was of the view that an award of $4,000 damages was sufficient.

The Court commented that there is force in the proposition that compensation should not be available for breaches of natural justice as a matter of course. In normal circumstances it would be a sufficient remedy for a breach of natural justice to have the impugned decision set aside, a declaration that it was not properly made and, if possible, an order to make the decision anew.

The Court held that the Judge was wrong to award pre-judgment interest. Although the Judge was not wrong in principle to award indemnity costs, the issue of costs against the Police was remitted back to the High Court, as the Court did not take the same view of the extent of the breaches as the Judge did.

Hammond J dissented with regard to the appropriate measure of damages and costs. He would have awarded Mrs Udompun $10,000 for the breach of her "dignitary interest". He considered also that she should have had her reasonable indemnity costs and disbursements in the High Court and costs in this Court. He would have allocated both the damages and the costs awards against the New Zealand Police.

The Supreme Court has refused leave to appeal.

Insolvency

Receiverships Act – Effect of s 30A on subsequent secured creditors

In *Agnew v Pardington* CA109/05 22 December 2005 receivers appointed to the Building Depot Limited by the first ranking general security holder, ANZ Banking Group (New Zealand) Limited, had realised all of the assets of the Building Depot with the exception of one vehicle. The second ranking general security holder, Fletcher Distribution Limited, was owed about $1.8m and the debts owing to lower ranking secured creditors would exceed the remaining surplus. Because of uncertainty as to the interpretation of s 30A of the Receiverships Act 1993, the ANZ receivers filed an application for directions as to where to pay the surplus funds. Williams J held that the ANZ receivers were required to pay the surplus, after paying prior ranking creditors, the ANZ and their costs, either to Fletcher's receivers or to the Official Assignee. This was on the basis that all security interests in those proceeds, other than that of ANZ but including that of Fletcher, were extinguished on the sale of the Building Depot's property by the ANZ receivers. Fletcher's receivers appealed against this finding.

The issue was whether s 30A turns subsequent creditors into unsecured creditors where property is disposed of by a receiver. Section 30A reads as follows:

> If property has been disposed of by a receiver, all security interests in the property and its proceeds that are subordinate to the security interest of the person in whose interests the receiver was appointed are extinguished on the disposition of the property.

The Court rejected the submission that proposed amendments to the Receiverships Act (enacted shortly before judgment was given), which preserve priority rights of subordinate security holders in any surplus left from the disposal of property by the receiver, were relevant to the interpretation of the current s 30A.

The Court accepted that it is possible to interpret the words of s 30A as meaning that, upon the disposal of property by a receiver, all subsequent security interests in the proceeds of sale held by the receiver are extinguished as well as those in the property and in any future proceeds from the property. The Court considered that it was also possible, however, to interpret the words as meaning that, upon the disposal of property by a receiver, it is only the subsequent security interests in the property and any future proceeds from the property that are extinguished.

The Court held that the second interpretation is consistent with the words of s 30A, is in accordance with its purpose and fits in with the context. The first interpretation would give the term "proceeds" a dual meaning, which was unlikely to have been intended. In the Court's view, Parliament's purpose was to ensure that a purchaser could take clear title to the property and not to extinguish the interests of subsequent security holders with regard to the surplus. Further, the Court held that the traditional and long-standing position regarding receiverships means that there is no need for a mechanical payment provision such as s 117 of the Personal Property Securities Act 1999 ("PPSA").

In addition, the first interpretation of s 30A is inconsistent with other provisions of the Receiverships Act, the PPSA, the Land Transfer Act 1952 and the Companies Act 1955. Finally, it is necessary to "read down" s 30A to ensure that the interpretation aligns with the purpose of the provision.

The appeal was accordingly allowed.

Intellectual Property

Patents – Objections

In *Pfizer Ireland Pharmaceuticals v Eli Lilly and Company* CA8/05 8 December 2005 the Court considered several pleading points which arose in patent litigation between Pfizer and Eli Lilly. Pfizer alleged that Eli Lilly had contravened patents and Eli Lilly counterclaimed that the patents were invalid. Eli Lilly set out the grounds of the counter-claim for the revocation of the patents in particulars of objection. Pfizer denied the grounds of objection without setting out the particulars on which it denied the grounds of objection. Eli Lilly sought an order requiring Pfizer to furnish fully particularised answers to each and every allegation in the particulars of objection. Potter J at first instance granted Eli Lilly's application and later granted a further order for more particularised answers. Pfizer appealed to this Court in respect of the

second of those decisions and then sought leave to appeal out of time against the initial decision to grant Eli Lilly's application.

A claim for the revocation of patents under the Patents Act 1953 is brought by way of an originating application and is addressed under the High Court Rules. The rules require particulars of the objection to be provided but do not include a requirement for a patentee to respond to the particulars of objection.

The Court held that *Ancare New Zealand Ltd v Ciba Geigy New Zealand Ltd* (1997) 11 PRNZ 398 did not correctly state the law. That case had stood for the proposition that the usual pleading rules applied in patent revocation cases including r 130. The traditional approach was reaffirmed. Patentees are not required to plead in a detailed way to particulars of objection.

However, on the facts of the case the appeal was dismissed for reasons primarily associated with Pfizer's election not to appeal against the initial decision. Further, in a case management context, Pfizer's complaints were unconvincing.

Land Law

Agreement for sale and purchase – Covenant not to caveat

In *Landco Albany Limited v Fu Hao Construction Limited* CA79/04 30 November 2005 the Court considered the enforceability of a clause in an agreement for sale and purchase of land which contained a covenant not to caveat until the deposit of a Plan of Subdivision. The vendors cancelled the contract and the purchaser then lodged a caveat contrary to the covenant in the agreement. The issue on appeal was whether the vendor cancellation was valid and whether covenants not to caveat are unenforceable on the basis that they are contrary to public policy.

Landco owned a large parcel of land which it agreed to sell to Fu Hao Construction on completion of the subdivision. The subdivision was not expressly allowed under the district plan so the contract contained clauses under which Landco was entitled to cancel the contract if it became unwilling or unable to obtain "consents to sale", and Fu Hao Construction agreed not to lodge a caveat against the title. After spending in excess of $137,000 attempting to obtain subdivision consent, Landco reached the conclusion that the proposal was not viable and purported to cancel contract. Fu Hao Construction lodged a caveat and applied for an order that it not lapse.

The High Court held that covenants not to caveat are unenforceable on the basis that they are contrary to public policy. This Court reversed the High Court decision. The Court did not consider "no caveat" clauses to be void or unenforceable for reasons of public policy. It noted that courts are always reluctant to refuse to give effect to contracts on the ground of public policy. This Court held that the Torrens System of land registration was not depreciated by a refusal to recognise a public policy invalidation of no caveat clauses, and that there are reasonable commercial and private reasons why such clauses may be stipulated and accepted.

The appeal was allowed and the order of the High Court that the caveat should not lapse was set aside.

Unit Titles Act 1972 – Whether rule ultra vires the body corporate

In *Velich v Body Corporate* (2005) 5 NZ ConvC 194,138 the Court allowed an appeal against a decision of Frater J granting summary judgment against a unit proprietor who sought to finish a partially completed deck. Rule 2.1(f) of the amended body corporate rules provided that no additions or alterations to the unit that in any way altered the external appearances of the unit could be made without the consent of the body corporate. Consent could not be arbitrarily or unreasonably withheld if the alteration was non-structural.

The Court held that rule 2.1(f) was ultra vires. Powers and duties could only be conferred on the body corporate by the rules which were incidental to the performance of duties and powers imposed on the body corporate by the Act. A rule which appreciably expands the existing powers and duties of the body corporate, as rule 2.1(f) purported to do, cannot be regarded as merely incidental to those existing powers and duties.

The Court had no adequate evidential basis to determine whether the default rule 1(f) would apply. Assuming that the consent of the body corporate was required before the deck may be completed, the Court considered it plain that the body corporate would not be entitled to act capriciously in terms of granting or refusing consent.

There was also a public law dimension to the case which the parties had overlooked. The Court noted that a body corporate's decisions under the Act involve the exercise of a statutory power of decision for the purposes of s 3 of the Judicature Amendment Act 1972. No sensible or rational body corporate could take exception to the roof over the fourth floor apartment being covered with decking. Likewise, a glass balustrade in itself would appear to be of little moment. The appeal was allowed and the declaration and permanent injunction issued by Frater J were set aside.

Leave was sought from the Supreme Court, but this application was ultimately abandoned.

Exercise of option to purchase - Exact compliance

In *Gulf Corporation Ltd & Anor v Gulf Harbour Investments Ltd* [2006] 1 NZLR 21 the Court considered whether the respondent, Gulf Harbour Investments Limited, gave its unqualified and absolute assent as offeree to the exact terms of an option to purchase a carpark site when it purported to exercise the option. The Court considered whether a letter, which contained an unequivocal statement that option was exercised, but also contained proposed variations to the precise terms of the option, was effective to exercise the option.

The Court discussed the effect of the proposed variations, which included a request to execute an agreement for sale and purchase, in relation to expression of intent. The Court examined the scope of the "exact compliance" requirement in *Reporoa Stores Ltd v Treloar* [1958] NZLR 177, which was affirmed in *Buckland v Bay of Islands*

Electric Power Board (1980) 1 NZCPR 217. O'Regan J accepted that both cases involve strict applications of the requirement for "exact compliance". On that basis, the majority of the Court held that the purported exercise of the option was ineffective because acceptance was not in the precise terms of the offer made under the option. The appeal was allowed and the order for specific performance made in HC was quashed.

McGrath J dissented from the majority decision. He considered that when read as a whole, in the context of the factual background and the terms of the option, there was nothing in the letter that was in conflict with the absolute and unqualified expression of intent to exercise that appeared in the first part of the letter.

The Supreme Court granted leave to appeal. The case has since been settled out of court.

Land-locked land - Property Law Act 1952, s 129B - Quantum

In *Lowe & Ors v Brankin* CA85/04 14 September 2005 the Court considered how compensation should be assessed on applications under s 129B of the Property Law Act 1952.

The High Court found that Mr Brankin's land was landlocked in terms of s 129B of the Property Law Act 1952 and granted an order for access from a right of way. Mr Brankin was to both pay for the necessary upgrading and pay $40,000 compensation to his neighbours. The neighbours appealed against the quantum of compensation ordered on the basis that the High Court failed to adequately take into account the increase in value to Mr Brankin's land which would result from there being vehicular access to the land.

Regarding the s 129B power, the Court observed that "Parliament has enabled the High Court to intervene where there is not reasonable access to land-locked land, by investing the High Court with jurisdiction of a broad equitable character. When the jurisdiction is invoked, a landowner cannot simply stand on his or her title." The Court noted that once a decision is appropriately made that a degree of intervention is required in favour of the land-locked land, compensation to the affected land owners may be appropriate. "This Court has consistently ruled that such compensation must be assessed on a willing buyer/willing seller approach, notwithstanding the very real difficulties of application that such a test may have in practice." The Court cited the well-known test formulated in *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418.

The Court found that the High Court erred by focussing solely on what might on what be termed the "loss" to the neighbours rather than, on a willing buyer/willing seller basis, the value of what Mr Brankin wished to acquire. There were a great many things which were considered relevant to such an exercise including the physical effect on the land, the particular effect on the residents' individual properties, including any loss of amenities, the fact that they would be giving up what could be broadly termed "the exclusivity" of the grouping of owners who had control of access over the area, and related factors. The Court held that the purchaser could reasonably be expected to absorb any actual costs to the existing residents including their

transaction costs, and any direct losses, as well as "a premium for gaining this access".

The Court allowed the appeal against the quantum of compensation and ordered $60,000 further compensation.

Resource consent conditions - Indefeasibility of registered bonds

In *Rodney District Council v Fisherton Ltd and Anor* [2005] NZRMA 514 the Environment Court had granted consent to the subdivision of coastal land. One of the conditions of consent was the provision of either a cash bond or a bond guaranteed by a trading bank to secure obligations relating to the planting and maintenance of native vegetation. The then owners provided a cash bond.

The respondents purchased the land in question and wished to replace the cash bond with a trading bank bond. The Council refused on the basis that the terms of the bond registered against the land prevailed over the consent conditions and that it was therefore entitled to insist on a cash bond. Venning J in the High Court found against the Council, but granted leave to appeal to this Court on the following question:

> Whether the specific terms of a bond made between a Council and applicant landowner provided to secure performance of subdivision consent conditions and registered against title to the land in issue prevents a subsequent landowner from relying on the express provisions of the subdivision resource consent conditions where the subdivision resource consent conditions are more favourable to the landowner than particular express provisions of the bond.

The Court noted that while the question was phrased in general terms, it had to be answered in the context of this particular bond and these particular circumstances.

The Court concluded that the bond was an instrument creating an interest in land within the meaning of s 62 of the Land Transfer Act 1952. Once registered, it was a covenant running with the land and binding on all subsequent owners. The terms of the bond did not permit a subsequent owner to substitute a cash bond with a bank guaranteed bond. The Council was therefore entitled to rely on the provisions in the registered bond. The consent conditions were outside the registered instrument and were therefore unable to alter or diminish the interest created by the registered bond.

The appeal was allowed.

Land law – Agreement to provide right of way – Laches – Specific Performance

In *No 68 Ltd v Eastern Services Ltd* CA173/04 20 September 2005 the Court allowed the appeal by No 68 Ltd for specific performance of an agreement to provide No 68's property with a right of way.

The High Court dismissed the claim because the prior owner of No 68's land had delayed asserting its rights under the agreement with the result that circumstances had arisen which gave rise to the application of the doctrine of laches. The Court found

that the High Court erred in bringing the principles underlying limitations statutes to bear on his discretionary judgment as to whether laches barred the claim.

The Court noted that laches could bar an action by reason of the staleness of a claim in situations where limitation legislation did not apply, either expressly, or by analogy. Laches, being a personal disqualification, does not bind successors in title. The Court accepted that the inaction of a predecessor was not a matter to be ignored. Although laches would not run with title to land, a successor who was an assignee, as in this case, might be barred from asserting its interests because it could only stand in shoes of assignor when seeking to enforce assigned rights. The Court considered that No 68 should bear the consequences of its predecessor's delay in the determination of whether the equities of ESL's position outweighed No 68's rights.

ESL carried the onus of proving the doctrine of laches applied to bar No 68 from exercising its rights. The question was whether the equity of ESL's situation outweighed No 68's contractual right under the agreement to call for a registrable easement on payment to ESL of a sum equivalent to half of the costs of construction. The Court found that it was not possible to identify circumstances linked to the delay which prejudiced ESL. Therefore No 68's contractual rights were not outweighed by the equity of the respondent's position. In the circumstances the Court was satisfied that the equitable remedy of specific performance should be granted, despite the delay. The appeal was allowed. Specific performance was ordered subject to a condition that No 68 pay to ESL $50,000 to discharge the obligation to pay one half of the cost of construction of right of way.

The Supreme Court has granted leave to appeal.

Legal Aid

Legal Aid - Deaths by Accidents Compensation Act 1952

In *Pou v British American Tobacco (NZ) Ltd* CA199/04 4 October 2005 and *British American Tobacco (NZ) Ltd v Legal Services Agency* CA40/05 4 October 2005 the Court considered an appeal against the decision to strike out a claim for damages under the Deaths by Accidents Compensation Act 1952 and an appeal by British American Tobacco against an unsuccessful challenge to a grant of legal aid to the plaintiffs.

Regarding the damages claim, in the High Court Harrison J had struck out the cause of action brought in respect of the death of the claimants' mother as a result of smoking-induced cancer. The Judge held that only pecuniary losses could be recovered and none had been identified. This Court agreed that the Act is confined to pecuniary loss and held that *McCarthy v Palmer* [1957] NZLR 442 remains good law. In terms of whether pecuniary loss could be identified, the Court had considerable sympathy for the view of Harrison J. It was clear that there was little prospect of a substantial award being made. The Court also noted that reformulation of the pleadings on the eve of the strike-out application being heard was troubling, as was the unsatisfactory nature of the purported particulars. Nonetheless, the Court could

not discount altogether the possibility of the claimants having limited but genuine claims under the Act based on lost services and other benefits that may have been given to one of the claimant's children. The appeal was accordingly allowed and the cause of action was restored.

British American Tobacco was unsuccessful in its appeal against a judicial review decision of Gendall J in the High Court. The LSA had decided to continue a grant of legal aid made to the plaintiffs' mother to bring proceedings against the tobacco companies. When the judicial review application came before Gendall J the only extant claim was by the children of Janice Pou – a claim which they were bringing in their capacities as her executors. The effect of the decision reinstating the claims under the 1952 Act meant that, in any event, each of the plaintiffs had a personal claim against the tobacco companies which arguably provided adequate pegs upon which to hang grants of legal aid. However, the Court found that Gendall J's decision was correct. The Legal Services Act 2000 does not make express provision as to what happens when a legally aided person dies. The tobacco companies made the submission that the children were not eligible for legal aid because they were suing in a merely representative, fiduciary, or official capacity as executors of the estate. The Court held that the children were for practical purposes representing themselves because the entire beneficial interest in the estate is held by them. Further the children could have joined themselves as plaintiffs in their personal capacities in place of themselves as executors. Alternatively they could be made parties to the proceedings in their personal capacities. That highlighted the artificiality of the argument for the tobacco companies. The appeal was dismissed

Maori Incorporations

Maori incorporation – Borrowing powers

The Proprietors of Matauri X Incorporation v Bridgecorp Finance [2005] 3 NZLR 193 was an appeal by the proprietors of Matauri X from a High Court decision granting an application by Bridgecorp Finance Ltd for a declaration that the registered mortgage granted to it by the proprietors of Matauri X Incorporation over the land of Matauri X was valid and enforceable.

Matauri X was a Maori incorporation set up in 1967 under s 271 of the Maori Affairs Act 1953. An area of land in the beneficial ownership of multiple Maori interests was vested in Matauri X. In 2001 Matauri X gave a first mortgage over the land to Bridgecorp to raise funds of just over $3m to invest in a business. A majority of the shareholders subsequently voted to support the decision of the management committee to make the investment. The business then failed and Matauri X could not repay the loan. Bridgecorp sought to rely on its security.

The High Court dismissed the defence that Matauri X had acted beyond its powers and that the loan was therefore void. Matauri X appealed.

On appeal, this Court traversed the legislation governing the operations of Maori incorporations and their powers of competency, namely, Part XXII of the Maori

Affairs Act 1953, Part IV of the Maori Affairs Amendment Act 1967, Te Ture Whenua Maori Act 1993, and Te Ture Whenua Maori Amendment Act (No 2) 1993, which came into force on 28 September 1993.

This Court held that the particular investment entered into by Matauri X, the borrowing of money for that investment, and the grant of a mortgage as security would have been beyond the objects and powers of the incorporation under the 1953 Act and the 1967 Amendment Act, had those Acts still been in force. The Court noted that s 358A was included in Te Ture Whenua Maori Act 1993 by the 1993 Amendment Act (No 2). This transitional provision, which came into force less than three months after the 1993 Act, restricted the general power of competency conferred on Maori incorporations by s 253 of the 1993 Act until the shareholders of an incorporation had resolved to dispense with the existing objects required under the previous Acts. The shareholders of Matauri X had not taken that step. The effect of s 358A was to restrict the powers of Matauri X to the objects of the incorporation under the 1953 Act. Since the borrowing did not fit within any of the objects of the incorporation, and those objects did not include alienation in the sense of mortgaging, Matauri X lacked the power to enter into the borrowing transaction. The Court allowed the appeal and outstanding matters were remitted to High Court.

The Court observed that s 271 of the 1993 Act was a statutory codification of the common law "indoor management rule", under which a person dealing with a company was entitled to assume that the company's internal requirements had been complied with and that its officers had acted lawfully. The Court considered that it was premature to make a declaration on whether or not that principle would have provided Bridgecorp with an answer.

The Supreme Court has granted leave to appeal.

Media Law

Indecent publications – Classification of publications - Films, Videos, and Publications Classification Act 1993 – Duty to give reasons - Meaning of "tends to" in s 3(2)

Society for the Promotion of Community Standards Inc v Film and Literature Board of Review [2005] 3 NZLR 403 was an appeal by the Society for the Promotion of Community Standards ("SPCS") against a decision of the High Court which upheld the decision of the Film and Literature Board of Review, ruling that the film *Visitor Q* was objectionable except if viewed for the purposes of tertiary study or as part of a film festival. The majority allowed the appeal.

The majority of the Court held that in making a finding of fact that *Visitor Q* would be objectionable unless it were screened so that a limited class of persons could attend and those attending could be informed of the meanings attributable to the film, the Board failed to give reasons for that finding to the standard required by s 55(1)(c) of the Films, Videos, and Publications Classification Act 1993 ("FVPCA"). The Board's decision did not make clear what the content of any educative material should

have been, nor set a requirement for such material to accompany the screening of the film. The majority considered that the Board ought to have stated why it formed the view that patrons would be given educative information, as this view was central to its classification. Without conditions being imposed to ensure the protection of the public, there was a risk that the film would be shown without the necessary educative material, and therefore in circumstances where it would be injurious to the public good. The Court could therefore not assess whether the board had properly construed its role. Section 4(1) did not constrain the requirement to give reasons on matters central to the decision

Anderson P (dissenting in part), would have held that the Board is required to give reasons for its decision, but not on every component, including findings of fact. Further, Anderson P said that the ground on which the majority founded the appeal was not specified in the notice of appeal to the High Court and was not a question of law. The President would have dismissed the appeal.

The majority also gave an extensive discussion of the meaning of the phrase "tends to" in s 3(2). The majority found that the phrase has a sliding scale, with the closest synonym being "likely to". The determination of the meaning is a matter for the expert classifying body to determine; however there must be a real or substantial risk that the publication would support or promote specified activity. The majority also examined the meaning of "specified persons" and "specified purpose" under ss 23(2)(c)(ii) and 23(2)(c)(iii) FVPCA.

Medical Law

Medical practitioners – Meaning of "conduct unbecoming"

In *F v The Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 the Court considered the meaning of the phrase "conduct unbecoming a medical practitioner … that reflects adversely on the practitioner's fitness to practice medicine" in s 109(1)(c) of the Medical Practitioners Act 1995. Dr F had been found guilty of conduct unbecoming in the Medical Practitioners Disciplinary Tribunal, the District Court and the High Court for failing to ensure adequate monitoring of a patient's vancomycin levels.

The key question for the Court was whether "conduct unbecoming" could include both professional conduct and conduct outside the scope of practice. A majority of the Court found that the term did include both forms of conduct. The majority acknowledged that if the Act were interpreted in isolation the opposite conclusion would be compelling, however the legislative history made it clear that conduct unbecoming was meant to capture both forms of conduct: professional and personal conduct. In terms of conduct in the professional sphere there was a hierarchy of offences: unbecoming conduct, professional misconduct and disgraceful conduct (listed in ascending order).

The majority also said that the addition of the phrase "that reflects adversely on the practitioner's fitness to practice medicine" added an additional element to the test for

unbecoming behaviour which had persisted under the earlier 1968 Act which did not include that "rider". As such the Court was required to first inquire into whether the conduct was such as to constitute "conduct unbecoming" and then to satisfy itself that the conduct was such that it reflected adversely on the practitioner's fitness to practise medicine. In the circumstances of the case the majority found that the charge of conduct unbecoming was not made out and allowed the appeal.

William Young J came to the same result but via a different path. His Honour considered that a charge of unbecoming conduct was not available in respect of allegations of professional negligence. In any case Dr F's conduct, in the circumstances, was not such as to reflect adversely on his fitness to practice medicine.

Medical Practitioners Disciplinary Tribunal – Disclosure of personal information - Health Information Privacy Code

In *Complaints Assessment Committee v The Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 447, the Court considered a "third" appeal from a decision of the Medical Practitioners Disciplinary Tribunal.

Dr C was accused of disgraceful conduct in a professional respect. This appeal concerned his access to the medical and counseling records of the complainant, following decisions in the High Court, District Court and by the Chair of the Medical Practitioners Disciplinary Tribunal (MPDT). The High Court had made an order that the medical and counseling records of the complainant be disclosed to Dr C.

First, this Court found that it had jurisdiction to hear the appeal. It held that a "third" appeal was permitted under s 121 of the Medical Practitioners Act 1995, incorporating s 144 of the Summary Proceedings Act 1957.

Secondly, the Court confirmed that ss 32 and 35 of the Evidence Amendment Act (No 2) 1980 (EAA) apply to MPDT proceedings. The Court held that there was no basis for finding these requirements were overridden in this case. There was also no basis for finding that the complainant consented to disclosure of information relating to the complainant's counseling, psychiatric and psychological history to the medical practitioner whose conduct was subject to the MDPT consideration. The Court gave an extensive discussion of the MPDT's powers to obtain information from third parties under the Medical Practitioners Act.

The Court also dealt with the application of the Health Information Privacy Code 1994, which was issued pursuant to the Privacy Act 1993. The Court allowed the appeal and referred Dr C's disclosure application back to the MPDT.

The Supreme Court has granted leave to appeal.

Personal Property

Personal Property Securities Act 1999 – Priority – Attachment

In *New Zealand Bloodstock Ltd v Waller* (2005) 9 NZCLC 263,944 the Court considered which of two creditors had priority in a debtor's horse. New Zealand Bloodstock Ltd ("Bloodstock") had leased the horse, which is a deemed security interest under the Act, while SH Lock (NZ) Ltd ("Lock") had registered a security interest in relation to advances made to the debtor. Lock's debenture had been entered into prior to the commencement of the Personal Property Securities Act 1999 ("PPSA") but Lock had registered its interest when the Act came into force. The Court unanimously held that the PPSA creates a deemed ownership interest in a debtor in the sense that a debtor is able to create a security interest in goods which may defeat retained title. The Court also unanimously held that the cancellation of a lease, which is a security interest under the Act does not prevent the operation of the priority rules under the Act.

The Court divided, however, on the question of whether Lock's security interest had attached. The majority considered that Lock had given value and the debtor had rights in the horse. William Young J took a different view. The security agreement that Lock relied on was entered into prior to the PPSA came into force and while that in itself was no impediment, security agreements are effective according to their terms. The question was whether the charging clause gave rise to a security interest in the horse that the debtor had leased from Bloodstock. William Young J did not construe the reference in the agreement to assets that are the property of the debtor as fairly extending to assets that are the property of third parties. Before the PPSA came into effect the debenture extended only to the debtor's contractual interests in the horse. The question was whether that changed when the PPSA came into effect. Such a statutory intention was not evident in s 40 and would create commercial difficulties. Lock was therefore, on William Young J's view, confined to the security for which it bargained when it obtained the debenture from the debtor.

Tax

Process for challenging default assessment

In *Allen v The Commissioner of Inland Revenue* (2005) 22 NZTC 19,473 the Court considered the process which a taxpayer is required to follow if he or she wishes to challenge a default assessment made by the Commissioner under s 106 of the Tax Administration Act 1994 ("TAA"). The Court took the opportunity to comment on the correct process for challenging a default assessment made by the Commissioner.

The Court said that a default assessment issued under s 106 is not to be treated differently from any other kind of assessment for the purposes of Parts 4A and 8A of the TAA. As such the taxpayer who wishes to contest an assessment must do so by way of a Notice of Proposed Adjustment (NOPA) and this must be done within the

applicable response period. That is a prerequisite to the entitlement to challenge an assessment by commencing proceedings in the Taxation Review Authority (TRA).

The only difference in the process for challenging a default assessment from the process which applies to other assessments is the requirement in s 89D(2) that the taxpayer must furnish a tax return for the assessment period. However, that provision does not provide for the tax return to be the method of disputing the default assessment. Rather, it is a requirement which must be met before the taxpayer may issue a NOPA under s 89D(1). That is why s 89D(1) is expressed to be subject to s 89D(2).

If a taxpayer wishing to challenge a default assessment has not issued a NOPA in respect of the default assessment under s 89D(1) within the applicable response period in accordance with s 89D(5), which the taxpayer cannot do until he or she has furnished a return of income for the assessment period under s 89D(2), then that taxpayer will not have met the requirements of s 138B(3) and will not therefore be entitled to challenge the default assessment by commencing proceedings in the TRA.

If a taxpayer has commenced proceedings in the TRA without complying with s 138B(3) the Commissioner may apply to have the challenge struck out under s 138H and the TRA should strike the proceedings out because of the failure to comply with s 138B. That was the case with respect to Mr Allen, and as such, the Court upheld the High Court's decision to set aside the decision of the TRA not to strike out the proceedings, and to strike out the taxpayer's proceedings in the TRA.

The Supreme Court has granted leave to appeal.

Tort

Negligence – Liability of Barristers – Immunity

In *Lai v Chamberlains* [2005] 3 NZLR 291 the Court (by majority) held that the longstanding immunity of barristers to suit in civil cases should be abolished. The Court considered that it was wrong in principle to retain the immunity, which left the victim of a barrister's negligence without a remedy. Further, the immunity eroded respect for the legal profession. The Court also noted the symbolic and hortatory effects of removing the immunity. Given this, the Court considered that the case for the immunity was not strong enough to justify its retention.

In particular, the Court concluded that there was no compelling evidence that the imposition of liability would result in advocates ignoring duties owed to the Court. It said that the fact that other participants in the judicial process possessed immunities was of no moment as they each have "their own distinct and eminently supportable justifications". The obligations imposed by the 'cab rank rule' are merely one circumstance to be considered when determining whether a lawyer had acted reasonably and prudently. The Court also noted that litigation was practised defensively even with an immunity rule in place. The risk of cases being relitigated by way of a negligence action could be countered by other means (e.g. refusal of legal

aid, or by the doctrine of abuse of process). A provision in the Law Practitioners Act 1982 which gives barristers the same privileges that barristers had in England did not relate to an immunity, and, at the very least meant that New Zealand Courts could change the rule as to immunity to reflect changes in the English position.

The Court explicitly left open the question of whether the immunity ought to be retained for barristers acting in criminal matters.

Anderson P issued a dissenting judgment which concluded that the immunity should be retained. The President considered that the immunity was no longer a common law principle, but rather a matter of statutory conferment which the Court was not competent to remove. His Honour also considered that the retention of the immunity was necessitated by policy considerations as the "immunity is as necessary for the due administration of justice for the public benefit, and for the advancement of our other democratic protections, as it ever was".

The Supreme Court has granted leave to appeal.

Exemplary damages – When appropriate – Quantum

In *McDermott v Wallace* [2005] 3 NZLR 661 the Court outlined principles for reckoning quantum in cases involving the award of exemplary damages.

Mr Wallace was a flying instructor who was flying with a trainee, Mr McDermott, in a dual controlled aircraft. At the time of the flight, Mr Wallace was under investigation by the Civil Aviation Authority in relation to an earlier incident. No pre-flight checks of the plane's weight were made, nor was a pre-flight briefing carried out. Mr Wallace allowed Mr McDermott to fly below the permitted minimum height, and to approach a residential dwelling. At that stage, Mr Wallace grabbed the controls, forcing the plane to bank and stall, eventually crashing the plane and causing serious injury to Mr McDermott.

Mr McDermott sued Mr Wallace. The District Court Judge awarded $50 000 in exemplary damages. The High Court Judge overturned this decision, instead preferring the conclusion of a District Court Judge who had presided in a quasi-criminal proceeding which arose out of the same incident that the accident was due to a momentary error of judgment.

The Court considered that the High Court Judge erred in how he dealt with the evidence in terms of causation, the setting aside of expert evidence and in his use of District Court sentencing notes. The Court concluded that it was open to the District Court Judge to come to the view she did of Mr Wallace's conduct, and that it had not been shown that she was wrong. The District Court's judgment on liability was accordingly restored and the appeal allowed.

Turning to quantum, the Court identified six principles relevant to the reckoning of quantum in exemplary damages cases: whether the claimant was a victim of punishable behaviour; that there should be moderation in awards; the means of the parties; whether any other compensation has been awarded to the claimant in criminal or regulatory proceedings; that regard must be had to any criminal penalty imposed

on the defendant; and the conduct of the parties up to the date of judgment. Improper behaviour on the part of the complainant could reduce or even eliminate exemplary damages in some situations.

The Court also included a table listing the quantum of exemplary damages awards in New Zealand cases to date.

Defamation – Scope of defences of truth and honest opinion – Pleadings

In *Television New Zealand v Rodney David Haines and Ors* CA71/04 13 September 2005, the Court was asked to consider the validity of a defendant in defamation proceedings seeking to set up different, and lesser, meanings from those pleaded by the plaintiff, and then to prove the truth of those alternative meanings. It was also asked to consider whether a defendant can plead honest opinion to the meanings alleged by the plaintiff or whether it is restricted to applying the defence to the actual words broadcast.

On the first question, it was common ground that pleading different meanings to those of the plaintiff and seeking to justify the truth of those meanings was not permissible following *Broadcasting Corporation of New Zealand v Crush* [1986] 2 NZLR 234. The question was whether that case was good law following the enactment of s 8 of the Defamation Act 1992.

The Court concluded from an analysis of the legislative history of s 8 that no remedial response was intended in respect of the rule in *Crush*. It is insufficient for a defendant to suggest that even though the words are capable of bearing a defamatory meaning, they also bear a lesser meaning which may be proven to be true. This is because proving the truth of a lesser meaning would not have an effect on the defamatory meaning pleaded by the plaintiff.

On the second question, the Court concluded, following *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448, that it is not correct to say that the jury is required, in deciding whether the defence of honest opinion applies, to look only at the literal meaning of words or to look at the words devoid of the imputations which it is argued they convey or to consider the question of whether the imputations are conveyed as statements of opinion in a vacuum, devoid of the context in which they arise.

Negligence – Duties of care by public regulatory bodies – Leaky building syndrome

In *Attorney General v Body Corporate No 200200* CA30/05 1 December 2005 the Court struck out negligence claims against the Building Industry Authority ("BIA"). A major residential development suffered from leaky building syndrome. The plaintiff body corporate and proprietors sued the Attorney General on behalf of the Crown as the statutory successor to the liabilities of the Building Institute Authority. The plaintiffs alleged that the BIA owed a duty of care associated with the use of face fixed monolithic cladding systems over untreated timber, to supervise the approval of building certifiers, and in approving the insurance cover arrangements for the building certifiers. The issue at the strike out stage was whether the causes of action in negligence were so untenable that they could not possibly succeed.

The Court held that none of the alleged duties of care could be sustained. The relationship between the BIA and building owners was extremely limited, with the result that there was no proximity. The philosophy behind the statutory framework was that building owners should take responsibility for the conditions of the homes they bought. A duty of care would be inconsistent with the statutory framework and promote the type of official over-vigilance that the Act was designed to prevent. Statutory functions that involve quasi-judicial or legislative powers are not appropriately the subject of duties of care.

Leave to appeal to the Supreme Court has been sought.

Trade and Competition

Restrictive Covenants – Whether enforcement of restrictive covenant precluded by the Commerce Act 1986

In *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* (2005) 11 TCLR 278 the Court considered the enforceability of an encumbrance intended to prevent future meat industry use of a site. During the 1990s AFFCO had shut down a number of plants including one at Waitara. AFFCO sold the plant on terms which involved the registration of an encumbrance intended to prevent use in the meat industry. ANZCO was a downstream purchaser of the site and wanted to set up certain meat-related activities there. AFFCO successfully obtained an injunction restraining the plant from being set up.

This Court held that ANZCO's activities were covered by the injunction.

The majority held that the encumbrance did not have an anti-competitive purpose so as to fall foul of ss 27 and 28 of the Commerce Act 1986. William Young J, dissenting, held that the covenant was anti-competitive in its purpose. Unless the covenant was intended to cause a diminution in competition to a sufficient extent to makeup for the lower sale price there would be no economic benefit to AFFCO in the encumbrance.

Trade Practices – Contract Law – Whether marketing campaign breached the Door to Door Sales Act 1967

In *Commerce Commission v Telecom Mobile Limited* [2006] 1 NZLR 190 the Court considered an appeal and cross-appeal from a High Court decision finding a breach of the Door to Door Sales and Fair Trading Acts. There was a cross-appeal by Telecom Mobile against the decision of the High Court that a marketing campaign for cellphones had breached the Door to Door Sales Act and the Fair Trading Act and an appeal by the Commerce Commission against the High Court's refusal to order corrective advertising.

Telecom Mobile, through a third party, used telemarketers to cold call homeowners and run through a prepared script. If the homeowner gave a favourable response, a credit check was carried out and a cellphone package was couriered out. The seal on

the box stated, "[b]y breaking the seal on this phone box you agree that you have accepted this mobile phone…"

The key issue on which Telecom Mobile's appeal turned was whether the Door to Door Sales Act applied. The Act provided that where a credit agreement is "made at a place other than appropriate trade premises" the vendor is not entitled to enforce the agreement unless the requirements of that Act were satisfied. The question was whether the contract for the sale of the phones was made over the phone or at the buyer's home when the seal was broken. Telecom Mobile's case was that the contract was completed during the phone conversation subject to the credit check as a condition subsequent to contract. Telecom Mobile had not told its customers that their apparent obligations were not enforceable and had billed its customers in a way that asserted at least by implication that the obligations were enforceable.

The Court held that the discussions on the telephone were merely precursors to the completion of the contract. That was the only sensible way of explaining the documentation which accompanied the cellphones. Accordingly, the agreements were subject to the Door to Door Sales Act and therefore unenforceable because the safeguards of s 6 had not been complied with. Telecom Mobile accepted that, to the extent to which the contractual arrangements were subject to the Door to Door Sales Act, then its conduct in relation to those contracts was in breach of the Fair Trading Act. Telecom Mobile's appeal was therefore dismissed. The Court allowed the Commission's appeal and ordered that corrective advertising be made. In the Court's view, having seriously misled customers as to their rights, there was no basis upon which Telecom Mobile could legitimately cavil at dispelling the misinformation for which it was responsible.

The Supreme Court has granted leave to appeal.

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B IMPORTANT CRIMINAL CASES

Adequacy of Directions / Summing up

Non-direction on the use of similar fact evidence

In *R v MacDonald* CA166/04 16 March 2005 the Court held that the failure to give orthodox similar fact directions necessitated a re-trial.

The appellant was charged with sexual intercourse with a girl under the age of 16. Evidence had been given by a friend of the complainant that he had shown sexual familiarity towards her such as touching her inappropriately and kissing her on the lips.

The Judge did not give a similar fact direction to the jury but counsel had not taken the point. However, the Court held that in the absence of appropriate directions on the use of that evidence, a miscarriage of justice was occasioned.

Miscarriage of justice – Misdirection by Judge regarding facial mapping evidence

R v Knight & Johnston CA460/04, CA497/04 28 June 2005 were appeals against convictions for arson. The Court allowed the appeals.

The Crown case was that the appellants had committed arson by lighting accelerant that they had splashed along the frontage of the Manawatu Hotel and bottle store, causing extensive damage to the building.

Crown evidence included a tape from a security camera at the hotel which was said to show the appellant Johnston concealing the bucket at the Hotel and later retrieving it and splashing its contents along the frontage of the building. The tape was of very poor quality and was analysed by an expert, Mr McCourt. The evidence given by the expert witness assumed considerable prominence at trial. His evidence was contested by another expert on behalf of the defence. Both accused maintained throughout that they had nothing to do with the fire. Mr Knight was tried as a party to Mr Johnston's alleged offending.

On appeal the appellants submitted that there had been a miscarriage of justice on several grounds, but at the hearing attention was focused upon the content of Mr McCourt's evidence and the manner in which the Judge addressed it in summing up.

This Court was satisfied on the basis of the information in this case that facial mapping may be a valid means of assisting in identifying an alleged offender, and noted that Mr McCourt had adequately qualified himself to give such evidence. While the Court accepted that the evidence was of limited value in identifying the appellant Johnston as the offender, it held that the evidence was of sufficient probative value to justify it being put to a jury.

However, the Court was concerned about the absence in the Judge's summing up of a direction as to how the jury should use the evidence. The trial Judge gave a standard direction on expert evidence and identification evidence, but omitted to give a specific direction regarding Mr McCourt's evidence as to facial mapping. In sumarising the evidence given on behalf of the appellants, the Judge emphasised what the Crown accepted on appeal to be an incorrect characterisation of Mr McCourt's conclusions. The Court felt that it was particularly important that proper assistance be given by the Judge in this case as the evidence was crucial to the identification of Mr Johnston as the offender, and Mr McCourt's methodology and conclusions were challenged by the defence's expert witness. The Court said that the Judge should have referred particularly to the explanation given by Mr McCourt and the defence expert witness' challenge to Mr McCourt's methodology and conclusions.

The Court allowed the appeals and ordered re-trials.

Manslaughter – Jury direction on onus of proof in self-defence – Real risk of misunderstanding

In *R v Kingi* CA122/05 10 August 2005, Mr Kingi appealed his conviction for the manslaughter of his uncle and his sentence of two and a half years imprisonment. His uncle had died of injuries sustained when Mr Kingi punched him once with a closed fist on the jaw, causing him to fall backwards, hitting the back of his head on a concrete floor. Mr Kingi was a professional K1 boxer.

Mr Kingi argued that the trial Judge's summing up to the jury on self defence in general was insufficient or amounted to a misdirection. In addition, and more particularly, counsel objected to the use of the phrase that the strength of the blow administered by Mr Kingi "is relevant to whether the defence that the accused was acting in self defence of himself is made out or not." He also sought leave to adduce fresh evidence relating to the credibility of certain Crown witnesses.

The Court found that the trial Judge gave clear general directions on the law relating to self defence and related those directions to the facts of the case. However, the Judge had failed to repeat or allude to the directions on onus of proof when discussing the facts. In particular, the jury were not directed on what to do if they were unsure of any aspect of Mr Kingi's evidence. More significantly, the Court considered that the phrase including the words "made out or not" could have suggested to the jury that their task was to make a simple choice between Crown and defence contentions. While this misdirection needed to be looked at in the context of the very clear, correct and repeated directions on onus of proof, there was a significant risk that the jury misunderstood where the onus lay, particularly as it was made in the discussion of factual issues to be determined. Furthermore, self defence was the only issue at trial.

The Court concluded that the misdirection led to a material risk of a miscarriage of justice. The appeal against conviction was allowed and a retrial ordered. Accordingly, the fresh evidence point did not need to be considered as it could be led at the retrial.

Requirements for directions

In *R v Mitchell* CA327/05 31 October 2005 the Court considered the requirements for jury directions in a criminal trial in somewhat unusual circumstances.

During trial, a decision was taken to place before the jury evidence as to the defendant's "police phobia", which necessarily involved saying something as to the circumstances out of which that phobia had arisen. This, in turn, necessitated evidence being led of Ms Mitchell's prior history of "misconduct", which consisted of prior arrests, but not convictions.

On appeal it was contended that the Judge's directions as to the use which could legitimately be made of this evidence were insufficient. The appellant contended that there should have been a specific direction against improper propensity reasoning. Instead, the Judge made a general direction that the jury must "put aside any feelings of prejudice or sympathy one way or another in this case, and just arrive at your verdict by dispassionately and analytically considering the evidence that you have heard".

The Court commented that it was unfortunate that the Judge did not see counsel briefly before summing up as to what, if anything, counsel considered should be said about the "misconduct" and "phobia" evidence. That judicial practice is a salutary one in difficult or unusual cases (which this was), and can lead to the avoidance of subsequent attacks on jury verdicts.

The Court noted that this was not a case in which previous "convictions" as such were led, which would undoubtedly call for a firm direction against propensity reasoning. Overall the situation in which this evidence was adduced was unusual. The difficulty was that the evidence was capable of leaving the jury, or some members of it, with a view that "she has done this sort of thing before, and this is just serial behaviour". Indeed, the Crown took advantage of what had been said in closing as to these past events. Further, as a matter of balance, there were things that needed also to be said for the Crown.

The Court reaffirmed its previous comments that a summing up must be tailored to the instant case and the real issue the jury is faced with. In this case, the directions fell short of what was required. The result would normally be a retrial, but the Court considered that this was patently a case for the application of the proviso to s 385 of the Crimes Act 1961.

Defences

Provocation by a third party

R v Turaki [2005] 3 NZLR 329 was an appeal from a murder conviction on the basis that the trial Judge erred by not permitting the defence of provocation to be left to the jury.

Mr Turaki attended a party with two others (also charged with the murder). The victim was part of a group who, after a confrontation, returned equipped with various weapons to retaliate. One of the retaliating party struck Mr Turaki's friend, leaving him unconscious and bleeding. Mr Turaki picked up a piece of wood and chased the other group. The victim was struck several times by Mr Turaki and both the co-accused. The trial Judge refused to permit the defence of provocation under s 169 of the Crimes Act 1961 to be left to the jury and Mr Turaki was convicted of murder. Mr Turaki appealed to this Court.

The Court held that at common law provocation had to emanate from the victim. Under s 169(6) of the Crimes Act 1961 there was no distinction made between those who actually committed the provocation and those who were parties to it. However, there needed to be a close relationship in time, place and circumstance between the conduct of the third party and of the victim. The question under s 169(2)(a) then was whether the provocation emanating from the victim, or reasonably thought by the accused to have emanated from the victim, could be seen by a reasonable jury as sufficient to deprive an ordinary person of the power of self-control.

The Court saw no reason why, under s 169, an attack on a friend could not be capable of amounting to provocation. In principle there is no reason why any act done in the presence of the accused should not suffice, provided it is in circumstances provocative to him or her and to an ordinary person.

The Court considered that there was an evidential basis for the defence of provocation to have been left to the jury. The Court held that the victim's conduct in being part of the armed supporting group was clearly very closely linked in time, place and circumstances to the actual attack on the partygoers and in particular that on Mr Turaki's friend. The connection becomes even stronger if the victim was or was reasonably thought to be armed and even stronger still if he was, or was reasonably thought to be, part of the subgroup. In the Court's view, the role the victim played clearly came within the principles articulated by the Court in *R v Su* CA407/00 5 July 2001 and the Australian authorities discussed in this judgment.

The Court considered that the trial Judge was wrong in not leaving the partial defence of provocation with the jury. The appeal was accordingly allowed, the conviction quashed and a retrial ordered.

Elements of Offences

Money laundering – Proceeds of a serious offence

R v Allison CA20/05 15 August 2005 was an unsuccessful appeal by Mr Allison against a conviction for money laundering.

Mr Allison was convicted in the High Court of money laundering and, in a separate trial, of various charges relating to manufacture of methamphetamine. The High Court Judge found that the possession of methamphetamine was a sufficiently serious offence upon which to base the money laundering charge.

Mr Allison submitted on appeal that the Judge had erred in finding that Crown had proved beyond reasonable doubt that the cash involved in the first money laundering count was the proceeds of a serious offence.

The Court held that there was no need for the Crown to prove an antecedent discrete serious offence before an accused can be found guilty of an offence under s 257A(2) Crimes Act 1961. Proof that property is the proceeds of a serious offence can be by inferences properly drawn from evidence. There was evidence available upon which the High Court Judge was entitled to conclude that the property was proceeds of a serious offence. The appeal was dismissed.

The Supreme Court refused leave to appeal.

Unlawful stupefication – Meaning of "stupefies" – Consent in sexual violation cases

R v Sturm [2005] 3 NZLR 252 was an appeal by Mr Sturm against convictions for sexual offending and an appeal by the Crown by way of case stated from the High Court as to the meaning of "stupefied" in s 191 of the Crimes Act 1961.

In October 2003 Mr Sturm was arraigned in the High Court at Auckland for trial by jury. He pleaded guilty to eight counts of supplying the class B controlled drugs known as ecstasy and speed. He pleaded not guilty to six charges under s 191 of the Crimes Act 1961 of unlawfully stupefying with intent to facilitate the commission of a crime. The Crown alleged that Mr Sturm stupefied each of the four male complainants in order to facilitate the commission by him of sexual violations or indecencies with those complainants.

At the close of the defence case, defence counsel made an application under s 347 of the Act for orders discharging Mr Sturm on the counts of unlawful stupefaction upon the grounds that the evidence did not show that any of the complainants were stupefied. The trial Judge made a determination as to the meaning of "stupefies" in terms of s 191 and reserved a question of law for this Court. He then directed the jury to return verdicts of not guilty on the stupefying charges.

The jury convicted Mr Sturm on ten other counts relating to sexual activities with the four complainants. Mr Sturm appealed against those convictions on various grounds, including the trial Judge's directions on similar fact evidence and his directions as to a defence of belief on reasonable grounds of the existence of consent to sexual connection.

The question of law reserved for the Court was as follows: "Where a person is charged with stupefying another with intent to facilitate the commission of a crime pursuant to s 191 of the Crimes Act 1961, is the Crown required to prove that the victim was placed into a "stupor" in so far as that term is generally understood within medicine and medical science?"

On appeal, this Court answered the question on the case stated in the negative. It allowed the Crown appeal in respect of the case stated, and set aside the directed verdicts of acquittal. The Court said that the Crown is required to prove that an

accused, with any of the intents specified in s 191(1)(a) or (b) or (c), has deliberately done something which has caused on the mind or nervous system of another person an effect which really seriously interfered with that person's mental or physical ability to act in any way which might hinder an intended crime. Whether any such interference was "really serious" was a matter of fact and degree for the jury or other trier of fact to determine.

On Mr Sturm's appeal as to the trial Judge's directions on similar fact evidence, the Court found that the direction left it open to the jury to apply illegitimate "propensity" reasoning.

On Mr Sturm's appeal as to consent on the sexual violation charges, the Court said that proof that the influence of liquor or drugs had a disinhibiting effect was not necessarily incompatible with consent but was a question of degree. Where the issue was whether the complainant's ability to form an informed and voluntary consent was impaired by the effect of drugs, a jury would be assisted by a direction that it was open to them to convict if they were satisfied beyond reasonable doubt that, in respect of any particular count:

(a) the accused had administered or provided the drug;
(b) with the intention it would induce in the complainant receptiveness to engaging in sexual activity with the accused;
(c) which the accused knew the complainant would not otherwise have engaged in; and
(d) the complainant had not taken the drug voluntarily and with awareness that it was likely to lead to sexual activity with the accused.

The Court allowed Mr Sturm's appeal against the sexual violation convictions and quashed those convictions.

The Court ordered a new trial on all counts.

Offensive behaviour in a public place – Covert photography

In *R v Rowe* [2005] 2 NZLR 833 the appellant surreptitiously photographed high school girls from within a curtained vehicle which was parked near the school gates. The appellant was observed by a police constable and the girls were not aware that they were being photographed. The question considered by the Court was whether, in these circumstances, the appellant was guilty of offensive behaviour in a public place.

The Court considered three questions. The first was whether it was permissible to have regard to course of conduct evidence in order to reach the conclusion that Mr Rowe's behaviour was offensive. The Court said that when evaluating whether Mr Rowe's conduct was offensive the Court was not entitled to have regard to the circumstance that it was an incident comprising part of a pattern of conduct: the Court could only consider the conduct on the day in question. However the purpose of the conduct could be relevant if it is a purpose that is discernible from the conduct. The Court said that in Mr Rowe's case the furtive or covert nature of the behaviour spoke for itself.

The second question the Court considered was whether the behaviour on the particular day was offensive in itself. A majority of the Court found that Mr Rowe's conduct was offensive. The majority said that Mr Rowe's actions were evidently furtive, that legitimate purpose was patently absent and that the furtive targeting of school girls was particularly pertinent. The minority member of the Court took the view that while there were grounds for concern about Mr Rowe's conduct, it was not such as to meet the test for offensive behaviour. The Judge did not accept that upon an objective assessment of all the circumstances on the relevant day it was open to conclude that the photographs were taken without legitimate purpose. He said that had the photographer for example been a police officer for the purposes of a criminal investigation the observable behaviour would have been the same.

The third question considered by the Court was whether Mr Rowe's behaviour was readily observable. Counsel for Mr Rowe argued that Mr Rowe's behaviour, however classified, did not have the necessary potential to cause serious offence because it was not observable. The Court held that it was enough that one person, the police constable, was able to observe the relevant conduct. The constable's evidence established that the behaviour was observable, albeit with difficulty.

The majority was thus satisfied that the relevant offence was committed.

The Supreme Court refused leave to appeal.

Fraudulent use of a document – Meaning of "use" in s 229A(b) Crimes Act 1961 – Effect of televising proceedings

In *R v Thompson* [2005] 3 NZLR 577, the Court was required to determine whether the actus reus in s 229A(b) of the Crimes Act 1961, namely using a document for the purpose of obtaining pecuniary advantage, could be satisifed where the accused induces a person to make a payment for the accused's benefit, and the dupe elects to execute a cheque as the means of transferring funds to a bank.

Mr Thompson had in effect induced the complainant himself to use the document. The Court found that this did not come within the ambit of the relevant provision. The actus reus of s 229A(b) is the use by the accused of a document capable of being used to obtain pecuniary advantage by another. The mens rea is the intention of the accused to defraud another. Mr Thompson did not personally or by an agent use the documents. Rather, he induced the complainant to use the document.

However, rather than allow the appeal, the Court exercised its discretion under s 386 of the Crimes Act to substitute convictions under s 246(1) of the Crimes Act.

An alternative ground of appeal, namely that the televising of the trial denied Mr Thompson a fair trial, was rejected. Counsel argued that the jury would have known that the media were particularly interested in the accused, as he was a convicted fraudster, rather than the charges, which were otherwise unremarkable. The Court found that television in the court room is now a regular feature of the juridical landscape and the bare fact of its presence could not lead to a miscarriage of justice.

The Supreme Court refused leave to appeal.

Evidence

Section 344A application to exclude evidence – interception warrants

R v Darwish CA190/05 9 November 2005 concerned the validity of an interception warrant issued under s 14 of the Misuse of Drugs Amendment Act 1978. The warrant related to Mr Darwish and authorised the police to use a listening device to intercept his private communications.

Mr Darwish's lawyer argued that the evidence derived from the first interception warrant was inadmissible because the warrant was "a nullity" as it failed to give Mr Darwish's address. The Crown therefore made a s 344A application to the High Court for an order that the disputed evidence was admissible at the trial.

In the High Court, Winkelmann J held that the warrant was defective because it did not specify Mr Darwish's address, and that s 25(1) of the Misuse of Drugs Amendment Act 1978 was relevant. Section 25(1) provides that any evidence derived from an unlawful telephone tap is inadmissible. However, the Judge held that the defect was not one of substance but merely a defect in form, so that the s 25(2) conditions were satisfied. The evidence was ruled admissible in respect of "drug dealing offences" and "prescribed cannabis offences", both terms defined in the legislation. The effect of the High Court decision was that evidence derived from the first interception warrant would be admissible with respect to the one charge of conspiracy to export cannabis, but inadmissible in relation to the rest of the charges facing Mr Darwish.

The Crown sought leave to appeal. It contended that the first interception warrant was valid and that evidence obtained pursuant to it was admissible with respect to the case in general.

On appeal, the Court considered s 14 of the 1978 Act which provides for the making of an application for an interception warrant. The Court did not accept Winkelmann J's conclusion that the first interception warrant was invalid or defective in any way. The Court said that s 14(2)(c), and its mirror provision in s 16, make it clear that the application for a personal warrant must specify an address only if it is known. In this case there was evidence that the police did not know where Mr Darwish was living at the date of the application. To hold that the police cannot get a warrant unless they know both the name and address would be to ignore the words "if known" in s 14(2)(c), which qualify only "address", and not "name and address". If the police do not know the name of the suspect, then obviously they will not apply for a personal warrant. In those circumstances, they will be able (at best) to get only a premises warrant.

The Court further commented that it is clear that the address (if known) is included in a personal warrant solely for identification purposes; there is no suggestion in the legislation that the police are limited, in the case of personal warrants, to intercepting communications of the suspect only at his or her stated address.

The Court allowed the appeal and declared the evidence derived from the first interception warrant admissible.

Appeal against s 344A order admitting evidence – Confession made by prisoner in custody – Effect of agreement between defence counsel and police for no communication with prisoner without counsel's presence

R v Rogers CA291/05 27 October 2005 was an appeal against a pre-trial ruling under s 344A of the Crimes Act 1961 upholding the admissibility of evidence obtained by the police after the arrest of the accused for murder.

Rogers, whilst in custody on a charge of murder, indicated that he wished to co-operate with police. His counsel requested that the police not have any communication with Rogers without counsel first being notified. In defiance of this request, the police, with the assistance of a relative of Rogers, obtained his permission for them to take him to Northland where they videotaped a full reconstruction and confession to the murder charge.

The Court found that an agreement existed between police and defence counsel evidenced by counsel's request and the conduct of the police in assuring that it would be complied with.

The Court also concluded that there had not been an informed waiver by Rogers of his rights. He had at no stage been told of the agreement between counsel and police. Given his position of distinct vulnerability, the absence of full information from which he could make an informed waiver led to the conclusion that the Crown had not discharged its onus of establishing that an informed waiver had been freely given.

This amounted to a breach of Rogers' rights to silence and counsel. Having undertaken a *Shaheed* analysis of the circumstances of the case, the Court was satisfied that the evidence of police interviews and the involvement of Rogers in a reconstruction could not be led at the trial.

Fingerprint evidence – Buisson *methodology and directions inapplicable but ordinary principles of expert evidence apply – Experts must give reasons for their conclusions*

In *R v Carter* CA155/05 19 December 2005, the Court discussed the approach towards fingerprint evidence. The only evidence linking Mr Carter to the offences against the Misuse of Drugs Act 1975 related to fingerprints on a methamphetamine recipe found at the relevant address. One of Mr Carter's grounds of appeal against conviction was that the expert evidence of fingerprint analysis should not have been admitted or that the Judge should have warned the jury to be cautious about relying on fingerprint evidence alone.

Earlier, the Court in *R v Buisson* [1990] 2 NZLR 542 considered the nature of fingerprint evidence and held that there was no rule that an opinion based on less than twelve points or characteristics was inadmissible. The Court held, however, that the Judge should warn the jury that the 12 point standard has normally been followed in New Zealand and that they should be cautious before convicting on fingerprint evidence of a lesser standard alone.

The Court accepted that new methodology relating to fingerprint evidence had developed since *Buisson*. Relevant guidelines now identify a four-step process, involving analysis, comparison, evaluation and verification, to determine whether a fingerprint can be matched to a particular person. The Court held that the need for a judicial caution of the type mentioned in *Buisson* has been overtaken by the developments in fingerprinting techniques.

The Court held, however, that evidence linking a fingerprint to a particular person is expert evidence and that, in accordance with the ordinary rules regulating such evidence, expert evidence given to reflect an approach consistent with the guidelines must identify the steps undertaken in the process of analysis and the major factors that influenced the expert to reach the opinion expressed. In this case, the expert's evidence fell short of what was necessary to provide a basis for his opinion. Although he explained the methodology employed and the need for individual identification by an expert, he failed to explain the major factors (other than reliance on peer review) that led him to the view that the fingerprint could be identified as Mr Carter's.

The Court considered that it had been open to counsel for Mr Cater to ask the jury to place no reliance on the expert's evidence because of the absence of any reasons to justify the opinion reached. However, as counsel made no reference to this, the Court held that it was open to the Judge to decide that the standard direction on expert evidence, rather than a direction tailored to the specific fingerprint evidence given, was all that was required. It was then for the jury to determine what weight ought to be given to the evidence. The appeal against conviction was accordingly dismissed.

Admissibility of evidence as to sexual experience of complainant in rape trial

In *R v M* CA292/05 13 October 2005, M appealed from a decision in the District Court dismissing an application under s 23A of the Evidence Act for leave to cross-examine the complainant as to the sexual experience of the complainant with her boyfriend.

The Crown had charged M with indecent assault, alleging that M had, in the early hours of the morning, approached the complainant who was asleep in a vehicle, got into the back seat with her, forced her skirt up around her waist, pushed her underwear to the side and pulled down his trousers with a view to having sex with her. The accused's case was that at the car he invited the complainant to engage in sexual activity and he believed she consented, but that he did not touch her. His contention was that she had lifted up her skirt and pushed her underwear to one side to allow this to occur.

A witness had been told by the complainant that she thought her boyfriend had been in the back of the car, that the person she thought was her boyfriend had told her to put her leg up on the seat, and that she had done so in that belief. The boyfriend had also acknowledged that he had had sex with the complainant at a function at about 8pm that night.

M argued that the preparedness of the complainant to have sex with her boyfriend at the function was substantially supportive of M's account that it was the complainant

who had moved the clothing to prepare for sexual intercourse with (as she believed) her boyfriend.

The Court stated that while s 23A must be given due effect in the manner stated by the Court in *R v Uiti* [1983] NZLR 532; *R v McLintock* [1986] 2 NZLR 99 and *R v Duncan* [1992] 1 NZLR 528 the Court must exercise discretion in favour of leave where the conditions of subs (3) are satisfied. Failure to do so will risk breach of the absolute right to a fair hearing confirmed by s 25(a) of the New Zealand Bill of Rights Act 1990: see *R v A (No 2)* [2002] 1 AC 45.

The evidence of the complainant's sexual relations with her boyfriend earlier in the evening in the environs of the same social function was closely linked with her moving her leg to facilitate sexual intercourse. Each was of direct relevance to the factual issue in the case – who moved the complainant's clothing. The Court was satisfied that to exclude questioning to establish the fact of such intercourse with the boyfriend would deprive the appellant of evidence potentially vital to that issue and would, in terms of s 23A, be contrary to the interests of justice.

Leave to cross-examine the complainant as to her having sexual intercourse with her boyfriend at that time was accordingly granted.

Right to silence – Evidence, submissions and summing up improper

In *R v T* CA255/05 24 November 2005, T had been convicted of three charges of indecent assault of a girl under 12 and one charge of sexual violation by unlawful sexual connection. In police inquiries, T had exercised his right to silence, acting on legal advice he had earlier obtained. He had also been asked if he wanted to see the complainant's video-interview to hear the allegations that had been made against him. He declined.

At trial the prosecutor had questioned police witnesses about T's exercise of the right to silence and his refusal to hear the allegations made against him. This became the subject of comments in the prosecutor's closing address to the effect that T had refused the opportunity to hear the allegations made against him because he knew what he would see and hear because he knew what he had done.

The Court found that the comments of the prosecutor were improper, had not been corrected in summing up by the trial Judge, and thus breached T's right to silence. There could be no room for degrees or gradations of the right to silence as it stands in New Zealand. The examination in chief of the Detective should not have occurred. It was an intolerable position for defence counsel to have to cope with given that cross-examination to rectify the matter only succeeds in drawing more attention to it. While the Judge could have rectified the matter by careful and judicious direction, the situation became irreparable with the prosecutor's use of the material in closing and the Judge's lack of criticism in summing up.

T also argued that comments made by the prosecutor in closing suggested to the jury that T had an onus of proof and constituted an adverse comment on the failure of the accused to give evidence contrary to s 366(1) of the Crimes Act 1961. The Court agreed that the prosecutor's comment had suggested to the jury that the onus had been

on the defence to call particular witnesses and called for the jury to speculate as to what the evidence of those witnesses would have been. It had also breached s 366(1) of the Crimes Act.

The convictions were quashed and a new trial ordered.

Evidence – Cutthroat defence – Admissibility of third party confessions

In *R v Wilding* CA104/05 19 May 2005 the Court considered the admissibility of off the record discussions by a co-defendant at the instance of the other co-defendant .

Both Mr Wilding and Mr McKenzie were charged with murder. At trial, both defendants will run cutthroat defences, each asserting that the murder was committed by the other. Mr McKenzie made a statement "off the record" to a detective asserting that he had killed the victim alone. Mr McKenzie accused Mr Wilding of the murder in a video interview. Mr Wilding wished to lead evidence of Mr McKenzie's admission through the detective even if Mr McKenzie does not give evidence. The Crown recognised that it would not be appropriate for it to seek to admit the evidence.

Different issues arise where a co-accused seeks to lead evidence of an admission, as opposed to the Crown. The fairness issue falls to be determined not just between the Crown and Mr McKenzie but rather between the Crown and Messrs McKenzie and Wilidng. Mr McKenzie ought not to be permitted to launch a full scale attack on Mr Wilding in terms of his role in the offending, free of the inconvenience of what he told the detective.

That decision was subject to any ruling by the trial Judge as to whether the discussion might be otherwise inadmissible by reason of potential involuntariness.

Evidence – Agent provocateur

In *R v Karalus* (2005) 21 CRNZ 728 the Court allowed an appeal by the Solicitor-General to admit evidence of a private investigator, hired by an employer, who had made an evidential purchase of drugs from the employee defendant. The Court considered that the fact that the private investigator was a private individual and not a State agent is not inconsistent with the jurisdiction to exclude the evidence if a prosecution would be an abuse of process or an affront to public conscience. Given that the powers of the State are necessarily engaged by the criminal process, it is not desirable for the Courts to adopt a completely hands-off approach. The entrapment of someone who was not predisposed to commit a crime would be equally unacceptable if carried out by a private agent provocateur. The inquiry should focus on the circumstances of the case as to whether the prosecution would be an abuse of process or an affront to public conscience. The policy concerns were not, however, engaged by the facts of the case. The defendant displayed his willingness to have and sell cannabis at the employer's premises. Further, he acknowledged selling cannabis to another worker on another occasion.

Search warrants – Solicitors' offices - Serious Fraud Office Act 1990

In *The Director of the Serious Fraud Office v A Firm of Solicitors and the District Court at Auckland* CA108/04 16 August 2005 the Court considered a number of issues about the power of search under the Serious Fraud Office Act 1990 (the Act) where the premises being searched are the offices of a law firm. In particular the case required consideration of the need to protect legal professional privilege attaching to documents and data held by the firm subject to search.

The Court considered a number of issues. First, the Court held that the Director ought to have disclosed to the issuing Judge that the solicitors of the firm in question had accepted that they had documents relevant to the inquiry in their control, and that they had agreed to co-operate, and that the failure to disclose such details to the issuing Judge constituted a material non-disclosure. The application for a search warrant under the Act was ex parte and the required the party making the application to provide "all facts which could reasonably be regarded as relevant" to the task of the issuing Judge.

Second, the Court considered that ss 9 (under which the Director can require certain persons to provide information and/or documents relevant to the investigation to the Director) and 10 (under which the Director may apply to a Judge of the High Court or the District Court for a search warrant) of the Act were alternatives designed to deal with different situations: the s 10 procedure will be appropriate when the s 9 process has been or will be inadequate. Each must be considered, but neither is a last resort.

Third, the Court, in forming a different view than the High Court Judge and Thomas J in the earlier case of *Hawkins v Sturt* (1990) 5 NZCLC 66,606, said that a warrant must be as specific as possible in the circumstances. The Court said that on the facts of the case it was possible for the Serious Fraud Office ("SFO") to narrow the ambit of the search in a way which would have excluded the vast bulk of documents and data held by the firm: the proposed search should have been narrowed to exclude from its scope irrelevant and privileged material.

The Court next dealt with the issue of legal professional privilege. The Court said that, in principle, it was possible to agree to a law firm's computer hard drive being cloned on site or to the removal of the computer hard drive for cloning off site, subject to appropriate conditions that protected privilege. The Court discussed when and when it would not be appropriate to take such a step and discussed in what circumstances an issuing Judge could issue such a warrant. The Court said that in view of the intrusiveness of the cloning procedure the issuing Judge would need clear evidence that no practical alternative existed and would be obliged to ensure that the conditions subject to which these actions could be undertaken were adequate to achieve the objectives. In that regard the Court noted that the conditions attaching to *Anton Piller* orders in the civil jurisdiction may provide guidance. It would be necessary to ensure that the cloning exercise, and the subsequent extraction of evidential material, was undertaken by an appropriately qualified and independent expert. The Court said that it may be that the process should be supervised by the issuing Judge or a person appointed by the issuing Judge for the purpose.

The Court also considered s 22 of the Act. Under s 22 the automatic consequence of a Judge's ruling that a search warrant was unlawful and the warrant itself was invalid is that the files taken from the firm must be returned, and the cloned computer information destroyed. An application by the Director to vary the automatic statutory consequence of the finding of invalidity of the warrant was made pursuant to s 22(2)(b), and, if granted, would allow the SFO to retain the fruits of the search made pursuant to the invalid warrant. Section 22(2)(b) contemplates that such an order will be subject to terms and conditions imposed by the Court. The Court said that it was incumbent on the Director to put forward to the Court suggested terms and conditions which the Court may impose under s 22(2)(b) if the Director's application succeeds. For a number of reasons the application had not been conclusively dealt with in the High Court proceedings and as such the Court referred the matter back to the High Court for determination.

The Court went on to briefly deal with the appellant's claim that the search and mode of execution of the search were unreasonable, but found that it was not necessary or wise (given such a finding may preempt the s 22 issue) to rule on reasonableness. The Court then gave some guidance on how the SFO and issuing judge should go about matters in the future.

DNA evidence – Whether permissible for experts to explain significance of results in words, as opposed to random occurrence ratio

In *R v L* CA334/04 1 November 2005, the accused had been convicted of sexual violation by rape. The Crown case hinged on the analysis of DNA from semen in soil collected from the crime scene, in stains in the arch of the sole of one of the complainant's shoes, and in the front of the waistband of the complainant's underpants.

Mr L appealed his conviction on the basis that the expert witnesses had gone beyond the permissible in explaining in words the DNA evidence in the form of the random occurrence ratio as being "extremely strong scientific support" that the DNA matched that of Mr L. This was said to be contrary to the principle that it is for the jury, not the person giving the evidence, to assess its significance in light of all the other evidence.

The Court did not accept this submission. Providing that it is done in a scientifically disciplined way, such explanations of the mathematical probabilities can only be regarded as helpful to a jury. It explains the random occurrence ratio in a readily understandable way, lessening the chance of the jury speculating about its significance.

The Court also rejected a submission that the evidence based on the a "Low Copy Number DNA analysis" was unreliable. It was the first trial in New Zealand in which this method of analysis had been used. Research showed that the LCN technique has general acceptance in the British criminal courts.

The appeal was accordingly dismissed.

Similar fact evidence - Admissions following severance

R v K CA162/05 18 July 2005 concerned pre-trial rulings relating to the re-trial of the appellant on charges of rape, sexual violation by unlawful sexual connection with children, indecent assault on a boy under 12 years old, and inducing an indecent act by a boy under 12 years old.

The High Court Judge ruled that, following severance between complainants, similar fact evidence from one complainant (B) could be introduced by the Crown at a trial concerning allegations relating to another complainant (M). The Judge ruled that admissions made to probation officers and doctors in relation to an earlier sentencing were admissible at the re-trial.

In relation to the similar fact evidence, this Court found that there was insufficient similarity of facts shown. Some of the allegations by B and some of the allegations by M concerned different actions by the accused towards children of different genders where the dissimilarities outweighed the similarities.

The Court allowed the appeal to the extent of reversing the ruling concerning B's evidence in a trial relating to complainant M's allegations, but dismissed the appeal in relation to the ruling that evidence of admissions made by the appellant to a probation officer, a psychiatrist and a psychologist was admissible at the intended re-trial.

Admissibility of evidence – Alleged breach of New Zealand Bill of Rights Act 1990

R v H CA310/04 21 April 2005 was an appeal against pre-trial rulings pursuant to s 344A Crimes Act 1961.

The appellant was awaiting trial on an indictment alleging three counts of kidnapping and nine counts of sexual offending, all of which related to three girls, each of whom was either seven or eight years old at the time of the alleged offences.

First, the appellant challenged the admissibility of a statement he made to a police officer, on the basis that it was obtained in breach of his rights under s 23(1)(b) of the New Zealand Bill of Rights Act 1990. The appellant contended that he had not heard and understood his rights on the basis that the right to consult and instruct a lawyer could not effectively be exercised whilst one was handcuffed and in a police car.

This Court was not persuaded that the Judge was wrong to conclude that the appellant was informed of his right to silence and to consult and instruct a lawyer, and was aware of those rights.

Secondly, the appellant challenged the admission of a blood sample and DNA analysis. The District Court Judge found that the procedures in relation to a request for a DNA sample from the suspect were lacking in the following respects: the police officer did not have reasonable grounds to believe that the analysis of the sample intended to be taken would tend to confirm or disprove the appellant's involvement in the commission of the offence believed to have been committed by the appellant; the samples were taken in contravention of s 52(1)(a) of the Criminal Investigations (Blood Samples) Act 1995 in that the police officer accompanying the appellant was

female and the appellant was a male; and that in the process of attempting to assemble and deal with the manifold forms stipulated by the statutory scheme, the police officer omitted to hand the appellant a form required to be handed to him pursuant to s 33(b) of the 1995 Act. Although the Judge found the taking of the blood sample to be unreasonable in terms of s 21 of the Bill of Rights, after undertaking a *R v Shaheed* balancing exercise, he concluded the evidence should be admitted.

In relation to the DNA evidence, this Court agreed with the Judge's conclusion that non-compliance with several of the various prescribed requirements of the 1995 Act amounted to an unreasonable search and seizure. The Court commented that the significance of compliance had been emphasised by cases such as *Shaheed*, and noted that the legislature had laid down a strict and complex regime to regulate the intrusion of privacy inherent in the taking of bodily samples for forensic analysis. Where the legislature had mandated that such samples be taken in accordance with stipulated procedures, it was a small step, and one readily taken by the Courts, to acknowledge that the right to use such evidence was dependent upon compliance in the obtaining of the sample. The Judge was right to turn to the question of balancing.

The Court then applied the *Shaheed* balancing test. As a majority of the Court held in *Shaheed*, whilst there was an undoubted and significant public interest in the admission of evidence of considerable cogency in relation to the identification of a child molester, there was not only the private interest of the appellant but the public interest in the observance of a statutory regime which imposed a close discipline on a form of search and seizure involving a significant intrusion into personal privacy. In this case, the public and private interest in vindicating the right not to be unreasonably searched outweighed the public interest in the admission of the evidence.

The Court granted leave to appeal and allowed the appeal in part so that evidence of the DNA sample and matching was declared inadmissible.

Procedure

Attempting to defeat the course of justice – Findings of fact in verdict by Judge alone

In *R v Meyrick* CA513/04 14 June 2005 the Court set aside a conviction for attempting to defeat the course of justice which had been entered by a Judge sitting alone. The appellant had driven from Hamilton to Auckland to recover a computer tower from his daughter's house. The police had previously executed search warrants at the appellant's house. When the police executed a search warrant at his daughter's house at 10:30 that morning, the appellant had already retrieved the computer tower (which was never recovered).

The Court noted that the judgment of a Judge sitting alone is, in effect, a verdict. Although it is traditional for Judges giving judgment in judge alone criminal trials to give short-form judgments, it is fundamental that the Judge identifies the findings which are critical to that guilty verdict. In this case, the Judge had not done so. It was not clear whether the Judge had concluded that the appellant knew that a search warrant was to be executed at 10:30 am. The impression of the Court was that the Judge had not drawn such an inference, and the Court would have expected such a significant finding to be expressed if made. The appeal had to be determined on the

basis of the Judge's findings of fact made at the time he delivered his verdict and the Court needed to put to one side what the Judge said when sentencing the appellant. The Judge made no finding as to whether the computer tower had evidential significance.

If the appellant had known that the police had a search warrant and intended to seize the computer tower pursuant to that search warrant, the Court considered that a conviction would probably have been well founded. However, knowledge of the warrant would not have been a prerequisite to liability. If he knew or recognised that the computer tower had likely evidential significance then he might also be liable. However the Crown never attempted to demonstrate that the computer tower did have or could have had any evidential significance. In those circumstances the appeal was allowed and a retrial directed.

Severance – Appropriateness

R v S CA323/05 3 November 2005 was a Solicitor-General appeal against a pre-trial severance ruling. S was charged with a count of threatening to kill a child, the offence allegedly occurring shortly before an alleged rape of the child's mother. The Court held that the count of threatening to kill was closely connected to other counts in terms of time, place and circumstance and probative in relation to consent/belief of consent in relation to the rape charge. The appeal was accordingly allowed.

The Court made some observations on severance principles. The Court cited *R v* W [1995] 1 NZLR 548 (CA) for the principle that where the allegations are interwoven or interconnected, the desirability of presenting the case on a realistic rather than an artificial basis will usually point against severance. The Court said that "interconnectedness provides the basis". The jury will necessarily be told of the need to reach a separate verdict on each charge and not to reason that guilty on one charge translates to guilt on another, since propensity or bad character reasoning is not permitted.

Severance - Cross examination of complainants about previous convictions

R v W CA105/05 CA131/05 26 July 2005 concerned appeals against a District Court Judge's pre-trial rulings concerning cross-examination of complainants about previous convictions and severance.

The previous trial concerned allegations of sexual offending against three male complainants when they were aged between 12 and 16 years. W was acquitted on some charges and the jury was unable to reach agreement on other charges, in respect of which there was to be a retrial in relation of two of the complainants. The defence to the charges was that W had never behaved in a sexually untoward manner towards any of the complainants. The defence argued that evidence must have been fabricated and that the complainants had colluded in manufacturing the allegations. The Court held that ss 5, 12 and 13 of the Evidence Act 1908 applied and the pre-trial rulings concerning cross-examination of two complainants were allowed to the extent of granting leave to cross-examine both as to their previous convictions. The appeal against refusal to order separate trials in relation to each of complainants was dismissed.

Possession of cannabis – Two separate quantities – No requirement of separate counts in indictment

R v Booth CA109/05 18 July 2005 concerned an appeal against conviction and sentence for one count of possession of cannabis for supply. Mr Booth was sentenced to five years imprisonment for the offence. The single feature of the case was that two separate and distinct quantities of cannabis were found by police at the appellant's address. Mr Booth acknowledged that the smaller of the two quantities was his but stated that it was for his own personal use. He disavowed any connection to a much larger amount found.

The Judge did not direct the jury that they must be satisfied unanimously about the extent of the possession of cannabis, that is, whether he had in his possession only the smaller quantity or also the larger quantity. In sentencing the Judge considered that while it was a theoretical possibility that the jury reached its verdict solely on the basis of Mr Booth's possession of the smaller amount, this did not accord with the realities of the case. The sentence was, therefore, based on possession of the larger amount as well.

The Court concluded that the indictment was not in error for duplicity. The case did not call for two separate counts relating to the two quantities of cannabis. On the facts of this case, for the purposes of ss 329(4) and 329(6) of the Crimes Act 1961, the allegation of possession of cannabis for supply was a single transaction sufficiently identified by a single count.

The Court also concluded that while the Judge did not make a specific direction about the need for unanimity as to the alternative factual bases relied upon by the Crown, there is no inflexible rule requiring such a direction and in most cases it will be evident from the general direction that such agreement is required. There was, on the facts of the case, no appreciable risk that the same factual foundation was not accepted by all jurors.

Furthermore, the Judge was entitled to determine as a fact beyond reasonable doubt that Mr Booth had been in possession of the larger quantity under s 24(1) of the Sentencing Act 2002. The appeal was dismissed.

Searching of criminal trial records

In *Mafart & Anor v Television New Zealand Ltd* CA92/05 4 August 2005 the Court considered whether it had jurisdiction to entertain an appeal against a grant of leave to search, inspect and copy the criminal records of a court.

TVNZ had sought and gained the leave of the High Court to search and copy the video tapes of the committal proceedings of a high profile case, so that they might be included in a documentary film for broadcast. The appellants, the French agents responsible for the sinking of the Rainbow Warrior and the manslaughter of crew member Fernando Pereira, filed and served an appeal against the decision to make the file available to TVNZ.

The members of the Court were agreed that the Court did not have jurisdiction to entertain the appeal, but for different reasons.

Anderson P noted that as the order by the High Court Judge could not be considered a judgment, decree or order in civil proceedings, it must either have the character of a judgment, decree or order in criminal proceedings or the character of a purely administrative decision. However, he considered that it was unnecessary to decide which of these alternatives was more appropriate because an appeal to the Court of Appeal would not lie in either case.

Chambers and O'Regan JJ were of the view that the videotape became part of the High Court record pursuant to s 182 Summary Proceedings Act 1957, and as such the videotape, like all other documents comprising the record of the appellants' criminal proceeding, became subject to the Criminal Proceedings (Search of Court Records) Rules 1974. The High Court Judge's decision under the Search Rules could not be the subject of an appeal under s 66 Judicature Act 1908, as that section authorised appeals only in civil proceedings. It was irrelevant how the High Court Judge's decision was precisely categorised; all that mattered was that it was not a decision within the High Court's civil jurisdiction. It was irrelevant how the videotape came to be made, as there could not be one rule for videotape and another for all other documents on the criminal proceedings file. It was also irrelevant how the application to search was made, as r 2(6) of the Search Rules made it clear that an application for leave to search might be made on an informal basis. Chambers and O'Regan JJ disagreed with the President's suggestion that, in some circumstances, a disaffected applicant could bring an application under Part 4A of the High Court Rules. Rather, the High Court Rules governed practice and procedure of the High Court only in civil proceedings, and this was not a civil proceeding.

The result was a unanimous decision that the appeal was dismissed for want of jurisdiction.

The Supreme Court granted leave to appeal.

Whether Court of Appeal bound by its previous decisions – Stare decisis in intermediate appellate courts

R v Chilton; R v Archbold CA333/04 and CA335/04 1 December 2005 were appeals by Ms Archbold and Mr Chilton against convictions on various charges under the Social Security Act relating to benefit fraud spanning a period of six years. The appeals included appeals against convictions under s 127 of the Social Security Act 1964 for omitting to inform the relevant Department of a de facto relationship for the purpose of the other partner continuing to receive a benefit. Two of the convictions under s 127 were quashed on the basis of this Court's decision in *Nicholson v Department of Social Welfare* [1999] 3 NZLR 50. This Court affirmed that that decision was correct. The convictions on the other counts were upheld.

This Court, although declining the Crown's request that this Court revisit its previous decision in *Nicholson*, gave an extensive discussion of when it will reconsider its own decisions, both in the civil and the criminal contexts. It concluded that the creation of the Supreme Court should not change the Court's approach on this issue.

The Court first examined the position of intermediate appellate courts in the United Kingdom, Canada and Australia in relation to the revisiting of their previous decisions. It then considered the position in New Zealand before the creation of the Supreme Court. It noted that this Court has recognised that it is ordinarily bound by its earlier decisions but that it will, in rare cases, be prepared to review and affirm, modify or overrule an earlier decision. It has resisted outlining in detail the circumstances in which it will depart from previous decisions, but it is clear that the approach will be cautious because of the need for certainty and stability in the law.

The Court then considered what the position should now be in New Zealand, in light of the creation of the Supreme Court. It recognised that some of the reasons given for retaining the ability to depart from previous decisions have now disappeared. However, it determined that there were no reasons to move to a more restrictive position, as in the English Court of Appeal. The Court noted that New Zealand is still a small country where developments in the wider common and civil law world and in international law should remain influential. Secondly, this Court is small in contrast to the English Court of Appeal. Thirdly, the requirements that must be satisfied for an appeal to be heard by the Supreme Court are relevant. Restrictive leave requirements may have the effect of rendering intermediate appellate courts the court of last resort in many cases.

The Court also commented that any change to its position as to overruling its previous decisions would in itself be a departure from the long line of cases that have held that it may depart from its previous decisions in rare cases. Further, there have been decisions of this Court since the advent of the Supreme Court where it has overruled previous decisions.

The Court accepted that there may be a mandate for a slightly less restrictive approach in criminal cases than in civil cases, particularly where the liberty of the subject or fair trial rights are at stake. It noted that the principle against the retrospective application of criminal liability (affirmed by s 10A of the Crimes Act 1961 and s 26(1) of the New Zealand Bill of Rights Act 1990) is relevant.

The Court concluded that even if it had considered that *Nicholson* may have been incorrectly decided, this case would not have met the tests for overruling previous decisions. The majority decision in *Nicholson* was carefully reasoned and the case related to a fine point of statutory interpretation. Most importantly, overruling *Nicholson* and applying a new rule to the appellants would have breached the rule against retrospective application of criminal liability. The Court declined to comment on whether prospective overruling would be available, but referred to the recent House of Lords' decision in *National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41.

Finally, the Court made some comments on the application of stare decisis to decisions of the Privy Council. It said that it was clear this Court is still bound by existing Privy Council decisions made in respect of appeals from New Zealand unless and until the Supreme Court overrules them. The status of Privy Council decisions on appeals from other jurisdictions is not so clear.

Abuse of process – Status hearing

Mellon v Attorney-General & Anor CA224/04 19 September 2005 was an appeal against the refusal by the High Court to judicially review a decision of the District Court.

The appellant had unsuccessfully sought a stay of prosecution in the District Court on the basis of an alleged abuse of process. At a status hearing, defence counsel disclosed that a certain defence to the charge of cultivation of cannabis would be that the conduct did not constitute the offence charged. The District Court Judge suggested that the facts would support a charge of being an accessory after the fact to cultivation. As a result, the prosecutor filed an indictment that the appellant was an alleging accessory after the fact and leave was obtained to withdraw the original summary information for cultivation.

On the stay application in the District Court, defence counsel alleged that jeopardy had increased by the invoking of the indictable process and that the integrity of the status hearing system was undermined by the prosecutor's reaction to the information given by the defence. It was submitted that status hearings should be conducted on a without prejudice basis.

On appeal, the Court held that there was no greater jeopardy to the appellant. The real nature of the appellant's complaint seemed to be that, by disclosing at a status hearing a technical hurdle in the path of the prosecution, the appellant gave the prosecution cause to consider whether it should take an alternative route. The Court said that it was obvious that for status hearings to be of any value, they must be conducted without prejudice, as they were. That meant that evidence should not be given at trial of what might have been said by or on behalf of the prosecutor or the defendant. The Court was not prepared, however, to declare that anything arising in the course of a status hearing necessarily excluded any procedural or evidential response by either the prosecution or the defence.

The Court rejected the appellant's assertion that knowledge gained from a status hearing could not be acted upon. Many transactions were conducted on a without prejudice basis, such as judicial settlement conferences in both the High Court and the District Court and the Court said it was unaware of any suggestion that participation in a settlement conference prohibited any use of information derived from such a conference. That would be an entirely unrealistic response, and a grave deterrent to participation in settlement negotiations because of the potential for manipulation by deliberate disclosure in order to prevent lines of inquiry. What had happened, in reality, was that counsel appearing for appellant at the status hearing disclosed an arguable legal defence on the facts and that led the prosecution to respond in a way that was legally open on those same facts. The prosecution could have done so at the end of the informant's case on the summary proceeding, albeit subject to leave. In that respect it was unlikely that the District Court Judge would think it proper not to amend the information. The issue of prejudice to appellant therefore became merely one of timing rather than of substance, the appellant was always liable and likely to face an amended information aptly responding to the unchallenged facts.

In any event, the appellant was now liable to a shorter sentence than if the police had continued with the cultivation charge. The Court did not accept that the prosecutor had acted unfairly, let alone in abuse of process. There was no proper basis for reversing the decision of the District Court or the High Court on review and the appeal was dismissed.

Accused conducting his own defence

In *R v Cumming* CA 43/03 2 November 2005 the Court considered whether the appellant was fit to plead and conduct his own defence at trial.

Mr Cumming was convicted, following a jury trial in the High Court, on counts of sexual offending against a seventeen year old woman over a period of two weeks during October 2001. He was sentenced to preventive detention and he also appealed against that sentence. He exercised his right to represent himself at trial.

The principal ground of the appeal against conviction was that Mr Cumming did not receive a fair trial because his mental disability detrimentally affected the conduct of his defence. Mr Cumming also referred to the principle that an accused person must be fit to stand trial. Other grounds of appeal included a challenge to part of the trial Judge's summing up.

While Mr Cumming was represented by counsel at the High Court sentencing hearing, it was submitted on his behalf, in support of the sentence appeal, that the manner in which he conducted his defence at the trial unfairly impacted on the sentence imposed on him.

The Court held that the requirement that an accused has the capacity to participate meaningfully in the trial rests on considerations such as trial fairness, humanity, and the need for public appreciation of and respect for the dignity of the criminal process. At issue are fundamental rights of persons charged with a criminal offence and protected minimum standards of criminal procedure. The first right, affirmed by s 25(a) of the New Zealand Bill of Rights Act 1990, is that every person charged with an offence has the right to a fair trial. It is closely linked to the right of all accused persons to be present at, and to present a defence at, their trial (s 25(e)). The right to be present extends to being psychologically as well as physically present at the trial in the sense that the accused must understand what is going on. An important element of the right to present a defence is that accused persons are capable of appreciating the prosecution case and effectively defending the charges. In other words the accused must rationally be able to understand the proceeding and be functionally able to defend it through participation in the trial process.

The Court held that the accused was capable of understanding proceedings and functioning in the conduct of his defence, with the result that a fair defence was presented. The Court dismissed the appeal against conviction, and dismissed the appeal against the sentence of preventative detention.

Leave to appeal to the Supreme Court has been sought.

Misuse of Drugs – Legal burden of proof

In *R v Hansen* CA128/05 29 August 2005, the appellant had been convicted in the District Court of possession of cannabis for supply contrary to s 6(1)(f) of the Misuse of Drugs Act 1975. Because of the amount of cannabis he had in his possession, he fell foul of s 6(6) of the Act which deemed him to be in possession for the purposes of supply, "unless the contrary is proved".

He appealed to this Court against both his conviction and sentence. The appeal was advanced on the basis that in light of recent rights-based jurisprudence (see *R v Lambert* [2002] 2 AC 545 (HL)), s 6(6) of the Act should be interpreted as putting on the defendant only an evidential burden of proof that the possession was not for supply. This in turn raised the question whether the Court should revisit the decision in *R v Phillips* [1991] 3 NZLR 175 which held that s 6(6) imposes a legal (balance of probabilities) burden of proof.

The Court could see no reason to revisit *Phillips*. The word "proved" was fatal to the appellant's argument. The idea of proof requires the party charged with the burden to show something to a persuasive standard. Simply pointing to evidence that might raise a reasonable doubt does not come within the meaning of the word "proved".

The Court reinforced that s 6 of the New Zealand Bill of Rights Act 1990 requires the Courts to prefer a meaning in an enactment that is consistent with the rights and freedoms contained therein, but it could only do so where the meaning advanced was "properly" or "reasonably" open. The appeal against conviction was, therefore, dismissed.

The sentence of three years imprisonment was reduced by six months.

The Supreme Court has granted leave to appeal.

Status of Acting Judges – Legitimacy of interception warrants where the target is in custody and has been charged with an offence

In *R v Te Kahu* CA492/04 28 September 2005 the Court rejected a challenge to the status of Neazor J as an acting Judge. The Court did not express a concluded view on whether the appointment of a former Judge as an Acting Judge under s 11A of the Judicature Act 1908 was consistent with the concept of judicial independence that is implicit in s 25(a) of the New Zealand Bill of Rights Act ("Bill of Rights"). However, to hold that an Acting Judge could not exercise judicial functions would fly in the face of the legislative scheme and be tantamount to finding the legislation ineffective, which is impossible under s 4 of the Bill of Rights. Accordingly, an interception warrant that Neazor J issued was not invalid.

The appellant also challenged the legitimacy of the interception warrant when issued against a target who was in custody. The standout features of the case were that the operation targeted suspects who were in custody and that custodial arrangements were put in place with a view to facilitating electronic surveillance of the targets. The Court held that there is no principle of law which prevents evidence being given of remarks made by those who are detained in custody. The admissibility of the

evidence was not affected by either the targeting of men in custody or the making of custodial arrangements to ensure that they were placed in cells likely to facilitate communication.

Jurisdiction – Composition of divisional Court

In *R v Jessop* CA13/00 19 December 2005 the Court reheard Ms Jessop's appeal against conviction and sentence on one count of aggravated robbery. Ms Jessop was one of the successful appellants in *R v Taito* [2003] 3 NZLR 577 (PC), and her appeal was remitted to the Court of Appeal by the Privy Council for rehearing. The Court dismissed her appeal. Of note in the case is the Court's consideration of a complaint by counsel for Ms Jessop regarding the composition of the Court that heard the rehearing of the appeal. The Court was a divisional one composed of two permanent Judges of the Court of Appeal and one High Court Judge.

The Court discussed s 58A of the Judicature Act 1908 (the Act) which provides that the Court of Appeal can sit in divisions which include High Court Judges for criminal appeals and which lays out the process by which High Court Judges are nominated to sit in divisions of the Court of Appeal. The Court distinguished warrants, which are issued upon the appointment of judicial officers by the Governor-General, and nominations to divisions of the Court undertaken pursuant to s 58A. The Court also discussed the procedure by which the President of the Court of Appeal assigns divisions under s 58C(1) of the Act. The Court recorded that once a High Court Judge has been nominated to a division of the Court of Appeal, and he or she has been assigned to a division, his or her authority to act as a Judge of the Court of Appeal is governed by s 58G of the Act which importantly provides that "The fact that a Judge of the High Court acts as a Judge of the Court of Appeal is conclusive evidence of the Judge's authority to do so, and no judgment or determination given or made by the Court of Appeal while the Judge so acts may be questioned on the ground that the occasion for the Judge so acting had not arisen or ceased to exist" (s 58G(1)).

Counsel for Ms Jessop said the fact that a High Court Judge was sitting put the impartiality of the Court in issue. The Court did not see how this could be so given that the High Court Judge's nomination and assignment involved no input or influence by the Executive. The Court reiterated the reference to "conclusive evidence" in s 58G(1), and assured counsel that the High Court Judge had been properly nominated in line with s 58A of the Act.

Application to vacate plea of guilty – incomplete historical record

In *R v Palmer* CA109/02 6 October 2005, Mr Palmer challenged 25 convictions entered in 1988. The charges arose from allegations of GST fraud, theft, conspiracy to pervert the course of justice, forgery and commercial fraud. Mr Palmer argued that, in respect of some of the charges, an application to vacate pleas of guilty was wrongly refused. In respect of other charges, he argued that no plea was entered, with the result that convictions on those charges were entered without jurisdiction.

There was not a complete record of court documents regarding what had occurred in 1987 and 1988. The Court held that Mr Palmer was not to be disadvantaged because of the absence of material, but the Court must nonetheless make sensible assessments

with regard to the position which must have existed based on the available material: see *R v Taito* [2005] 2 NZLR 815 (CA) at [29] and following.

There was uncontradicted evidence that on the day of his application in person to vacate the pleas of guilty, Mr Palmer had been attacked in prison, sustained injuries, required medical treatment, been knocked out, declined neurological observation against medical advice and had suffered medical difficulties for days afterwards. As a result the Court found that it had no option but to conclude that the application to vacate the pleas of guilty was fundamentally flawed and could not be relied upon.

The Court allowed the appeal, quashed the convictions, and "turned back the clock" to 30 March 1988 to allow Mr Palmer to reargue, this time with legal counsel, the application to vacate his guilty pleas.

Bill of Rights – Refusal to order last minute adjournment to instruct counsel

R v McKinnon CA240/04 4 May 2005 was an appeal against conviction for the manufacture of the class B drug methamphetamine. Mr McKinnon appealed on the basis that his rights had been compromised when the Judge declined to order a last minute adjournment of the trial so that Mr McKinnon could instruct counsel.

Mr McKinnon had been previously represented at the trial from which he absconded, but he contended that there was a miscarriage of justice because the trial Judge had declined to adjourn the trial to give him a further opportunity to consult counsel or make an application to the Legal Services Agency to retain counsel. Mr McKinnon also rejected the jurisdiction of the High Court in favour of sovereignty of the Maori race. He sought to appoint his friend K as an "official court Advocate/Counsellor".

The High Court Judge pointed out that people could be represented only by a lawyer or by themselves, perhaps with the assistance of a McKenzie friend. K addressed the Court on the day fixed for the trial to commence on the issue of sovereignty and sought to have Mr McKinnon released into the custody of the Confederation of Maori tribes. The High Court declined to release Mr McKinnon or grant an adjournment as sought, particularly in light of Mr McKinnon's earlier absconding from trial at which he had retained counsel. The Judge held that Mr McKinnon had been given every opportunity to prepare himself for trial and directed that the trial proceed. Mr McKinnon pleaded a previous acquittal by the Maori Court of Aotearoa on the anniversary of the Declaration of Independence. The Judge directed a not guilty plea to be entered.

On appeal, Mr McKinnon relied on rights conferred by s 24(c), (d) and (e) of the New Zealand Bill of Rights Act 1990, being the right to consult a lawyer, the right to adequate time and facilities to prepare a defence, and the right to receive legal assistance without cost if justice requires it and the person does not have sufficient means. This Court said that a balance of interests were in play in addition to those of Mr McKinnon, such as the due administration of justice. The Court noted that Mr McKinnon had been given adequate opportunity to take legal advice. A factor of prime, though not decisive, importance was Mr McKinnon's deliberate decision not to appear at the previous trial, without notifying the Court of his intention not to appear. The Court held that the due exercise of discretion was dependent on circumstances,

and noted that it had been open to the Court at the time of the first trial to have proceeded in the absence of absconders. The Court concluded that Mr McKinnon knew what he was doing and had to accept the consequences. The appeal was dismissed.

Sentencing

Preventive detention – Relevance of possibility of extended supervision order on release

In *R v Parahi* [2005] 3 NZLR 356 the Court considered whether the possibility of an extended supervision order being imposed upon release was a relevant consideration when determining whether to impose a sentence of preventive detention.

Mr Parahi indecently assaulted a female under the age of 12 while on parole from a four-year sentence imposed in April 2000 for sexual offending against two 12-year-old girls. He had a prior conviction for rape and convictions for indecencies and offending of a "peeping-Tom" variety. Parahi was eligible for preventive detention under s 87 of the Sentencing Act 2002, and this sentence was imposed as the sentencing Judge concluded that even a lengthy finite sentence would be "inadequate as an appropriate response to the risk that the psychologist and psychiatrist [have said Mr Parahi poses] to society and in particular to young girls".

Parahi appealed against the imposition of preventive detention, arguing that it was manifestly excessive and that a lengthy finite sentence with a final warning was the appropriate sentence.

The Court confirmed that the law, following *R v Mist* [2005] 2 NZLR 791 (subsequently overturned on other grounds - see [2005] NZSC 77), is that a sentencer must take into account, when considering the effect of a determinate sentence, the possibility that an extended supervision will be imposed if the relevant offender is considered to be likely to commit relevant offences after his release. The Court explained that the course contemplated by *R v Mist*, while not relieving the sentencing Judge from the decision whether to impose preventive detention, has the advantage of allowing, in a finely balanced case, a risk assessment to be made at the time a prisoner is about to be released, rather than requiring predictive assessments before the sentence.

The Court did caution that there is little experience of the practical operation of the 2004 amendment which authorises the grant of extended supervision orders. It also said that sentencing Judges should not see what might be termed a "back-up" or a "backstop" in the form of an extended supervision order as presenting an agreeable alternative to preventive detention and thus relief from the burdensome task of determining whether that sentence should be imposed. Care must always be taken to determine both the precise criminality and the sentence proportionate to the offending in its total context. If preventive detention is called for, it should be directed at the time of sentence.

Generally, the Court noted that there has to be a significant, ongoing risk of serious harm before somebody is incarcerated indefinitely, particularly for lower level offences, but that the test may be met in an appropriate case, even where the relevant offences are indecencies as opposed to sexual violations.

The Court concluded that while Mr Parahi was on the cusp, the combination of the low level character of the vast majority of his offending, the fact that there was uncertainty as to what happened in relation to earlier sentencings (due to an incomplete lower Court record), and the availability of extended supervision orders tipped the balance against preventive detention.

Methamphetamine dealing – Guidance

In *R v Arthur* [2005] 3 NZLR 739, the Court offered some guidance on sentencing in methamphetamine cases. The appellant, who was a secondary school teacher, attended a party held at his flat at which the majority in attendance were teenagers. During the course of the party the appellant invited four of the teenagers up to his bedroom and offered them methamphetamine. The appellant was convicted of supplying the class A drug methamphetamine. The drug had only recently been re-categorised from a class B drug. The Judge adopted a starting point of three years imprisonment, and gave a one year discount for adverse career consequences, past professional competence, and good record. The final sentence was two years imprisonment with leave to apply for home detention.

It was submitted on appeal that the starting point was too high and therefore the sentence was manifestly excessive. This Court took the opportunity to consider sentencing tariffs in cases involving low level supply of the class A drug methamphetamine with the view of formulating some guidance for sentencing judges.

The Court said that in the absence of specific legislative direction, the only logical way to approach sentencing for the supply of a class A drug is to fit the particular drug supply in question within a band of similar supplies. Chambers J noted that the quantity of the drugs being trafficked is clearly the starting point for such an exercise. The Court adopted three bands (based on the New South Wales model) which differentiates between large commercial supply (250 g plus), commercial supply (5-250 g), and low level supply (less than 5 g). On the basis that imprisonment is generally appropriate, appropriate starting points would be 2-4 years imprisonment for low level supply, 3-9 years imprisonment for commercial supply, and 8 or more years for large commercial supply. The Court said that the reality is that only trafficking in large commercial quantities will attract the maximum penalty of life imprisonment.

The Court commented that while quantity of supply is clearly of prime importance in fixing starting points, it is not the sole consideration: sentencing is a question for judicial discretion, taking into account the general principles of sentencing. The Court suggested that the supply of a point of methamphetamine to a spouse or partner would be at the low end of low level supply, while supply to a minor would become an aggravated supply.

The Court noted as an aside that those who manufacture or import class A drugs may well incur much higher sentences than those imposed for supply, reflecting responsibility for actually bringing the illegal substances into existence or within jurisdiction.

In relation to Mr Arthur, this Court considered the approach of the sentencing Judge and compared the end sentence to other similar drug supply cases in New Zealand and in the United Kingdom. The Court did not consider that the sentencing Judge's starting point was too high. The Court noted that although this case involved a small supply, it was significant that four people were supplied, not just one, and that those four were all teenagers. The appeal was dismissed.

Manslaughter by provocation

In *R v Edwards* [2005] 2 NZLR 709 the Court considered whether a sentence of nine years imprisonment was appropriate for manslaughter by provocation.

The manslaughter conviction arose out of circumstances where the victim agreed to pay Mr Edwards to have him perform a sexual act in the victim's presence and in his home. While he was performing the sexual act, Mr Edwards claimed that the victim made a homosexual advance towards Mr Edwards which caused him to become enraged. Mr Edwards hit the victim about his head until he was lying on the floor, not moving and covered in blood. After Mr Edwards had a shower, he left the victim's house, in the victim's car, taking bottles of alcohol, the victim's wallet and credit cards, and some of his clothes.

At the jury trial, Mr Edwards defended the charge of murder on the basis of provocation or lack of murderous intent. Mr Edwards was found guilty of manslaughter. The sentencing judge determined that the defence of provocation was the most likely explanation for the jury's verdict. On that basis, Mr Edwards was sentenced to nine years imprisonment with a minimum non-parole period of four and a half years imprisonment.

Mr Edwards appealed the sentence imposed. He argued there were three essential errors in the sentencing Judge's approach: the sentence imposed was inconsistent with other authorities; the Judge gave no credit, or insufficient credit, to the fact that Mr Edwards had always been prepared to plead guilty to manslaughter; and the Judge regarded the severity of the attack as relevant.

The Court reviewed the sentence against several United Kingdom appellate decisions, as well as the proposed sentencing guideline for manslaughter by provocation, produced by the United Kingdom Sentencing Advisory Panel. The Court held that there was no doubt that this case came within the most serious category of the Panel's sentencing guideline and that the sentencing Judge's decision was within the suggested sentencing range. Given the aggravating features present, this Court found that the sentence was well within range and was not out of line with other authorities, whether they be New Zealand, Australian, or English.

The Court also noted that although Mr Edwards might have been prepared to plead guilty to manslaughter, he had not set forth exactly what he contended the facts of the

matter to be. Had Mr Edwards tabled a definitive account of what happened at the same time as indicating a preparedness to plead guilty to manslaughter, and had the trial Judge concluded that his version of events was probably true, there would have been no reason in principle why appropriate credit should not have been given. The Crown might still be justified in pursuing the prosecution for murder. The Court acknowledged that if the ultimate outcome in a case accorded with what the defendant had said, due recognition should be given by way of a reduction in sentence. In this case a reduction in sentence was not justified on account of Mr Edwards' preparedness to plead guilty to manslaughter, as it was not accompanied by his account of the relevant facts. The Court dismissed the appeal.

Effect of early guilty pleas - Concurrent sentencing

In *R v Lowe* CA62/05 4 July 2005 the Court allowed an appeal against sentence by Mr Lowe in respect of fifteen convictions for burglary, five convictions for theft, five convictions for receiving, fourteen convictions for obtaining a document, nine convictions for using a document fraudulently, a single conviction for unlawfully taking a motor vehicle, and four convictions for offences under the Land Transport Act 1998.

Mr Lowe appealed against the sentence of seven years imprisonment on the basis that it was manifestly excessive and in particular that the discount allowed by the Judge (one year from a starting point of eight years) gave insufficient credit for mitigating factors, including guilty pleas entered at a very early stage.

The Court held that the starting point of eight years imprisonment was available to the Judge as Mr Lowe was a recidivist burglar and there were serious aggravating factors. However, the Court held that the discount for early guilty pleas did not fully reflect Mr Lowe's co-operation with police.

The sentencing Judge allowed a discount of one year, in respect of the early guilty pleas and "in a token way acknowledging the possibility of remorse". The Judge accepted that Mr Lowe had facilitated the resolution of matters by pleading, but he considered a 25 per cent discount from the starting point to be "too much" because of the part played by the police in withdrawing "dozens of charges".

On appeal, the Court held that the sentencing Judge had erred in principle in the way he approached the discount for the early guilty pleas entered prior to depositions. The Court said that the withdrawal of charges by the police was an irrelevant consideration at sentencing; the Judge was not entitled to speculate as to why such a withdrawal of charges had occurred or whether Mr Lowe was guilty of greater offending than that which was before the Court. The Court held that the very early pleas, coupled with Mr Lowe's assistance to the police, would normally have justified a 25 per cent discount.

The Court also pointed out an error in the Judge's approach to concurrent sentencing where there are multiple charges. The Judge had sentenced Mr Lowe to seven years imprisonment on each of the fifteen burglaries. Technically this was not in compliance with s 85(4) of the Sentencing Act. The Judge should have chosen the worst of the burglaries to receive the penalty that was appropriate for the totality of

the offending. All the other burglaries, like all of the other offences, should then have received the penalty appropriate for the totality of the offending.

The Court allowed the appeal and substituted a sentence of six years imprisonment for the most serious burglary. The Court then looked at all the other burglaries and categorised them into three groups depending on their seriousness. The Court held that three warranted sentences of two and a half years imprisonment, four warranted sentences of two years imprisonment, and the remainder warranted sentences of twelve months imprisonment. Formal orders were made to reflect the new sentences and the fines, which were remitted without jurisdiction, were reinstated.

Possession and conspiracy to export class A drug

R v Davis CA440/04 and *R v Collinson* CA13/05 20 October 2005 involved two appeals against sentences handed down for possession of a Class A drug and conspiring to export a class A drug. The Solicitor-General appealed against Davis' sentence of seven years imprisonment. Collinson appealed against his sentence of nine years imprisonment with a minimum non-parole period of four and a half years imprisonment.

The Police had surprised both Davis and Collinson in a hotel room in Auckland while they were in possession of 2.871 kgs of cocaine. Davis said that his task had been to export the cocaine out of New Zealand for financial reward and that Collinson had been recruited to take it out and was to be paid AU$15,000 for his involvement. Davis' remuneration had not yet been negotiated. The Court considered that the evidence showed that Davis was of more crucial importance in the operation than Collinson. Davis had recruited Collinson, and connected Collinson to those higher up the pyramid.

The Court emphasised that sentences are determined by weighing the relevant factors of the specific case. It is dangerous to try to extract a mathematical formula from previous cases and dissection of High Court cases is not a profitable exercise. In setting a starting point, the fundamental focus is on the actual offence and the involvement of the particular person in that offending.

The Court concluded that the starting point of 10 years imprisonment for Davis' sentence could not stand scrutiny, even taking into account the high test to be satisfied on a Solicitor-General's appeal. Davis was a very vital component in an international enterprise, though not at the top of the pyramid. It was important that New Zealand does not become viewed as a "soft touch" for the transit of illicit drugs. An effective sentence of ten years imprisonment was substituted. The Court was also of the opinion that in Davis' case a minimum non-parole period of five years imprisonment was necessary in the circumstances.

Collinson's appeal had been predicated on the disparity between Davis' sentence and Collinson's. With the increase in Davis' sentence this argument fell away. However, the Court was persuaded to quash the minimum non-parole period to correct a disparity between when Collinson and a third, equally culpable, associate could apply for parole.

Methamphetamine – Sentencing tariff

In *R v Fatu* CA415/04 18 November 2005 the Court set down new tariffs for methamphetamine offending.

For supply, the guidelines are:
(a) Band one - low level supply (less than five grams) - two years to four years imprisonment.
(b) Band two - supplying commercial quantities (five grams to 250 grams) - three years to nine years imprisonment.

(c) Band three - supplying large commercial quantities (250 grams to 500 grams) - eight years to 11 years imprisonment.
(d) Band four - supplying very large commercial quantities (500 grams or more) - ten years to life imprisonment.

For importation, the guidelines are:
(a) Band one - low level importing (less than five grams) - two years six months to four years six months imprisonment.
(b) Band two - importing commercial quantities (five grams to 250 grams) - three years six months to ten years imprisonment.
(c) Band three - importing large commercial quantities (250 grams to 500 grams) - nine years to 13 years imprisonment.
(d) Band four - importing very large commercial quantities (500 grams or more) - 12 years to life imprisonment.

For manufacturing, the guidelines are:
(a) Band one - will not be applicable because the difficulties, expense and risks involved in manufacturing methamphetamine make it inherently unlikely that such an operation would be set up to produce drugs for purely personal consumption.
(b) Band two - manufacturing up to 250 grams - four years to 11 years imprisonment.
(c) Band three - manufacturing large commercial quantities (250 grams to 500 grams) - ten years to 15 years imprisonment.
(d) Band four - manufacturing very large commercial quantities (500 grams or more) - 13 years to life imprisonment.

The Court also noted that weight was to be determined by reference to the amount of pure methamphetamine involved. So a mixture containing 12 grams of a controlled drug and six grams of baking soda is treated as 12 grams and not 18 grams of the controlled drug for the purposes of the Act.

Preventive Detention – Indecent Assault

In *R v Rowe* CA385/04 14 March 2005 the Court dismissed an appeal against the imposition of a sentence of preventive detention. The appellant had crept up behind a tourist and forced his hand between her thighs. The appellant had numerous previous convictions for sexual offending including sexual violation, indecent assault, and performing an indecent act. The appellant had narrowly avoided a sentence of preventive detention in 1998. The appellant was assessed as a hardcore recidivist.

Finite sentences had been tried but his offending behaviour and associated thinking had not changed.

Sexual violation by a woman – Adequacy of summing up - Sentence

In *R v L* CA115/05, CA132/05 July 18 2005 the Court dismissed the appeal against conviction and allowed the Solicitor-General's appeal against sentence.

This case concerned sexual violation and attempted sexual violation by a 49 year old woman on a fifteen year old teenage boy. The trial Judge imposed a sentence of four and a half years imprisonment. On appeal, L complained that the trial Judge misdirected the jury concerning the attempted sexual violation.

This Court held that the Judge had given adequate directions to the jury about the requisite intent element of the attempted sexual violation charge. The Court referred to s 72 of the Crimes Act 1961 as to attempts, and considered the meaning of the words "having an intent to commit an offence" in the context of attempted sexual violation. The Court said that the accused must intend at the time of the attempt to have sexual connection with the complainant, without the consent of the complainant to the activity which amounts to attempted sexual connection, and without believing on reasonable grounds that the complainant consents to that activity.

The Court held that the trial Judge had given an adequate summing up to the jury, despite the fact that the Judge did not specifically tell the jury that the appellant's state of mind had to be assessed at the time of the attempt. The Court held that in all the circumstances, this omitted matter was implicit in the summing up and that, in any event, any technical deficiency in the summing up could not have resulted in a miscarriage of justice. The Court held that the complainant's evidence in relation to the charges provided a foundation from which the jury was able to draw the inferences necessary to support a finding of guilt.

The Solicitor-General appealed against sentence on the basis that the sentence imposed by the High Court Judge was manifestly inadequate and wrong in principle.

The the critical issue in this case was the appropriate starting point. The Court noted the eight year starting point that exists for contested rape, which is by definition limited to situations where a male rapes a female: *R v A* [1994] 2 NZLR 129. That tariff had been extended to anal rape of either gender but not to other situations involving unlawful sexual connection: *R v Castles* CA105/02 23 May 2002; *R v Tawha* CA396/02 26 February 2003. The Court distinguished *R v Herbert* CA70/98 21 May 1998 because the question of whether or not there should have been an eight year starting point for sexual violation of a male by a female did not arise in that case. On that basis, the Court also distinguished *R v Matthews* HC ROT T 024757 20 June 2003 and *R v Shaskey* HC CHCH T 23-03 14 Aug 2003. The Court held that the Judge was obliged to take into account consistency of sentencing levels under s 8(e) of the Sentencing Act 2002. Section 8(e) requires judges to have regard to the eight year starting point for contested rape as a highly relevant factor in offending of this nature. The Court reaffirmed the conclusion reached in *R v A* that sexual connection is gender neutral.

The Court held that the appropriate starting point in this case was in the region of seven to eight years rather than the six years adopted by the High Court Judge. Because it sat as a divisional Court, this Court considered that it would not be appropriate to attempt to determine the matter on any broader basis. The Court allowed the sentence appeal and substituted a sentence of five and a half years imprisonment.

The Supreme Court has granted L leave to appeal.

Sentencing guideline – Grievous bodily harm

In *R v Taueki, Ridley and Roberts* [2005] 3 NZLR 372 the Court set down guidelines for sentences for grievous bodily harm (GBH) offences (the maximum penalty for GBH is 14 years imprisonment), replacing the guidelines set down in *R v Hereora* [1986] 2 NZLR 164.

The Court set out a number of factors that would affect the assessment of the starting point for sentencing. The factors that would contribute to the seriousness of the offending included: extreme violence, premeditation, serious injury, use of weapons, attacking the head, facilitation of crime, perverting the course of justice, multiple attackers, vulnerability of victim, home invasion, gang warfare, victim is a public official, vigilante actions, and hate crime. The factors that would reduce the seriousness of offending included: provocation and excessive self defence. Matters which would not be seen as reducing the seriousness of the offending were the fact that the violence occurred in a domestic situation, a victim's plea for a lenient sentence, and intoxication (alcohol and drugs).

The Court then went on to set out three sentencing bands for GBH offending:

- Band one: 3-6 years: this band will be appropriate for offending involving violence at the lower end of the spectrum of GBH offences.
- Band two: 5-10 years: this band will be appropriate for GBH offending which features two or three of the aggravating factors referred to above.
- Band three: 9-14 years: this band will normally encompass serious offending which has three or more of the aggravating features referred to above, where the combination of aggravating features is particularly grave.

These bands represent ranges of starting points, not final sentences, and were intended for guidance only. The Court laid out examples of types of offending that would fall into each of the bands. The suggested bands and starting points should be used flexibly, and each case must be carefully assessed to establish a starting point which reflects the culpability inherent in the offending. Once a starting point has been determined it is necessary to determine whether the aggravating or mitigating factors relating to the offender's particular personal circumstances require that the actual sentence should be higher or lower than the starting point. This will involve consideration of the factors mentioned in ss 8 and 9 of the Sentencing Act.

The Court endorsed the two stage approach to minimum parole periods described in *R v Brown* [2002] 3 NZLR 670 (a two stage process involving the setting of the nominal (maximum) sentence as the first stage, and undertaking the exercise required by s 86

of the Sentencing Act, where it is applicable, as the second stage). The Court noted that the Sentencing Amendment Act 2004 had added a new factor additional to those set out in *Brown*, namely, protection of the community. The Court rejected the argument that the *Brown* approach involved double counting because the setting of the minimum period of imprisonment required similar analysis to that required for setting the nominal sentence.

Preventive detention

In *R v Mist* [2005] 2 NZLR 791 the Court considered whether there existed jurisdiction to impose a sentence of preventive upon Mr Mist with reference to s 153 of the Sentencing Act 2002, a transitional provision, and s 4(2) of the Criminal Justice Act 1985 which provides that penal enactments are not to have retrospective effect to the disadvantage of an offender. The Court found there was jurisdiction and found that preventive detention was appropriate on the facts of the case. The central question was, in regard to s 75 of the Criminal Justice Act 1985, whether it was necessary for the offender to have reached the age of 21 years at the date when the qualifying offence was committed, or whether it was sufficient for that age to have been attained by the date of conviction (or sentencing). The Court held that it was sufficient if the offender was aged 21 or more at the date of conviction. However, on appeal the Supreme Court disagreed and allowed Mr Mist's appeal ordering that his sentence of preventive detention be quashed: [2005] NZSC 77.

Although the Court of Appeal's decision was overturned in respect of the above matters the judgment provides important discussion regarding the effect of extended supervision orders being available under Part 1A of the Parole Act 2002 on the decision whether to impose a sentence of preventive detention. The Court said that the possibility of an extended supervision order must be taken into account when assessing the extent to which a lengthy determinate term will provide adequate protection for the public under s 87(4)(e) of the Sentencing Act 2002 (the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society is a mandatory consideration for the Court when considering whether to impose a sentence of preventive detention).

The Supreme Court allowed an appeal against this decision.

Trial Errors

Trial irregularity - Judge and jury communications

R v C [2005] 3 NZLR 92 was a successful appeal against convictions for sexual offences. The appeal was based on trial irregularity relating to improper communications between the judge and jury members.

The appellant was tried in the High Court on an indictment alleging 15 counts of sexual and other assaults in respect of the same complainant. After the jury retired the judge received two communications from a juror warning of jury intimidation and lack of agreement on some charges. The Judge decided to give the jury a

Papadopoulos direction. The jury then returned to indicate unanimous verdicts of guilty on six of the counts, and an inability to agree, unanimously, on the balance of the counts. Convictions were entered on those six counts, and a new trial was ordered in respect of the other counts.

This Court noted that there was imprecision regarding the facts as to timings, actions and reactions, and commented that this reinforces the desirability of trial counsel and judges keeping a close written record of trial incidents. However, the real issues on the appeal concerned the proper procedure when the jury brought to the notice of the Judge matters occurring in the course of their deliberations, and how the Judge dealt with that information. The Court said that jury difficulties such as this can create serious problems for trial judges because they entangle a number of important rights and interests, both of the accused and the public. Sometimes jury problems can involve privacy issues. The practice of trial judges has been to raise the matter with counsel in the absence of the jury so that counsel may take instructions as to whether there is any objection to the judge seeing the juror privately in chambers to inquire into the matter, before again seeking submissions on the outcome of the inquiry. This Court said that that course is entirely appropriate when it does not envisage an inquiry into the jury's deliberations but goes only to the juror's capacity and the possible need for discharge of the jury or an adjournment.

In this case the Court considered that it could not be assumed that the jury's concerns about intimidation related only to the counts on which verdicts were not reached. It is reasonably possible that one or more of the jurors may have subscribed to the guilty verdicts on the lesser counts in consequence of perceived intimidation and against their subjective judgments.

The Court referred to *R v Smith* [2005] 2 All ER 29, a recent House of Lords decision, and set out a number of principles which this Court held also apply in New Zealand. This Court also set out the observations it made in *R v N* (2005) 21 CRNZ 621 as to the procedure that should generally be followed in the event that a Judge receives a communication from the jury other than a communication of an administrative kind, raising something unconnected with the trial.

The Court held that the Judge ought not to have assumed from the second note that the difficulties referred to in the first had dissipated. There should have been a direction about individual conscience and the importance that such should not be suborned by intimidation. There should also have been a direction that it was not too late, before delivery of a verdict in Court, for any position which the jury had reached in respect of any count at all in the indictment to be reconsidered. In the circumstances, the Judge's direction should have emphasised that no one should go against their individual judgment and conscience through feelings of intimidation and that no juror should seek to undermine, by intimidation, any other juror's conscientious honouring of the individual oaths or affirmations.

Improper and prejudicial remarks by prosecutor

In *R v S* CA2/05 14 June 2005 the Court allowed the appeal against conviction and ordered a new trial on the basis of improper and prejudicial remarks by a prosecutor.

Mr S was charged with sexual violation and other offending. In the final address at the trial, the Crown prosecutor commented on Mr S's failure to give evidence, contrary to s 366(1) of the Crimes Act 1961. In addition, the prosecutor made other improper and prejudicial remarks in the his final address; the trial Judge failed to properly direct the jury as to "recent complaint" evidence; and inadmissible evidence was led by a police officer. Counsel for Mr S complained that the combined effect of these errors had resulted in a miscarriage of justice and that this Court ought to allow the appeal as required by s 385(1)(c) of the Crimes Act 1961.

The Court found that there had been a breach of s 366(1) of the Crimes Act as to the proper role of counsel when representing the Crown in a criminal trial. The breach arose from a combination of statements by the Crown prosecutor in his final address to the jury at trial, the effect of which was to wrongly imply that Mr S was under a duty to give evidence.

The Court noted its previously expressed position that a breach of s 366(1) may give rise to a miscarriage of justice such that the Court must allow the appeal under s 385(1) of the Crimes Act 1961. The Court referred to several appellate cases which demonstrate that the nature of the s 366(1) breach and the trial Judge's summing up are relevant considerations as to whether a miscarriage of justice has occurred. The Court accepted that prosecutorial misconduct may be cured in the trial Judge's summing up, but emphasised that a breach by a prosecutor of s 366 is a most serious matter, and one which always runs the risk of a declaration of a mistrial, or on appeal, of the verdict being set aside.

In this case, the Court indicated that it was inclined to the view that the Judge's summing up would have effectively cured the breach of s 366(1). However, the s 366 breach was only one of a number of serious defects that occurred in the course of the trial. The Court went on to consider the other matters complained of, relating to the prosecutor's final address, misdirection by the Judge as to the recent complaint evidence, and the admission of evidence improperly led by the prosecution from a police officer. The Court found that the prosecutor's final address and the other matters, taken cumulatively, created a real possibility that there had been a miscarriage of justice. The appeal against conviction was allowed and a retrial ordered.

Possible bias – Communication with jury

In *R v N* (2005) 21 CRNZ 621 the Court allowed an appeal against conviction because of unauthorised communications between the trial Judge and the jurors.

The appellant was convicted on a charge of sexual violation by rape. During jury deliberations the Judge received a note from the foreman. The note stated that one juror had dicussed her own sexual abuse experience (which had similarities to the allegation before them) with the other members of the jury, and that the jury was split 8 to 4 in favour of conviction. After receiving the note, the Judge interviewed the juror in chambers, in the presence of the foreman and the Court taker. Counsel and the accused were not present. The juror claimed that she was not biased, and on that basis the Judge determined that the juror should remain on the jury. The juror and the foreman returned to the jury room for further deliberations. Counsel were called back

to Court, where the judge advised them of what had occurred and of the need for a *Papadopoulos* direction. In the meantime, the jury had reached a verdict.

This Court considered the correct procedure for managing cases of unauthorised communication between the Judge and the jury. The Court held that communications from the jury during deliberations should be copied in writing to counsel for their consideration. The hearing should resume in open court, in the presence of the accused but in the absence of the jury, for counsel submissions on the appropriate response. If disqualification of a juror is in issue, the judge may question that person and no other jury member should be present. That juror should then remain apart, pending further counsel submissions. The judge needs to make a contemporaneous record of what has transpired. There may be exceptions to the general recommendations regarding open court and the presence of the accused, for example, as in this case, where the issue is personal to the juror.

The Court held that the procedure in this case fell short in a number of respects. In particular, the Judge had determined an issue of juror competence in the absence of counsel and the accused, the foreman had wrongly become involved, and the Judge omitted to record what had occurred until the following morning. This Court found that the failure to follow the correct procedures had created a miscarriage of justice. The conviction was quashed and a new trial directed on the charge of sexual violation by rape.

Murder conviction - Provision of written material to juries

R v Taylor (2005) 21 CRNZ 1035 was an appeal against conviction for murder. One of the grounds of the appeal was that trial Judge's provision to the jury of an "issues document" without prior discussion with counsel resulted in a miscarriage of justice.

The victim had been hitchhiking from Christchurch to the West Coast on 2 February 2000 when Mr Taylor picked her up at a service station where she had purchased a drink, a roll and a cellphone card. The Crown alleged that Mr Taylor had strangled her at the Porter River layby with motives of robbery and sexual assault. Her body was not discovered until 6 February 2000 after which an autopsy was carried out. The pathologist called by the Crown was of the opinion that death had occurred 18 to 24 hours prior to the autopsy on 6 February but could not rule out the possibility that death had occurred on 2 February. The defence pathologists concurred. However, another expert Crown witness was firmer in this opinion that death could have occurred on 2 February. There was evidence from the funeral directors responsible for the victim's body that the victim had died earlier than 5 February. Specific complaints were made regarding the "issues document" relating to various evidential issues.

As to the "issues document" the Court held that the direction was detailed, strong and entirely standard. The direction that pieces of evidence had to be looked at in the light of all the evidence and not in isolation was entirely orthodox. There was never any suggestion that there was an onus on the defence to prove anything. The order in which the issues were dealt with did not skew the case in the Crown's favour, and even if there may not have been any current issue between the parties on any of these

pieces of evidence, it did not mean that evidential references should not be given to enable the jury to check the evidence for themselves if they wished to.

The Court commented on the utility of the provision of written material to juries. The Court said that as long as the jury was made aware that it was for them to decide on the facts, then directions could be given by the Court regarding the facts. Given the length of the trial, the number of witnesses, and the number and complexity of issues, provision of the "issues document" was highly desirable. Though errors or omissions in a written document, as well as an oral summing up, could lead to a miscarriage of justice, there was a very wide latitude accorded to the Judge as to how he summed up. There was no risk here that any errors were such as to mislead the jury. The appeal was dismissed.

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