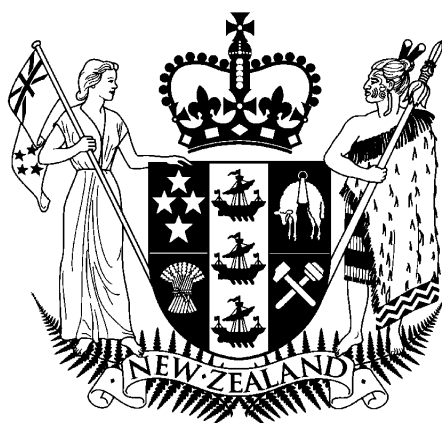

CONFERENCE OF JUDGES OF
THE SUPREME COURT, COURT OF APPEAL
AND HIGH COURT OF NEW ZEALAND

MARCH 2007



Court of Appeal Report for 2006

JUSTICE HAMMOND - JOEL HARRISON



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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 in 2006 consisted of the President and seven 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 other 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 this year increased in both jurisdictions with a considerable increase in the criminal area. The Court dealt with 535 criminal cases and 151 civil cases. In 2005 the Court dealt with 477 criminal cases and 125 civil cases. Judgments in 37 cases were reserved at the end of the year.

In addition to the 151 substantive civil appeals mentioned above, the Court dealt with 253 miscellaneous motions, compared with 140 in 2005. One contributing factor to such an increase in this area was the number of matters dealt with by way of judicial conferences 67 heard in 2006 with only six in 2005.

Notices of discontinuance received (or abandonments as they are now referred to since the rule changes in 2005) has gone against the trend of the past two years with the number of applications increasing. This year 88 applications were processed compared with 46 in 2005, 56 in 2004, and 77 in 2003. A further 29 appeals were

abandoned for lack of prosecution under the Court of Appeal (Civil) Rules, eight more than 2005.

The number of civil appeals filed remained steady this year with 285 appeals accepted in 2006 compared with 288 in 2005. The number of applications for fixture tracked similarly with filings with 147 received in 2006 compared with 149 in 2005. At the end of 2006 in the civil jurisdiction 60 appeals had fixture dates and 17 were waiting to have a date confirmed.

In the criminal jurisdiction there were a total of 495 appeals filed which is a decrease from the rise we have experienced over the past two years with 521 received in 2005 and 528 in 2004. Of those, 112 were against both conviction and sentence, 107 were against conviction, 106 were against sentence, 82 dealt with pre-trial rulings, 35 were appeals by the Solicitor-General, and the others concerned bail, special leave applications, case stated and name suppression, plus 1 further application for rehearing.

In 2005, the decrease in the number of criminal matters heard in the permanent court was noted. The figure had dropped considerably compared to the 2003 and 2004. That has not occurred again in 2006 with 20.1% (88 matters) being listed for hearing in the permanent court. This compared to 9.64% (37 matters) in 2005, 24% (93 matters) in 2004 and 21% (62 matters) in 2003. A five Judge bench heard two of those appeals.

At the end of 2006, 240 criminal appeals remained on the hearing status list; of those, 168 had a fixture date. The caseload position at the same time in 2005 was 266 appeals with 165 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 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 Wellington and Auckland. One sitting week was also held in Christchurch during August.

Procedural developments

Amendments to the criminal and civil rules for the Court both came into force on 7 August 2006 in respect of delivery of judgments for the court.

Members of the Court of Appeal

With the President, Hon Justice Anderson taking up an appointment as a Judge of the Supreme Court in February 2006, the Hon Justice William Young was appointed President of the Court. As well as the President, the Court was served in 2006 by seven permanent Judges: Hon Justice Glazebrook, Hon Justice Hammond, Hon Justice Chambers, Hon Justice O'Regan, Hon Justice Robertson, Hon Justice Arnold (from May 2006), and Hon Justice Ellen France (from June 2006).

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. In February 2006 he was appointed to the Supreme Court.

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. In February 2006 he was appointed President of the Court of Appeal.

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

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 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 Sheffield Young 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.

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

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



2 STATISTICS

Criminal appeals

	Hearing	Allowed	Dismissed	Dismissed On the papers
Conviction & Sentence	114	25	76	2
Conviction	93	30	65	1
Sentence	98	43	53	3
Solicitor-General Appeals	43	40	8	0
Pre Trial	63	18	42	1
Other	27	5	19	2
Sub total	438			
Abandonments/No jurisdiction	88			
Total	526	161	263	9

NOTE: The number of cases heard does not equal the number allowed and dismissed. Fourteen additional days of hearing were held to deal with interlocutory matters. Four cases heard in 2005 were decided in 2006 and four judgments for 2006 cases are reserved.

Of the appeals allowed, 28 were allowed in part.

The following table shows comparisons with earlier years

Year	Appeals or applications for leave filed	Oral Hearing	OTP	Allowed	Dismissed/abandoned/ no jurisdiction
2002	457	321	47	122	293
2003	486	370	29	128	324
2004	528	392	21	99	396
2005	521	384	17	143	339
2006	495	438	9	161	351

Criminal caseload

	2002	2003	2004	2005	2006
Permanent Court – seven judges	Nil	Nil	N/A	N/A	N/A
Permanent Court – five judges	5	3	2	5	2
Permanent Court – three judges	51	59	91	32	86
Criminal Appeal Division	265	309	299	345	350
On the papers	47	29	21	17	9

***Civil appeals***

	2002	2003	2004	2005	2006
Motions filed	276	247	273	288	285
Appeals set down	163	146	129	149	147
Appeals heard	153	148	113	125	151
Appeals allowed	60	56	34	53	57
Appeals dismissed	83	91	69	71	81

NOTE: the number of cases does not equal the number allowed and dismissed. Judgments in 33 cases were reserved at the end of the year, 15 judgments came from cases heard in the previous year, four matters were adjourned part heard requiring additional hearing days and one case has been adjourned sine die.

Civil caseload

	2002	2003	2004	2005	2006
Permanent Court – seven judges	Nil	Nil	N/A	N/A	N/A
Permanent Court – five judges	18	14	8	2	2
Permanent Court – three judges	71	92	96	105	120
Civil Appeal Division	62	42	8	18	29
Discontinued	50	77	56	46	88
Abandonments	58	20	42	21	29

Year end workflow

	2002	2003	2004	2005	2006
Criminal appeals awaiting hearing as at 31 December	168	191	218	266	240
Civil appeals awaiting hearing as at 31 December	59	55	57	65	77

*Privy Council appeals and petitions for leave to appeal*

Date PC Judgment	Parties	Result	Whether NZ Judge sat
04.05.06	Norbrook Laboratories Ltd v Bomac Laboratories Ltd	Allowed	No
23.05.06	McLachlan & Ors v Mercury Geotherm Ltd & Ors	Dismissed	No
21.06.06	Stemson v AMP General Insurance (NZ) Ltd	Dismissed	No
30.10.06	Ngati Apa Ki Te Waipounamu Trust v Attorney-General & Ors	Dismissed	No
Total Heard		4	
Total Dismissed		3	
Total Allowed		1	
Appeal from Court of more than 3 Judges		1	
Appeals from Courts of 3 Judges		3	

*Supreme Court appeals and applications for leave to appeal**Leave applications*

Year	Applications for leave to appeal	Leave granted	Leave declined / abandoned	Undetermined at end of period
2005	69	22	38	9
2006	101	25	61	15

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

Substantive appeals

Year	Appeals allowed	Appeal dismissed / abandoned	Reserved at end of period	Unheard at end of period
2005	1	7	5	9
2006	7	10	10	8



APPENDICES

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Note: The cases summarised in the Appendices have been collated by Hammond J and the Judges' Clerks of the Court of Appeal. They are intended to inform Judges and interested parties, but are in no sense "authorised" summaries. Reference should be had to the actual judgment for consideration in any legal proceedings, or in giving legal advice, or, in the case of lay litigants, in considering what steps to take in relation to their affairs.

Further, the following summaries are only a portion of the Court's decisions for 2006. In particular, cases containing suppression orders in relation to the reasons or result of the judgment have not been included in this report.

A IMPORTANT CIVIL CASES

Access to Court Records

Search and copy of Court records – “genuine or proper purpose” – applicant’s status as Member of Parliament

In *Murray McCully v Whangamata Marina Society Inc and Attorney-General* [2007] 1 NZLR 185, Mr McCully, Member of Parliament for East Coast Bays and National Party spokesman on conservation, appealed against a decision of Wild J declining him access to search and copy the court file in relation to judicial review proceedings being brought by the first named respondent against the second.

The judicial review proceedings related to the Minister of Conservation’s decision to decline the Marina Society’s marina development proposal, after the Environment Court had recommended to the Minister that the development proceed. On 1 June 2006, Wild J made orders granting Radio New Zealand and the *Dominion Post* leave to search and copy documents on the court’s file. Mr McCully’s personal application followed Wild J’s upholding of the Registrar’s decision to decline leave to the National Party Research Unit. Mr McCully had stated a concern for the integrity of the Minister’s decision-making process. Under r 66(9) of the High Court Rules a Registrar may grant access to court files, and shall, subject to the directions of a Judge, grant leave to any person who has a “genuine or proper interest”.

Wild J had considered that granting access to Mr McCully risked removing into the political arena an issue that had been entrusted to the courts. He considered that access would potentially, depending on Mr McCully’s use, ride roughshod over the principle that Parliament and its members should refrain from commenting on matters that are *sub judice*.

The Court noted that this was the first occasion in which it was called to consider r 66(9). It was therefore appropriate to place r 66(9) into an overall context. While access is generally available to the essential steps in a proceeding and the outcome, access to other materials is subject to approval of the court. Where proceedings have not been determined, the court must decide whether the applicant has a proper or genuine interest – the file is not, as matters stand, a publicly available register (the Court acknowledged the New Zealand Law Commission’s recent report, *Access to Court Records* (NZLC R93 2006)). The Court was of the view that such a decision is only partly discretionary. The Registrar must decide whether there is a genuine or proper interest in fact. Any discretionary element only arises when a Judge attaches conditions. The Court was supported in this view by previous decisions of the High Court (see, e.g., *Elworthy-Jones v Counties Trustee Co Ltd* (2002) 16 PRNZ 382 (HC)).

A two-stage approach was adopted. First, the applicant must satisfy the judicial officer that he or she has a genuine or proper interest. This is variously described in

the High Court cases as authentic, bona fide, respectable, or not frivolous, vexatious, or merely prurient. Once a genuine or proper interest is made out the second stage must be considered. A Registrar is obliged to allow search, copying, and inspection, but this remains subject to the directions and overriding control of the Judge.

The Court accepted Mr McCully's argument that he, as a Member of Parliament and spokesman for the National Party on conservation, had a genuine and proper interest under r 66(9) (potentially greater than that of other citizens). The Court could not accept Wild J's view that the mutual respect exhibited between Parliament and the courts would be threatened by his access. Mr McCully might or might not be able to utilise the files according to the rules of Parliament, but, "Parliament is master of its own house" and the court should proceed on the basis that the rules of the House will be respected. Finally, the Court took the view that no issue arose as to the effect of access – to both pleadings and affidavits - on the administration of justice in this case.

Search and copy of court record – video of Rainbow Warrior bombers pleading guilty – privacy and public interest

In *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 534 the Court upheld TVNZ's successful application to copy and publicly screen footage of the Rainbow Warrior bombers, Mafart and Prieur, entering pleas of guilty to the manslaughter of Fernando Pereira in 1985.

A major plank in Mafart and Prieur's argument was the contention that the video recordings were, at the time of their making, to remain the property of Judge Gilbert, the Judge presiding over their trial. Following an application for access to the videos in 1986 however, the parties (Mafart and Prieur and BCNZ, TVNZ's predecessor) agreed to consent orders which transferred the footage to the High Court as part of the committal record. The footage was therefore subject to applications to view and copy. On the basis of this history, the Court was of the view that there was no possibility that access to the record would bring the administration of justice into disrepute.

Several applications over the past twenty years had been made to view the footage, but each was unsuccessful, primarily because access to court records under the Criminal Proceedings (Search of Court Records) Rules 1974 was dominated by the protection of privacy. This changed, however, with the Court's decision in *R v Mahanga* [2000] 1 NZLR 641 which stated that in any application, the competing principles of privacy, open justice, freedom of information, and administration of justice, were to be weighed without any particular hierarchy.

The Court considered the competing interests of privacy and freedom of information. In relation to the privacy interests of the appellants, the Court noted that while it was crucial that a liberal state recognise the freedom to withhold intimate information in certain contexts, the appellants' own published works concerning the Rainbow Warrior bombing portrayed a sense of victory, rather than humiliation. Weighing against the minimal privacy interests of the appellants was the incontrovertible public interest in having a visible record of what is an important event in New Zealand, and world, history.

The Supreme Court has refused leave to appeal.

Accident Compensation

Delay in payment of compensation – Whether interest to be calculated on simple or compound basis

In *ACC v Robinson* CA56/06 13 October 2006, the Court allowed an appeal against a High Court decision holding that s 72 of the Accident Rehabilitation and Compensation Insurance Act 1992 (“the Act”) provides for the payment of compound interest on late payments from the ACC.

The respondents were entitled to compensation for loss of earnings under the Act. These payments were delayed for a period in respect of both respondents. The ACC paid the respondents simple interest on the delayed payments. The respondents were successful in an appeal to the High Court, which held that s 72 of the Act provides for the payment of compound interest on late payments from the ACC.

In the High Court, Heath J relied on the principles articulated in *Alington Group Architects Ltd v Attorney-General* [1998] 2 NZLR 183 (CA). He considered that the wording of s 72 was ambiguous, and said it was necessary to “determine the interpretation that best fits the underlying policy of the statute”. The Judge found that the policy weighed in favour of requiring the ACC to pay compound interest as a disincentive to making late payments.

Section 72 stated that interest is to be paid at the rate prescribed by s 87 of the Judicature Act 1908. The Court considered s 87, noting that nothing in s 87(1) authorises the payment of interest upon interest. However, s 87(1)(b) also states that the section does not apply to interest payable as of right under a statute. Given that ACC is a statutory corporation, it has only those powers expressly or impliedly given by statute. The question was therefore whether s 72 authorises or, more accurately, requires the payment of compound interest.

The Court disagreed with Heath J’s reliance on *Alington*, accepting that s 87(1) of the Judicature Act may not be of assistance in interpreting the intentions of parties to a contract, but finding that s 87(1) was of relevance in the statutory context under consideration. While s 87(1) does not necessarily proscribe the power of the ACC to pay compound interest on late payments, one would expect clear statutory language requiring such payments.

The Court found several indicators within the Act that weighed against an interpretation that required the ACC to pay compound interest. The language of s 72 of the Act creates a strong inference that the rate to be paid is a simple interest rate at the amount currently prescribed by s 87(3) of the Judicature Act (at present 7.5%). This is supported by the fact that the section is silent on the interval at which compounding is to occur; an important aspect of a compounding regime. Further, s 118 of the Act makes provision for the payment of compound interest on “penalty” payments for late payment of premiums. While not directly analogous to the compensatory payments dealt with in s 72 of the Act, this shows that Parliament

turned its mind to compounding in the context of the Act and used plain language to impose such an obligation on the ACC.

The Court ultimately addressed the policy considerations considered by Heath J. The Court noted that s 72 shows Parliament's wish to compensate those who do not receive payment within a month from when it was due. It is clear, however, that the legislation attempts to balance several competing interests, one of which is affordability. Furthermore, compound interest was not a feature of the common law action for negligence causing personal injury, which the accident compensation legislation has replaced. The Court disagreed with Heath J's finding that Parliament intended the ACC to pay compound interest as an incentive to comply with its timing responsibilities, finding that if Parliament had intended such an outcome, it would be expected to say so clearly. For the foregoing reasons the Court concluded that s 72 does not require or authorise the payment of compound interest.

Jurisdiction – special leave to appeal

In *Elliston v Accident Compensation Corporation* CA209/05 9 December 2005 Ms Elliston applied for special leave to appeal from a decision of MacKenzie J in which he refused special leave to appeal from a decision of the District Court under the Injury, Prevention, Rehabilitation, and Compensation Act 2001 ("the Act").

Under s 163 of the Act, the Court has jurisdiction in respect of "any determination or decision of [the High Court] on the appeal". A decision of the High Court refusing leave to appeal was not to be considered a determination or decision "on the appeal". The Court therefore did not have jurisdiction to hear the appeal.

Occupational diseases – lump sum compensation

In *Estate of Priddle and Others v Accident Compensation Corporation* CA223/05 19 October 2006 the Court held that the appellants were entitled to lump sum compensation as opposed to an independence allowance under the transitional provisions of the Injury Prevention, Rehabilitation and Compensation Act 2001 ("the Act").

All of the appellants had cover under the Act for asbestosis or mesothelioma due to exposure to asbestos while in employment. These conditions are occupational diseases listed in Schedule 2 of the Act. The appellants were assessed by ACC as having 80 percent or more permanent whole person impairment from their injury and were paid the independence allowance entitlement. ACC determined they were not eligible for lump sum compensation because of the transitional provisions of the Act. These provisions provide that a person who suffers personal injury caused by a work-related gradual process, disease, or infection in the circumstances described in s 30(2) is not entitled to lump sum compensation for permanent impairment if the personal injury preceded 1 April 2002.

Section 30(2) sets out three circumstances that must be fulfilled in order for a personal injury to constitute a "personal injury caused by a work-related gradual process, disease, or infection" under s 30(1) of the Act. Section 30(3) provides cover for a person suffering from a Schedule 2 occupational disease provided that it is suffered by

a person who is or has been in employment involving exposure to agents, dusts, compounds, substances, radiation, or things described in relation to that type of personal injury.

After examining the statutory framework, the Court held that the transitional provision did not apply to the appellants, as they did not suffer from a personal injury caused by a work related gradual process, disease or infection in the circumstances described in s 30(2). Section 30(3) is a standalone definition, not dependent in any way upon s 30(1). Therefore, a claimant suffering from a Schedule 2 occupational disease has his or her cover confirmed by s 30(3) and there is no need to consider the application of s 30(1) and (2). Accordingly, the appeal was allowed.

Administrative Law

Judicial review of Parole Board decisions – release on home detention or parole – relevance of general deterrence

In *Reid and Ors v The New Zealand Parole Board* CA247/05 29 August 2006, the appellants had sought judicial review of decisions of the Board in declining to grant home detention and parole. In each case the Board's reasons included the need to consider aspects of general deterrence in assessing whether the offender's release would pose an undue risk to the safety of the community. The appellants challenged the relevance of this consideration under the Parole Act 2002 ("the Act") notwithstanding *Hawkins v District Prisons Board* [1995] 2 NZLR 14, in which this Court held that general deterrence was a relevant consideration. The case was removed into the Court of Appeal from the High Court under s 64 of the Judicature Act 1908.

The Court reviewed the differences between the legislation under which *Hawkins* was decided and the new Parole legislation. It concluded that the new legislative environment led to a different approach to that sanctioned by *Hawkins*. It was more consonant with principle that considerations of general deterrence be taken into account by the Judge at sentencing, rather than by the Board in making decisions on release, to which the likelihood of re-offending and the risk posed to the safety of the community were more relevant.

Accordingly, the Court made a declaration that although considerations of general deterrence are relevant when setting the nominal sentence and minimum periods of imprisonment and in determining whether to grant leave to apply for home detention, they are not relevant when the Board is considering applications for release on home detention or parole. Factors relating to the particular individual that may affect the safety of the community, as provided for in ss 7, 28, and 35 of the Act, are, however, relevant when the Board is considering such applications.

Judicial review – Minister’s refusal to make a polytechnic a university – Education Act 1989 – legitimate expectations – natural justice

Attorney-General v Unitec Institute of Technology CA163/05 23 November 2006 involved an appeal by the Attorney-General against a decision of Miller J in the High Court in which he held in favour of Unitec on a judicial review of the Minister of Education’s actions in suspending statutory processes in respect of Unitec’s application to become a university.

Miller J had held that the Minister had suspended Unitec’s application pending the formulation of government policy concerning the shape and structure of the tertiary education sector. He was of the view that this suspension constituted an unlawful suspension of s 162 of the Education Act 1989, and that in doing so the Minister had breached Unitec’s legitimate expectations and right to natural justice. In addition to the Attorney-General’s appeal, Unitec had cross-appealed the Judge’s finding that the suspension of the process was for the purpose of settling government policy regarding tertiary education. In its view, the decision was made based on government policy that there be no more universities.

The Court agreed with the Judge that the reason for the suspension of the proposal by Unitec to become a university was to allow government policy on the tertiary sector to be finalised. Accordingly the cross-appeal was dismissed.

However, the Court disagreed with Miller J on the role in the process to be played by the Minister. Miller J saw the process as being that of an “application” by the institution to the Minister with the Minister having a semi-adjudicative role. However, since the Education Act imposes no explicit obligation on the Minister as to when that decision must be made, there is nothing in the Act to prevent the Minister from deferring the making of that decision. The Court saw the Minister as the key player in the process. As a result, the Court was satisfied that the Minister was under no express or implied time constraint as to when to make a final decision whether or not to recommend university status. Nor did the Minister have an obligation to continue with the statutory process. A final decision was not imminent and the Minister was entitled to discontinue or suspend the process if the possibility of making a positive recommendation was not under immediate consideration.

Judicial Review – Commerce Commission thresholds for lines businesses – whether Court can decline a remedy after unlawfulness established

In *Unison Networks Ltd v Commerce Commission* CA284/05 19 December 2006 the Court dealt with a judicial review challenge to the regulatory regime imposed by the Commerce Commission (“the Commission”) on the electricity industry under Part 4A of the Commerce Act 1986 (“the Act”). The judicial review claim was dismissed by Wild J at first instance.

The Commission is empowered to set thresholds for the declaration of price control. The thresholds act as a screening mechanism to identify which electricity lines businesses charge in such a way as to deserve the implementation of price control. A lines business in breach of the thresholds is not subjected to price control as a matter of course, but is earmarked for further inquiry as to whether price control might be

appropriate. Accordingly, the thresholds might result in false positives, i.e. businesses which breach the thresholds but are not deserving of price control.

Section 57E of the Act sets out the purposes to which the Commission must have regard in setting the thresholds. These are ensuring (1) that suppliers of electricity are limited in their ability to extract excess profits; (2) that they face strong incentives to improve efficiency and quality; and (3) that they share the benefits of efficiency gains with consumers, including through lower prices.

Unison challenged two thresholds the Commission had created under the Act. The initial threshold was gazetted on 6 June 2003. This required that lines businesses' prices not exceed the lowest average price between 8 August 2001 and 6 June 2003. The formula it adopted was of the form $CPI - X$ where $X = CPI$. It was, in essence, a price freeze. The revised threshold was gazetted on 31 March 2004. It retained the $CPI - X$ formula, but assigned variable values to X depending on the relative efficiency, productivity, and profitability of any given lines business. The result of the revised threshold was that the stronger a lines business performed, the more it was permitted to raise its prices.

Unison alleged the thresholds were inconsistent with the statutory purpose in s 57E. The Court accepted Unison's arguments in relation to the initial threshold, but not the revised threshold. The Court agreed with Unison that the initial threshold did not comply with s 57E because there was no logical correlation between requiring lines businesses to freeze their prices in nominal terms, and ensuring the attainment of the s 57E objectives. An inefficient and gouging lines business could put itself out of the Commission's reach simply by maintaining its monopoly pricing and low-quality service, clearly in breach of the s 57E objectives. With respect to the revised threshold, the Court rejected Unison's argument that the possibility of false negatives (lines businesses which deserved control but complied with the threshold) rendered the threshold unlawful. The Court said Unison's criticism boiled down to a preference for a different regulatory model. The selection of the model was a matter for the Commission. Accordingly, the Court found the initial threshold was unlawful but the revised threshold was lawful.

The Court divided on the question of remedy. Ellen France J, delivering the reasons of herself and Hammond J, declined to grant a remedy quashing the initial threshold because to do so would cause considerable disruption to electricity industry participants and consumers. This was because the revised threshold would fail if the initial threshold was quashed, given the linkages between them in temporal terms. The majority pointed out that most of the lines businesses comprising the industry supported the initial threshold and that there was public interest in its continued operation. Dissenting, O'Regan J said the starting point was that the Court would quash any decision which was ultra vires unless the circumstances were "exceptional". O'Regan J was not unsympathetic to the Commission's argument that quashing the initial threshold would cause the revised threshold to fail, but considered that many lines businesses had been exposed to regulatory action that was illegal. These businesses were entitled to a remedy and, absent a further hearing to highlight any truly exceptional reasons for declining one, the Court should grant it.

Leave to appeal to the Supreme Court has been sought.

Habeas Corpus – detention under the Mental Health (Compulsory Assessment and Treatment) Act 1992

In *Sestan v Director of Mental Health Services Waitemata District Health Board* CA254/06 12 December 2006 the Court considered an application for habeas corpus where Mr Sestan was detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (“the MHCATA”).

The Court determined that a person is not detained whilst the s 8B examination is conducted and the s 8A application for compulsory assessment is made. Accordingly, there is no requirement that a person under examination be informed of their right to a lawyer at this stage of the process.

The Court rejected an argument that the information provided regarding Mr Sestan’s right to consult a lawyer was inadequate. The appellant had argued that he should have been told that he had a right to see a lawyer “without delay and in private” in accordance with s 23(1)(b) of the New Zealand Bill of Rights Act 1990. The Court found that s 70 of the MHCATA, which only provides that a patient had a right to consult a lawyer, was the applicable provision in this case.

The Court rejected an argument that the respondent had failed to ensure that Mr Sestan was adequately informed of his rights. The *R v Mallinson* [1993] 1 NZLR 528 (CA) requirement that police ensure that a detained person properly understood advice provided was held to not extend to detention under the MHCATA.

The Director of Mental Health Services conceded that there had been a breach of s 9(2)(d) of the MHCATA as a family member had not been present when the assessment procedure was explained to Mr Sestan. The Court found that non-compliance with a mandatory provision does not necessarily mean that a writ of habeas corpus is either required or appropriate. Procedural error does not necessarily invalidate official action. The effect of non-compliance depends on the place of the requirement in the legislative scheme and the degree and seriousness of non-compliance. In this case, a nurse had attempted to get family members to attend but none had been willing to do so. The appeal was dismissed.

The Supreme Court has refused leave to appeal.

Civil Procedure

Summary judgment – guarantee – dual capacity signature

In *Vuletic v Contributory Mortgage Nominees Ltd* (2006) 22 NZTC 20,003, Ms Vuletic appealed against a High Court decision that she was liable as guarantor to Contributory Mortgage Nominees Limited (“CMNL”). CMNL sold property it held as mortgagee to Harris Road No 10 Ltd. Ms Vuletic personally guaranteed the purchase agreement as director and shareholder of Harris Road. Harris Road did not pay CMNL the GST component of the sale price. Instead Harris Road’s refund of GST input tax from the Inland Revenue Department was to be assigned to CMNL.

However, Harris Road failed to pay GST and Contributory Mortgage Nominees sought to claim payment from Ms Vuletic as guarantor.

CMNL sought summary judgment against Ms Vuletic in her personal capacity as guarantor. Faire AJ granted summary judgment, having found that Ms Vuletic had signed in a dual capacity as both director of Harris Road and personally as guarantor of the agreement. On appeal, Ms Vuletic argued that summary judgment should not have been entered against her as she had only signed the agreement once and not in a dual capacity as both Harris Road's director and as guarantor.

The Court did not dispute that it is possible for a person to sign a contract once but in dual capacity. However, there is a presumption that, if the signer purports to sign on behalf of a company or another, he or she is signing only in that capacity. Such a presumption may be displaced by clear words within the contract or by extrinsic evidence inferring the signer's intention when affixing his or her signature: *Doughty-Pratt Group Limited v Perry Castle* [1995] 2 NZLR 398 (CA).

The Court disagreed with Faire AJ and held that it was clearly arguable that Ms Vuletic signed only in her capacity as director of Harris Road. The Court pointed out that there was no evidence that Ms Vuletic ever orally agreed to guarantee Harris Road's obligations under the agreement. Furthermore, there was no extraneous material available at the summary judgment stage to colour Faire AJ's interpretation of the documentary evidence, although the Court observed that may change by the time of trial. On the basis of the documentary evidence alone, there was nothing that displaced the presumption that Ms Vuletic signed only as director of Harris Road and that she was not personally liable to make the GST payment.

First, the structure and words of the sale agreement and the mortgage agreement reinforced the presumption that Ms Vuletic signed in her capacity as director alone. Neither of the agreements demonstrated an intention on the part of the drafters that Ms Vuletic would be a party in her personal capacity, rather they seemed to assume that the guarantee would be provided in a separate document or by separate endorsement by her on the sale agreement. In both agreements, the description of the parties did not include the guarantor, and both agreements were marked by a lack of provision for the signature of the guarantor. Also, the description of the sale and purchase agreement did not detail itself to be a guarantor document. If another director of Harris Road had signed the agreements, then there could have been no argument that that director had signed as guarantor. The whole format of the agreements would have led the objective observer to conclude that there were only two parties to the sale and mortgage-back agreement and that whoever executed them on Harris Road's behalf would be executing solely in their capacity as director.

Secondly, the whole format of the guarantee clause in the sale agreement reinforced the impression that Ms Vuletic did not sign as guarantor as well as director. Read on its face, cl 26 was no more than a covenant by Harris Road to procure the guarantee of Mrs Vuletic. Clause 26 could have operated as an effective guarantee had Mrs Vuletic indicated in some positive way that that was what she meant. But she did not.

Thirdly, the impression that Mrs Vuletic signed only as director is reinforced by the fact that she added “Director” immediately under her name. That could be said to create a presumption that she had signed solely as director, which could only be displaced if there were relevant extraneous material such as conversations or correspondence indicating a contrary intention.

The Court distinguished *Doughty-Pratt* and said that *Chiswick Investments v Pevats* [1990] 1 NZLR 169 (HC) was of doubtful authority. The Court considered that while there were factual differences between the agreement in *Trotter v Avonmore Holdings Limited* (2005) 8 NZBLC 101,646 (CA) and the sale agreement in this case, the principles were helpful.

The Court allowed the appeal and ordered that summary judgment against Ms Vuletic be set aside.

Contempt of court proceedings – objection to previous amicus curiae acting as counsel

In *The Solicitor-General v Miss Alice (Previously Robert Alexander Moodie)* CA168/06 25 October 2006 the Court allowed an appeal by the Solicitor-General against a High Court decision which held that Messrs Dobson QC and Lithgow were prevented from representing the Solicitor-General in contempt proceedings against Dr Alice. The contempt proceedings arose out of the actions of Dr Alice as counsel for a Mr and Mrs Berryman in a case brought by them against the New Zealand Defence Force (“NZDF”). In the course of the those proceedings Dr Alice obtained a report prepared by the NZDF on the causes of the collapse of a bridge built by the NZDF on the Berrymans’ land. Dr Alice released that report to Television New Zealand in breach of an undertaking to opposing counsel and posted it on the internet in breach of a court order.

Initially Mr Dobson was appointed by the High Court as amicus curiae to identify whether Dr Alice was in contempt of court in releasing the report. Mr Dobson filed a memorandum in which he took the view that it was “tolerably clear” that Dr Alice’s conduct constituted contempt. Accordingly, the Solicitor-General began contempt proceedings. Dr Alice objected to Messrs Dobson and Lithgow acting for the Solicitor-General in these proceedings given their previous role as amici. Fogarty J in the High Court granted an order to this effect.

The Court concluded that it had always been envisaged that Messrs Dobson and Lithgow would “prosecute” the contempt (if found to be soundly based) when they were appointed as amici and so it would not be a change of their function to represent the Solicitor-General. Furthermore, there is nothing improper or uncommon in amici taking a partisan role. The Court considered that counsel would not have an undue advantage in the proceedings because of their previous role. A fully informed member of the public would understand that judges decide cases impartially on the merits and on the law, and not on the basis of the seniority, expertise, or manner of appointment of counsel. Thus, the administration of justice could not be brought into disrepute by amici acting for one of the parties. In addition, the High Court had not paid proper regard to the special character of contempt proceedings and the role of the

Solicitor-General as Law Officer representing the public interest. The appeal was allowed and the order of the High Court set aside.

Costs – correct use of costs application following unsuccessful application for non-party discovery

In *Berryman v New Zealand Defence Force* CA95/05 13 July 2006 the Court dismissed the Berrymans' appeal from a costs judgment of Wild J following an unsuccessful interlocutory application for non-party discovery. The proceedings in the High Court concerned a judicial review application requesting that the Solicitor-General take steps to order the Coroner to hold a new inquest in relation to the death of Mr Richards following the collapse of a bridge at Te Rata Station. The original Coroner's inquest had determined that the Berrymans were substantially responsible for the death. The Army had a report that was not disclosed to the Coroner and which contained some adverse findings against itself. Wild J in the High Court had held that the Berrymans were not entitled to discovery of the Army report. When the Army brought an application for costs, the Berrymans argued in very strong terms that there had been misconduct on the part of the Army with regards to the Coroner's inquest, and that this should be taken into account. The argument continued in the Court of Appeal.

The Court stated that as a non-party had effectively been dragged into the litigation, the usual rule that the non-party should have their costs applied. Costs are also to be assessed in the context of each interlocutory proceeding, rather than in relation to the proceedings at large. Furthermore, a costs application on non-party discovery was not an occasion for "punishing" the Army for alleged misconduct, even if it had been established.

The Supreme Court has refused leave to appeal.

Commercial Law

Fair Trading Act – liability of sales manager employee – whether employee can be "in trade" under the Act – "mere conduit" defence

In *Newport v Coburn & Ors* (2006) 8 NZBLC 101,717 the Court was asked to consider the extent to which the "mere conduit" defence from *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) applied to employees as opposed to independent agents. The defence operates as follows. If an agent passes on a misleading representation to a representee, the agent can avoid liability under the Fair Trading Act 1986 ("the Act") if he or she purports to do no more than pass on instructions from his or her principal. Therefore, the agent is required to demonstrate that he or she disclaimed to the representee any belief in the representation's veracity. The agent must show that he or she merely passed on the information as a mere conduit.

Mr Newport was the Sales Manager of Installer Services Ltd ("ISL"), a business which franchised nationwide the installing and repairing of electronic accessories in cars. He was the contact point listed in a franchise advertisement for interested

prospective franchisees. Mr and Mrs Leeming contacted Mr Newport who forwarded to them an overview of ISL's operations containing misrepresentations as to ISL's client base. The overview had been provided to Mr Newport by ISL. The Leemings subsequently purchased ISL's Wellington franchise. Similarly Mr and Mrs Coburn contacted Mr Newport with an interest in ISL's Manuwatu franchise. Mr Newport forwarded an overview of ISL's operations to Mr Coburn. Subsequently Mr Newport met with Mr Coburn and Mr Corry, a director of ISL. At this meeting, Mr Newport and Mr Corry reinforced the contents of the overview, which contained false promises of clientele and turnover. The Coburns purchased the franchise. In due course, both franchises failed largely because the promised clientele was in fact non-existent. The Leemings and Coburns brought proceedings in the High Court. Durie J found Mr Newport (along with Mr Corry and others) liable under the Act. Mr Newport appealed. The Court allowed Mr Newport's appeal in whole in relation to the Leemings and in part in relation to the Coburns.

The Court found that Mr Newport was an employee of ISL. The Court said it was therefore arguable that Mr Newport was not "in trade" for the purposes of the Act, citing with approval academic commentary to the effect that decisions of the Court of Appeal and High Court holding that employees are "in trade" were wrongly decided. However, the Court said that since the point had not been fully canvassed in argument, resolution of the issue would have to wait until it was raised in either the Court of Appeal or the Supreme Court. Accordingly, the Court proceeded on the basis that Mr Newport could be "in trade" under the Act.

The Court said it was not established on the evidence that Mr Newport knew the misrepresentations made to the Leemings were false. As such, he could not be secondarily liable under the Act because secondary liability required actual knowledge of the misrepresentation's falsity. The question then arose whether Mr Newport could incur primary liability under s 9. The Court said there were difficulties in applying the "mere conduit" test to employees. It said there was nothing in *Goldsbro* requiring an employee to distance himself or herself from a representation in order to avoid liability. Mr Newport did not add his imprimatur or an embellishment to the representation and it should have been apparent to the recipient of the information that Mr Newport passed it on as an employee. The Court stated it was not pronouncing a new test for employees, but rather emphasising that the *Goldsbro* test would not apply if, on the facts, it was or ought to have been apparent to the recipient of the information that the employee merely passed on that information from his or her employer.

The Court found that by the time the misrepresentations were made to Mr Coburn, Mr Newport knew of their falsity. Accordingly he was secondarily liable for assisting ISL's directors in a breach of s 9 of the Act. However, his role in the breach was comparatively minor compared with the directors', and accordingly the damages for which he was liable were reduced.

Breach of solicitor's undertaking – construction of undertaking – abuse of process

Bhanabhai and Burgess v Commissioner of Inland Revenue CA218/05 20 December 2006 concerned the construction of an undertaking given by a solicitor to the Commissioner of Inland Revenue. Mr Bhanabhai was the solicitor for companies

developing a residential apartment building in Auckland which were in arrears in their GST output tax liabilities to the Commissioner. Mr Bhanabhai undertook that on settlement of various units in the building that “we will forthwith pay to you the GST component of the sale consideration.” However, by the time that the units were settled, the security arrangements with a finance company did not permit any part of the proceeds to be paid to the Commissioner. The Commissioner sued on the undertaking.

The Court was ultimately not persuaded that Laurenson J erred in finding that the undertaking was given personally and not on behalf of the developers. There was no apparent reason not to construe the undertaking as meaning other than what it said, in fact, to construe it otherwise would remove all commercial point to the letter in which it appeared.

The Court rejected the argument of Mr Bhanabhai that the undertaking was conditional on the proceeds of sale being available for payment of GST output tax. The Court could find no principle of law that undertakings be read down so as to be conditional upon fulfilment of the undertaking being possible.

The final question was whether the claim by the Commissioner was an abuse of process. The developing companies had gone into liquidation and in 2001 the liquidator had commenced proceedings against the directors, including Mr Bhanabhai. The Commissioner of course was a creditor. However these proceedings were eventually settled between the liquidator and directors, but no part of the settlement proceeds went to the creditors as they were completely absorbed by the liquidator’s costs. Mr Bhanabhai argued that the settlement precluded the Commissioner’s claim.

Applying *Henderson v Henderson* (1843) 3 Hare 100, *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL), and *Chamberlains v Lai* [2006] NZSC 70, the Court concluded that the Commissioner’s claim was not an abuse of process. In particular, the liquidator was acting independently in settling the proceedings and the Commissioner had not assented to settlement. The Court stated that the claim by the liquidator was conceptually very different to the Commissioner’s. Further, the claim on an undertaking invokes the disciplinary jurisdiction of the court over solicitors and is thus not affected by technicalities that might otherwise defeat an orthodox civil proceeding.

Leave to appeal to the Supreme Court has been sought.

Company Law

Reckless trading – objective test – failure to keep proper books of account – quantum following liability

In *Mason v Lewis* [2006] 3 NZLR 225, the appellant liquidators appealed against a decision of Salmon J finding that the Lewises, the directors of Global Print Strategies Ltd (“Global Print”), were not in breach of their obligations as directors not to allow

the company to trade recklessly (s 135 of the Companies Act 1993 (“the Act”)), and to keep proper books of account (s 300 of the Act).

In November 1994, Global Print was incorporated with the Lewises as directors along with Mrs Sarah Grant, the wife of Mr Graeme Grant (the “entrepreneur” who dreamt up Global Print), and Messrs Shanks, Spier, and Carter (who resigned in April 2000). Mr Grant was appointed the manager. The company was a print brokering business, established to service the print management requirements of Corporate Express, a joint venture of Mr Grant’s. Corporate Express, however, terminated its contract with Global Print in early February 2000, a fact that the Lewises only became aware of near the end of April. Mr Grant assured the Lewises that Global Print had sufficient work from other clients to continue operating. However, in reality the company was in serious financial trouble from the end of March 2000. Nevertheless, the company traded on. Mr Grant then enlisted his director-wife to factor some of the company’s debts to Commercial Factors Ltd – after Mr Lewis refused to do so. The Inland Revenue Department (as one sign of financial instability) sent the Lewises a letter in March or April 2001 detailing outstanding tax totalling over \$163,000. The Lewises took no action and Mrs Lewis resigned as director in September 2001. Mr Grant had in fact been arranging for false invoices to be made out by Global Print to third parties, and these invoices had been factored to Commercial Factors. He was later convicted on five charges of fraud.

The liquidators brought proceedings for reckless trading and failure to keep proper books of account ostensibly for the benefit of unsecured creditors. Salmon J in the High Court considered that the Lewises had acted honestly, in good faith, and reasonably throughout the life of the company. In relation to keeping proper books of account, Salmon J considered that the Lewises could legitimately rely on their view that Mrs Rowe (an accountant) was keeping records.

The Court examined the boundaries of s 135, noting that the provision imposes a duty owed to the company (rather than any particular creditor). It is concerned with preventing substantial risk of serious loss (requiring a sober assessment of the company’s likely future income stream), and illegitimate risk taking, focusing not on the director’s actual beliefs, but on the manner and method in which a company’s business is carried on. Flowing from this assessment, the Court emphasised that s 135 – on its terms as well as decided case law – requires an objective examination of the directors’ conduct. The Court therefore disagreed with Salmon J’s assessment that s 135 required an element of subjectivity – be it intention, recklessness, or wilful blindness. Emphasis, however, was placed on the distinction between s 135 (reckless trading) and s 301 (the Court’s discretion as to what recovery is available).

The Court took the view that the Lewises had paid no or no proper attention to the financial affairs of the company, instead relying on the assurances of Mr Grant. In the context of such dire financial circumstances, where solvency had become a critical issue, the Lewises should have been paying especially close attention to the company’s financial state, and taking active remedial steps. Instead, for a period of at least 15 months creditors were left at the mercy of a hopelessly insolvent company – “a paradigm case of reckless trading”. As to s 300, the Court concluded that the Lewises actually knew that no adequate system of accounting was in place, and they were not themselves getting accounts.

The case was remitted to the High Court to establish the quantum for the Lewises liability under s 301. The Court noted that although it would have been preferable to resolve this aspect of the case immediately, there were several problems: the liquidators had pleaded the case in a misleading fashion, failing to note that a secured creditor – Commercial Factors – may be the only party who recovers (the Court doubted the status of the debentures held by Commercial Factors also); several of the listed creditors were unexplained; and there were issues of proof surrounding unsecured creditors. The Court then provided several principles to be applied in determining quantum. Once “breach” is established, it is necessary to consider causation, culpability (with particular regard to the position of directorship), and the duration of the trading.

Part XV of Companies Act amalgamation – validity of ex parte orders – standing of Takeovers Panel to intervene

In *Dominion Income Property Fund Ltd and Ors v Takeovers Panel* CA229/06 26 October 2006, Dominion and two associated companies had planned to amalgamate under Part XV of the Companies Act 1993. Accordingly, the companies applied to the High Court for initial orders under s 263 and the orders were granted by Asher J. The Judge did not direct the holding of shareholder meetings but rather postal voting processes. Furthermore, he required approval of 75% of those voting but did not require a majority voting threshold requirement.

The Takeovers Panel (“the Panel”), which has become increasingly dissatisfied with the use of Part XV of the Act as a Code avoidance mechanism, applied to the Court to vary the orders so as to provide for a majority voting threshold requirement. This application was granted by Stevens J. Dominion appealed to the Court of Appeal.

In an oral judgment, the Court allowed the appeal and set aside the variation of the orders made by Stevens J. The Court found the positions of both parties finely balanced, but ultimately was persuaded that the position of Dominion was correct. This was because it was likely that the proposed amalgamation would be approved by an overwhelming majority of those voting, though the total votes in favour would likely fall short of 50%. Furthermore the Court could not see any basis for regarding the amalgamation as other than very orthodox. There was no evidential basis for the view that it was a Code avoidance mechanism.

The Court then considered the standing of the Panel to intervene in cases such as this. While not inclined to give a final view on the matter, the Court thought it arguable that the Panel did have standing since it was legitimately a matter of interest to the Panel under s 8 of the Takeovers Act 1993.

Liquidation – disclaimer of onerous property – holding of creditors meeting – approach to s 284 of the Companies Act

Trinity Foundation (Services No 1) Ltd v Downey and Black as Joint Liquidators of CWF Holdings Ltd (In Liquidation) CA193/05 15 November 2006 concerned the propriety of actions taken by the liquidators of CWF.

In advance of the initial creditors meeting the liquidators disclaimed a long-term agreement between CWF and Trinity Foundation under s 269 of the Companies Act 1993 (“the Act”). The result was that what had previously been a claim based on the agreement became a claim for damages which was required to be made in the prescribed form. Trinity had used the wrong form and the liquidators rejected the claim in full accordingly. The upshot of this was that Trinity was not recognised as a creditor at the meeting and could not vote on the decisions made at that meeting. Trinity applied to the High Court under s 284 of the Act for leave to apply for orders reversing various decisions made by the liquidators at the meeting.

In the High Court, Lang AJ refused leave to apply for an order reversing the decision to disclaim the agreement, but gave leave in respect of the other decisions. Before the Court of Appeal was a cross-appeal from the liquidators in respect of the decision to give leave, Trinity having abandoned its appeal against the refusal to grant leave in respect of the disclaimer decision.

The Court noted the importance of the creditors meeting, providing as it does the opportunity to decide who the liquidators should be. The Court approached the case on the basis that Trinity was required to show that it had an arguable case for relief before leave to apply could be given. However, despite the casual nature of the claim made by Trinity, and in the context of s 243(1), the Court would have expected the liquidators to have either estimated the amount of the claim for damages or submit the matter to the High Court for a decision. Liquidators ought to do what they reasonably can to facilitate creditors being able to vote at the meeting. Against that background it seemed to the Court that Trinity had a credible basis for challenging the decisions of the liquidators and so it dismissed the cross-appeal and gave leave to Trinity to apply to the Court for orders.

Competition Law

“Raw Milk” Regulations – Price of raw milk for independent producers – calculation of Fonterra “retention” – calculation of “annualised share value” using WACC

In *Commerce Commission v Fonterra Co-Operative Group Ltd* CA175/05 4 May 2006 the Court was concerned with the price of milk. Under regulation 8(6) of the Dairy Industry Restructuring (Raw Milk) Regulations 2001 (“the Regulations”), Fonterra must supply raw milk to independent producers at the price set out in the regulations, unless the parties agree to a price. The regulation establishes the following formula:

$$(\text{total payout} + [\text{Fonterra}] \text{ retention} - \text{annualised share value})$$

kilograms of milksolids

Two issues arose in calculating this price. First, how the utilisation of reserves by Fonterra, in relation to the word “retention”, was to be treated. Fonterra took the position that the word “retention” in the formula encompassed transfers “to” reserves,

but not transfers “from” reserves. Secondly, an issue arose as to how to calculate the “annualised share value”. The annualised share value, in essence, is intended to represent the return for that particular season on the capital which is supplied by the thousands of Fonterra supplier shareholders. According to reg 9, calculating the annualised share value turns on the discount rate used by Fonterra, which “must be the same as the cost of capital used by Fonterra in calculating the price of a co-operative share”. Fonterra used a Weighted Average Cost of Capital (“WACC”) and argued that this was beyond its control because, as per Fonterra’s constitution, this was decided upon and set by the co-operative’s valuers. The Commission, however, contended that Fonterra should use a “cost of equity capital” rate, and that only this formed the use of a cost of capital rate. In its view, the appropriate question to ask was, “How much is Fonterra paying for the equity capital supplied by its shareholders?” This was, in the Commission’s view, consistent with a purposive interpretation of the Regulations. Two proceedings were accordingly commenced in the High Court. In the first, the retention proceedings, Fonterra sought a declaration that it was not in breach of the regulations by not including an after-tax loss of approximately \$50 million for the 2001-2002 season as a negative retention in the formula. The loss of \$50 million arose after it was included in a payout provided to farmers. The second proceeding concerned a declaration, sought by the Commission, as to the meaning of the words “the cost of capital rate”. In the High Court, MacKenzie J ruled in favour of Fonterra in both proceedings.

In relation to the calculation of the annualised share value and consequently, the cost of capital, the Court, upon a reading of the Regulations, and Fonterra’s constitution, noted that once the valuation pattern is settled, it substantially controls the future. The Court stated that there is no fixed or right answer to calculations of cost of equity. It could be said however that the WACC approach is a perfectly accepted methodology and one that is widely adopted. The Court took the view that to resolve the debate as to the “best” methodology, reg 9(1) utilises a relatively arbitrary formula: the cost of capital rate that was simply used. On the plain reading of the regulation “cost of capital” could not become “cost of equity capital”. The judgment of MacKenzie J was therefore, in this respect, affirmed.

With regards to the retention proceeding, the Commission argued that where Fonterra makes a payment out of reserves to shareholder suppliers in a season, that payment should be treated as a negative retention. Alternatively, the Commission argued that the term “total payout” means the total payout from profits in that season, and does not include payments to shareholder suppliers out of reserves. MacKenzie J took the view that “total payout” included all payments made to shareholding farmers for raw milk supplied in a season, and that “retention” was limited to after-tax profits retained by Fonterra (relying on the definition of “retention” in the regulations). The Court noted that the economic merits lay with the Commission because, in effect, Fonterra’s transfer from reserves artificially inflated the price of raw milk for independent producers. The Court concluded that “is retained” in the definition of “retention” has a present sense, and cannot be read to include transfers from reserves. However, the Court thought it appropriate to “read-down” (if necessary) the term “total payout” to only refer to payouts in that particular season, meaning that a retention from a previous season could not be double counted as a payout in a subsequent season out of reserves.

The Supreme Court has granted the Commerce Commission leave to appeal.

Contract Law

Contract – reasonable notice – breach of fiduciary duty – exemplary damages

In *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 the Court considered the legal nature of the relationship between two parties involved in the waste paper business.

The Court upheld the findings of Nicholson J in the High Court that the parties' dealings from the mid-1980s to 2001 showed that the parties had an understanding that Aotearoa was to be Paper Reclaim's sole agent with respect to the export of Paper Reclaim's waste paper, and that the contract could not be terminated peremptorily but only on the giving of reasonable notice. As it turned out the joint venture relationship did not terminate on effluxion of a reasonable notice period. Instead, the agreement was terminated when Aotearoa elected to cancel following a repudiation of the agreement by Paper Reclaim. The Court held that Aotearoa's submission that the contract could have been of indefinite duration never had any chance of success. The Court overturned the High Court decision that the period of reasonable notice was eight years. But for Aotearoa's cancellation of the agreement, Paper Reclaim would have been able to give reasonable notice under the joint venture agreement and that would have been at least a year.

The Court held that the High Court was wrong to find that certain sales by Paper Reclaim to Carter Holt Harvey Ltd were in breach of an implied term of the joint venture contract that each party would act with reasonableness and good faith to the other in the implementation and continuing operation of the joint undertaking. The Court overturned the High Court finding that Paper Reclaim was in a fiduciary relationship with Aotearoa and had breached its fiduciary obligation to act reasonably and in good faith in the implementation of the joint undertaking. While the High Court was correct that the agreement did create a joint venture relationship, the relationship did not impose a fiduciary duty on Paper Reclaim.

The Court found no evidence to support the High Court finding that a commission was payable by Paper Reclaim to Aotearoa for the balance of an order for paper which had never been supplied to an Australian company. Paper Reclaim paid Aotearoa a commission on the tonnage of waste paper actually supplied to the Australian company but Aotearoa argued that Paper Reclaim's failure to supply Aotearoa with the required amount of paper led Aotearoa to breach an unconditional contract of sale with the Australian company. The Court found that all the evidence led to the conclusion that there was no breach of contract with the Australian company. Indeed, the Australian company never sued for breach of contract.

The Court held that Aotearoa's loss should not be difficult to calculate on the basis of the Court's findings as to the date of Aotearoa's cancellation, but directed that if the parties were unable to agree on quantum, then a further hearing in the High Court might be required. The Court overturned the High Court finding that this was an

appropriate case for award of indemnity costs to Aotearoa. Although Aotearoa had succeeded on a major issue in the case, being the existence of a joint venture agreement, it failed on many of the causes of action it advanced and failed in its defence to Paper Reclaim's counterclaim. The costs judgment was therefore set aside.

Finally, the Court ruled that as a matter of law exemplary damages were not available for breach of contract in New Zealand. In doing so, the Court said that there was a clear trend of overseas authority against the suggestion that exemplary damages should be available in breach of contract cases and that the position in New Zealand should conform with that trend. The Court was particularly influenced by detailed reports undertaken by law commissions in the United Kingdom and Ireland. The question of whether exemplary damages could be claimed for breach of fiduciary duty was left open. There was no order for costs in the Court of Appeal as the "honours [were] equally shared".

The Supreme Court has granted leave to appeal.

Employment Law

Transferring of public holiday entitlements to another day – whether collective employment agreement sufficiently identified transfer days

In *Air New Zealand Ltd v The New Zealand Airline Pilots' Association Industrial Union of Workers Inc* CA113/05 13 November 2006, the Court considered whether the appellant airline's collective employment agreement ("the agreement") with the respondent union complied with the Holidays Act 2003 ("the Act"). The appeal was from a decision of the Employment Court on a question of law pursuant to s 214(3) of the Employment Relations Act 2000.

The Act stipulates in s 44(1) 11 days that are deemed to be public holidays. This reference is followed by s 44(2), which states:

However, an employer and employee may agree (whether in an employment agreement or otherwise) that any public holiday specified in subsection (1) is to be observed by the employee on another day.

The Act creates entitlements for employees who work on public holidays. The combined effect of ss 48(2)(b), 50, and 56 (to which the majority referred to as "the entitlement regime") is that if a public holiday falls on a day that would otherwise be a working day for an employee, and the employee works on that day pursuant to his or her employment agreement, the employer must pay the employee on a time and a half basis and provide the employee with a day off in lieu of the public holiday worked. The entitlements given by the Act are minimum entitlements and they are mandatory.

The agreement creates a roster system under which it is likely that a pilot will work on at least some of the 11 public holidays specified in s 44(1). Pilots do not receive additional remuneration for working on a public holiday. Instead, the agreement

provides pilots with 11 additional days' leave, over and above annual leave entitlements, irrespective of the actual number of public holidays worked by a pilot.

The Court unanimously dismissed the appeal, agreeing with the Employment Court that the agreement did not comply with the Act. (The Court split on whether it complied with the Act's predecessor, the Holidays 1981, Chambers J holding it did, William Young P and O'Regan J expressing no view.)

The issue of the construction of s 44(2) divided the members of the Court. In the majority, William Young P and O'Regan J considered that the effect of s 44(2) was that an employer and an employee could agree, in any employment agreement or otherwise, to transfer the observance of a public holiday to another day (the "exchange day"). So, for example, if an employer and employee agreed that Christmas Day were to be observed on 17 July, 25 December would cease to be Christmas Day for the employee in terms of his or her employment agreement. The employee would work on 25 December as if it were an ordinary day. He or she would be paid at the usual rate. The entitlements provided for by ss 48(2)(b), 50, and 56 would inure to 17 July. The employee would not work 17 July, but if for some reason he or she did, he or she would be paid on a time and a half basis and receive a day in lieu. William Young P and O'Regan J cited the example of a non-Christian employee who wishes to observe a feast day in his own religion, and accordingly would agree to work Christmas Day so as to transfer the Christmas observance to the feast day. William Young P and O'Regan J thought that there was a purported exchange in the agreement, but considered that the agreement was defective because it did not sufficiently specify the exchange days.

In his separate judgment, Chambers J disagreed. He thought that on the majority's interpretation, the entitlement regime would rarely apply, because it would only inure to the benefit of an employee on the off-chance that he or she were called in to work on the day of transferred observance (i.e., on 17 July in the example above). Chambers J thought there was nothing in the scheme of the Act to suggest the meaning which the majority ascribed to s 44(2) and that that meaning could be oppressive for employees. However, Chambers J concurred in dismissing the appeal because the agreement failed to comply with the requirements to supply an identifiable day in lieu and time and a half payment.

Leave to appeal to the Supreme Court has been sought.

Holidays – alternative day under s 56, Holidays Act 2003 – requirements for alternative day under s 57 – whether employment agreement complied with s 57

In *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union* CA270/05 21 December 2006 the Court had to decide whether the collective employment agreement between the appellant Commission and the respondent Union complied with s 57 of the Holidays Act 2003 ("the Act"). The Act provides that where employees work on a public holiday, they are entitled, amongst other things, to a day in lieu (an "alternative day"). Section 57 spells out the requirements for an alternative day. It provides that an alternative day must be taken on a day that is agreed between the employer and the employee (s 57(1)(a)) and that an alternative

day must be taken on a day that would otherwise be a working day for the employee (s 57(1)(b)).

Firefighters work in “watches”. Each watch is 160 days long and is made up of 18 cycles of eight days work, followed by 14 days leave and two days which are “rostered days off which are not leave” (this 16 day leave period is referred to as the “period”). Within the eight day cycles, days one to five are working days and days six to eight are not. The period provides for annual leave entitlements and alternative days. The number of alternative days provided for by the period is in excess of the amount of public holidays any individual firefighter will ever be required to work.

The union contended that the alternative days provided for in the period did not comply with s 57 because, if they were not alternative days, the days would not be days on which a firefighter would be working in terms of s 57(1)(b). The union argued that even if it were wrong in this submission, the alternative days were not sufficiently specified so as to be the product of agreement in terms of s 57(1)(a).

By majority the Court rejected both of the union’s arguments. Chambers J, delivering the judgment of himself and William Young P, considered that but for the fact the period was a designated leave period, it would contain two eight day cycles, meaning the employee would effectively work ten days out of the 16 (i.e., two lots of five days). Therefore, the two lots of five days were, if not alternative days, “otherwise working days” in terms of s 57(1)(b). The majority also held that the agreement complied with s 57(1)(a), because the 16-day period was a pool of days out of which a firefighter could choose alternative days to represent public holidays worked. Since it would make no difference to the employer as to what days a firefighter chose for this purpose, there was an element of agreement because the choice effectively remained with the firefighter.

Dissenting, O’Regan J considered that the period was set aside as a period of leave, containing both annual leave and alternative days. Accordingly, if a day within the period was not designated an alternative day, it would be a day of annual leave or a rostered day off which is not leave – i.e., it would not be a day on which the employee would work. O’Regan J also considered there was no compliance with s 57(1)(a). In the context of the Act, the agreement as to when an alternative day was taken had to be a specific agreement with respect to a specific day.

Leave to appeal to the Supreme Court has been sought.

Family Law

Relationship Property – valuation of super-profits – relationship between economic disparity orders and maintenance orders

In *M v B* [2006] 3 NZLR 660 the Court considered the valuation of a husband’s super-profits in a partnership and application of income awards as relationship property under the Property (Relationships) Act 1976 (“the PRA”).

Allan J in the High Court determined that as there was no element of super-profits in the husband's earnings from his law firm, the husband's interest in the firm had no value and could not constitute relationship property. Allan J's assessment was based on two factors. First, that the comparable earning figure for a "clone" of the husband at the independent bar was not markedly different from the income the husband could anticipate from the firm. Secondly, income from the firm was to be calculated at the date of separation with little regard to what advantages might accrue from hindsight.

Robertson J stated that, in this case, the Court had the advantage of information about what had actually occurred after separation and such information was of substantial value in the valuation process. He stated that the approach in *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) provided but one approach to the valuation of super-profits and was not necessarily to be used in all circumstances. When assessing the comparable earning figures for a "clone" who had not entered a partnership, assessment should be based on actual rather than assumed evidence. An evaluative process needed to be undertaken which had proper regard to the multi-functional nature of the husband's tasks as a partner, the actual work undertaken, as well as what he could reasonably have achieved outside the firm. He preferred the evidence of what a partner who had left the firm was able to earn. Valuation approaches could be confirmed by undertaking an "economic reality" check. In this case, Robertson J affirmed his valuation by comparing it to what the husband effectively "paid" to enter the partnership and assessing the income he had forgone when entering the partnership.

William Young P stated that the courts should encourage a simpler, more straightforward, and less personalised approach to super-profits based on models used by chartered accountants.

In relation to post-settlement receipts, spousal maintenance, and economic disparity orders under s 15 of the PRA, William Young P advocated a broad-brush approach in order to produce an outcome that is "just" as required by s 1N(c) of the PRA. He stated that the order in which spousal maintenance and economic disparity orders determinations are made is not particularly important. What is important is that the overall assessment is coherent and in accordance with the overall statutory scheme.

Hammond J stated that the PRA and Family Proceedings Act 1980 should be viewed as a "legislative package". It is appropriate when making findings in accordance with specific provisions to stand back and ask whether the overall scheme of the legislation has been satisfactorily met.

Robertson J stated that once relationship property has been equally divided and any adjustments made in accordance with the PRA through, for example, s 15 of the PRA, then, and only then, can an assessment regarding spousal maintenance be made.

Hague Convention – child objection defence

White v Northumberland [2006] NZFLR 1105 concerned the proper approach to judicial discretion where a child's objection defence is raised under s 106(1)(d) of the Care of Children Act 2004 to an order for the return of an abducted child to his or her country of origin.

The child, “George”, was born in August 1995 in Basingstoke, England. His parents had separated when he was two years old. After their separation George continued to live in the family home in England with his mother, but continued to see his father regularly. In 2003 George’s mother, following a visit to New Zealand, decided she would like to move to New Zealand with George. George’s father did not agree so the mother applied to Basingstoke County Court for permission to take George to New Zealand. The Court granted consent, but upon conditions. In breach of those conditions, and without telling the father, the mother brought George to New Zealand in October 2004. When the father discovered where the mother had taken George, he applied to the New Zealand Family Court to have George returned to England. The father brought his application under the Hague Convention on the Civil Aspects of Child Abduction (“the Hague Convention”). The Hague Convention remained “implemented” as part of New Zealand law by virtue of Part 2 of the Care of Children Act 2004. George’s mother opposed his father’s application on the basis that George did not want to return to England, which, under the Hague Convention, could amount to a reason for not returning an abducted child to his or her place of habitual residence.

Judge Costigan in the Family Court accepted that George objected to being returned but considered, taking into account his age and level of maturity, only “modest weight” could be given to his views. She concluded that George should be returned to England. George’s mother appealed to the High Court. Chislm J in the High Court confirmed the decision of Judge Costigan. The mother sought leave to appeal to the Court of Appeal.

The Court granted leave to appeal because there was conflicting High Court authority on the correct approach to the exercise of judicial discretion where a party opposed an order for the return of a child on the basis that the child objected to being returned: see the High Court judgment by Chisholm J in the present case and the approach taken by Harrison J in *Collins v Lowndes* HC AK AP 115-SW02 6 March 2003. The Court said that resolving conflicts at the High Court level was a paradigm case for Court of Appeal involvement. Harrison J took the approach that where the child was of such an age and maturity that it was appropriate to take into account an objection to returning, a presumption was created that the Court would not order the child’s return in the absence of countervailing factors. On the other hand, Chisholm J’s approach did not recognise any presumption against an order for return in circumstances where it was appropriate to take into account the child’s objections. Under this approach, the child’s objection was given weight according to his age and maturity. The Court endorsed Chisholm J’s analysis in all respects, and said that the steps he took reflected the Court’s task on “child objection” cases.

The Court said that taking the child’s objections into account does not automatically mean that the child cannot be returned. The judge must take further steps before deciding what is to be done. If the child objects and is of an age and maturity at which it is appropriate to take his or her views into account, then the judge has the subsequent task of deciding what weight to give those views based on all the evidence. The judge must then weigh in the balance all the relevant factors, including the child’s objections (bearing in mind what weight they have been given). The Court accepted that “the best interests of the child” is a relevant factor in the court’s decision whether to return the child. However, the Court emphasised that the general principle

of the Hague Convention is that the child is to be returned to his or her place of habitual residence. The courts of that country are best placed to make any determination about the best interests of the child in terms of where the child eventually ends up.

The Court further said that there was no “general welfare” reason militating against George and his mother returning to England to have questions of George’s relocation properly considered in the parties’ home court. In so far as “general welfare” considerations were relevant, the Court found that Chisholm J had properly considered them.

The Court granted leave to hear the appeal but then dismissed the appeal.

Hague Convention – principles relating to habitual residence – settled purpose – stay for a delimited period – “shuttle custody” arrangements

In *P v Secretary for Justice* [2007] 1 NZLR 40 the Court discussed the principles relating to a child’s habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the Hague Convention”). After Mr and Mrs P separated in Australia, they signed a “shuttle custody” agreement whereby the children were to spend two years in New Zealand with their mother followed by two years in Australia with their father until they were 18 years old. Five months after arriving in New Zealand, the mother applied for custody. The Central Authority, on the father’s behalf, applied for the children to be returned to Australia. This application was unsuccessful as there could be no retention until the end of the two-year period. The Central Authority renewed its application at the end of this period. The Family Court held that the children’s habitual residence at the time of the retention was New Zealand. On appeal, the High Court held that the children’s habitual residence remained in Australia. The mother appealed against this decision.

The Court allowed the appeal and reinstated the decision of the Family Court. The Court held that the principles relating to habitual residence were correctly stated in its previous decision of *SK v KP* [2005] 3 NZLR 590. Thus, the inquiry into habitual residence is a broad factual inquiry which should take into account all relevant factors, including settled purpose; the actual and intended length of the stay in a state; the purpose of the stay; the strength of ties to the state(s); the degree of assimilation into the state; and cultural, social, and economic integration. Settled purpose is important but not necessarily decisive and should not override the underlying reality of the connection between the child and the particular state. Policy issues should be openly identified and weighed but must not obscure the factual nature of the inquiry.

The Court held that habitual residence can change where there is a parental agreement for a delimited, rather than indefinite, stay in a state. Although the test is a factual one, depending on the combination of circumstances in each case, the Court discerned some themes from the caselaw. Where the agreed period in the new state is to be under a year and the purpose temporary, such as for holidays, education, visiting relatives or sabbaticals, and the ties to the existing habitual residence are strong, the courts have normally found that the existing habitual residence subsists. Where the period is two years or over and it is not clear that the purpose of the stay was temporary, such as where it was to spend a lengthy period with a parent in his or her

habitual residence or for a long offshore work or military posting, the courts have been much quicker to find a change in a child's habitual residence, particularly if the ties to the former habitual residence are weak. Where the period is between a year and two years, decisions have gone either way.

The Court held that shuttle custody cases are determined with regard to the same general principles of habitual residence. In such a case, the courts have usually concluded that the child has consecutive, alternative habitual residences, although each case depends on the particular facts. The parents generally have a settled purpose that the child resides with one parent for a specified period of time (usually relatively lengthy), followed by a specified period of time with the other parent, and for this arrangement to continue. This purpose is carried into effect when the child physically moves between the states in accordance with the agreement and makes a home with each parent. During the time in each state, the child will carry out his or her regular day-to-day life, such as attending school and forming social contacts.

In the Court's view, Judge Ullrich's decision was made in accordance with the correct principles and was available on the facts. Goddard J thus could not properly have come to the conclusion that it was wrong, particularly as it was a decision emanating from a specialist court. Even had Goddard J been entitled to examine the case *de novo*, however, her decision was not in accordance with the principles relating to habitual residence applied in *SK v KP*, a decision binding on her.

Hague Convention – Meaning of “settled in his or her new environment” – Apparent conflict between High Court authorities

HJ v Secretary for Justice [2006] NZFLR 1005 involved an appeal from a decision of Ellen France J upholding an order under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the Hague Convention”) for the return of children to Australia.

HJ, a New Zealand citizen living in Australia, had removed her children to New Zealand in order to escape the violence of the father of the children towards her. The father, TJ, applied through the New Zealand Central Authority for the return of the children. There was no dispute that the removal was wrongful in terms of the Hague Convention. However, HJ invoked the defence under s 106(1)(c) of the Care of Children Act 2004, that return would expose the children to a grave risk of physical or psychological harm, and, since the proceedings were brought more than one year after the children had been wrongfully removed from Australia, the defence found in s 106(1)(a), that the children were now settled in their new environment.

The Court first considered the “grave risk” defence. This raised the issue which of two apparently conflicting High Court decisions, *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 and *KS v LS* [2003] 3 NZLR 837, was correct. The Court concluded that, on the whole, it preferred the approach found in *KS v LS* to that in *El Sayed*. But the Court recognised that the difference between the two approaches may be little more than semantic. The integrity of the Hague Convention and its underlying policies will usually be very important considerations whenever a discretionary defence is raised.

In terms of the second defence raised, the crucial issue was whether, once it was found that the children were settled, the Court nonetheless had a discretion to order the return of the children. The Court reviewed international authorities and found that the significant and clear trend of authority was in favour of a judicial discretion to order return notwithstanding a finding of settlement. This was supported by the way in which s 106(1)(a) was expressed. The legislation gives the Court a discretion and it would be a strong step to say that such a discretion may not be exercised in favour of an order of return.

The Court went on to consider what the relevant discretionary considerations were in determining whether to return a child when the s 106(1)(a) defence was made out. There were two aspects to the discussion: first, the criteria by which courts determine settlement; and secondly, how the discretion is exercised. On the first aspect the Court was content to follow the approach espoused by Thorpe LJ in *Cannon v Cannon* [2005] 1 WLR 32 (CA) at [49] – [59]. Likewise, on the second aspect the Court followed the decision of Thorpe LJ in *Cannon* in deciding that when the s 106(1)(a) defence is made out, the applicant seeking an order for return should be expected to show good reason why the discretion should be exercised in his or her favour. The best interests of the child are likely to be at least a relevant, and perhaps a controlling, consideration.

The appeal was accordingly allowed and the application for return dismissed.

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

Hague Convention – habitual residence – onus of proof – conflicting evidence

In *B v G (Basingstoke v Groot)* CA135/06 7 November 2006 the Court overturned Judge Ullrich's order that a three year old child born in the Netherlands and brought to New Zealand by her mother be returned to the Netherlands where her father lives. The mother said the move to New Zealand in August 2004 was intended to be permanent while the father said it was a temporary measure to enable the mother to be with a terminally ill grandmother. The parents were having relationship difficulties at this time. The father came to New Zealand in November 2004 where he lived separately from the mother and child, but they spent considerable time together. All three remained in New Zealand even after the grandmother died in December 2004. In May 2005, after the mother withdrew her sponsorship for the father's presence in New Zealand, his permit was revoked and he returned to the Netherlands. The father applied to the Family Court under the Hague Convention on the Civil Aspects of Child Abduction 1980 to have the child returned to the Netherlands.

Judge Ullrich held that the child remained habitually resident in the Netherlands both at the time she came to New Zealand and at the time of retention (being the date the mother withdrew her sponsorship for the father's stay in New Zealand). These findings were largely because of the relationship difficulties between the parents. As a result, she ordered that the child be returned to the Netherlands. On appeal to the High Court, Miller J ordered the appeal to be removed to the Court of Appeal.

The Court held that Judge Ullrich correctly stated that the onus was on the father to prove that the child was habitually resident in the Netherlands immediately before her

retention in New Zealand. However, she then incorrectly reversed the onus by requiring the mother to prove that the child lost her habitual residence in the Netherlands. Further, Judge Ullrich said that the mother must establish that habitual residence had switched to New Zealand, which does not recognise that it is possible for a child to have no habitual residence.

The Court held that Judge Ullrich's view on onus was determinative of her decision regarding the move to New Zealand and had a continuing effect on her assessment of the evidence relating to the later period. It was, therefore, necessary for the Court to consider the question of habitual residence afresh.

As the parents' views on the purpose of the move to New Zealand differed, the Court discussed the correct approach to reconciling conflicting affidavit evidence. Conflicts of evidence must be resolved in the usual way, taking into account such factors as any independent extraneous evidence, consistency of the evidence and inherent probabilities. As parental purpose is assessed on the basis of both the subjective intentions of the parents and the objective manifestations of that intent, courts will attach more weight to the contemporaneous words and actions of the parents (and any independent evidence) than to their bare assertions as to the position. After assessing the evidence in the normal way, the court must decide whether the applicant has proved habitual residence on the balance of probabilities. The Court recognised that there may be relatively rare cases where it is not possible, after making due allowance for the absence of cross-examination, to resolve the conflicts. If so, then the applicant will have failed to discharge the burden and the application will be refused.

The Court held that the child was not habitually resident in the Netherlands when she came to New Zealand as the evidence supported the mother's version that both parents intended the move to be permanent. The evidence supporting the mother's version included: the history of the relationship; the packaging of a tea chest; the cards from the father's relatives given to the mother before her departure; the father's present to the child (a locket); and the father's presence in New Zealand. The child had, therefore, lost her habitual residence in the Netherlands in August 2004.

If it had been necessary for the Court to deal with the later period, it would also have overruled Judge Ullrich's finding that the child's habitual residence had not switched from the Netherlands to New Zealand by the time the father's permit was revoked. It was an error of principle to treat reconciliation as trumping all other factors pointing to a change in habitual residence in this later period. While parents should not be discouraged from trying to save their relationship by courts holding too readily that habitual residence has changed, this policy factor can only prevent habitual residence from being acquired for a limited period of time. In this case, the father's lengthy presence could only have strengthened the child's ties to New Zealand. The settled purpose of both parents for an indefinite stay in New Zealand combined with the factors showing the child's integration into New Zealand led to the conclusion that the child's habitual residence had moved to New Zealand.

Accordingly, the Court allowed the appeal and set aside the order for return.

Hague Convention – grave risk defence

In *MS v DA (Smith v Adam)* CA164/06 22 November 2006 the Court considered the “grave risk” defence to abduction under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the Hague Convention”). The parties were the parents of a child who was born in England in 2002. The mother brought the child to New Zealand in 2005, which meant that she had abducted him in terms of the Hague Convention. The mother maintained that there was a grave risk that returning the child to England would expose him to physical or psychological harm or would otherwise place him in an intolerable situation. This was because there was a significant risk of the mother suffering a major depressive episode if she had to return to England, which would, it was argued, adversely affect the child.

In the Family Court, Judge D G Mather held that the mother had not established the defence as the risk of a depressive episode could be ameliorated in a number of ways. Winkelmann J rejected the mother’s appeal.

The Court said that leave to appeal will only be granted where the appeal raises some question of law capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal.

The Court considered first the submission that the lower Courts erred by interpreting the grave risk defence narrowly. The Court referred to *HJ v Secretary for Justice* [2006] NZFLR 1005 (CA) which held that the defence should not receive a wide interpretation. The Court said that the grave risk defence is not easy to invoke successfully, in part because of the expression “grave risk” and in part because of judicial expectations that the legal, health, and welfare systems of other countries will protect children from harm. The Court said that the High Court of Australia took the same approach as *HJ* in *DP v Commonwealth Central Authority* (2001) 206 CLR 401 and did not endorse a wide interpretation of the grave risk defence. The Court held that there was no error in principle in Judge Mather’s approach to the defence. The mother merely took issue with the Judge’s factual findings, which meant that this case was unlikely to be suitable for a second appeal.

The Court considered next the submission that there was no or insufficient evidence before Judge Mather to support his finding that the grave risk could be ameliorated. Judge Mather accepted the psychologist’s evidence that the mother had been suffering from a major depressive episode. He considered, however, that the risk could be ameliorated in a number of respects including: the mother could take anti-depressant medicine; she should be better equipped to access support services in England than when she was there before; and the father and his family were available to assist with the child’s care. The Court said that the first difficulty with the submission is that the onus of proving the grave risk defence was on the mother. To discharge this burden, she also had to show why the legal, health, and welfare systems of England, the country of habitual residence, would fail to protect the child against the risk pending the custody and access issues being decided. In the absence of evidence to the contrary, the Judge was entitled to assume that such protections would be available. The second difficulty was that there was evidence on all of the ameliorating points taken into account by Judge Mather. Accordingly, the Court was unable to discern any error of principle in the approach of the lower Courts.

The Court considered finally the alternative submission that the return order should have been conditional on measures being taken to alleviate the risk of the mother suffering a depressive episode on her return to the United Kingdom. The Court said that it would not have been appropriate in this case for conditions precedent to be attached to a return order. The Judge held that there was not a grave risk and many of the measures he saw as alleviating the risk were matters within the mother's control.

Accordingly, the Court refused leave to appeal.

Human Rights

Extended supervision orders – penalty or punishment – declaration of inconsistency with NZBORA based on retrospectivity – use of actuarial assessments as evidence

Belcher v Chief Executive of the Department of Corrections CA184/05 19 September 2006 was an appeal against a decision of Keane J to impose an extended supervision order on Mr Belcher on his release from prison for sexual offences against children and young persons. The appeal took the form of a challenge to the validity of Part 1A of the Parole Act 2002 as inserted by the Parole (Extended Supervision) Amendment Act 2004, based on human rights arguments, in respect of which a declaration of inconsistency was sought. It was also said that the evidence did not warrant the making of an order in Mr Belcher's case. It was heard by a Full Court which issued an interim judgment.

The primary argument against the extended supervision regime were that it constituted a retrospective punishment in breach of ss 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights"). Strongly supporting this argument was the Attorney-General's report made to Parliament under s 7 of the Bill of Rights which proceeded on the basis that the legislation had retrospective effect but was justified on public policy grounds.

The Crown maintained that the legislation should not be regarded as providing for either penalties or punishment, but rather was civil in character. The Court rejected this argument, finding that the jurisdiction amounts to the imposition of significant restrictions on offenders through the criminal justice system and is accordingly a punishment. Furthermore, the legislation makes it abundantly clear that it is to be applied retrospectively.

Since the Crown had not set out to justify the inconsistency of the legislation, the next issue for determination was whether the Court should make a declaration to that effect. The Court was not prepared to make such a declaration on the arguments heard at the hearing and therefore reserved the question for further hearing to take place in 2007. In particular, the Court will determine whether courts generally have the jurisdiction to make declarations of inconsistency and in what circumstances they should be made.

The Court then turned to the contention that the evidence did not warrant the making of the order. The evidence before Keane J was in the form of psychological

assessments of the likelihood of Mr Belcher re-offending made by a Department of Corrections psychologist and a psychologist called by Mr Belcher. The Corrections psychologist made use of actuarial instruments, namely Static-AS, RoC*RoI and SONAR in assessing Mr Belcher as at a high risk of re-offending. Mr Belcher challenged these assessments on the grounds that they are too generalised and do not sufficiently take into account factors specific to the individual. In his view, there was also no attempt to take into account Mr Belcher's age or his time spent offence-free since his release, meaning he could not necessarily be regarded as a homogenous member of the high-risk group to which he had been assigned in the actuarial assessments.

The Court rejected this argument. The jurisdiction to make an order is an exercise of discretion requiring a judgment based in part on a review of statistical material available and in part on a professional assessment of its relevance to the offender. The Court was not prepared to disturb Keane J's assessment of the risk of re-offending.

Various other aspects of the regime including the process adopted by the psychologists were challenged, but rejected by the Court.

Finally, the Court found no reason to disturb the supervision term of 10 years ordered by Keane J.

Leave to appeal out of time – claim for public law compensation following breach of natural justice and s 27(1) of the Bill of Rights

In *King v Attorney General and The Visiting Judges at Paparua Prison* CA73/06 13 October 2006, the Court refused an application for special leave to appeal out of time against a decision of the High Court finding breaches of the right to natural justice and s 27(1) of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights"), but making no order for compensation.

The applicant and four other prison inmates were charged with internal disciplinary offences at Paparua Prison. Each inmate was required to provide urine samples for the purpose of drug testing. The samples were analysed by the ESR. Each sample returned an inconsistent result, meaning that the sample was characterised as inconsistent with human urine. The applicant and other inmates claimed that this result was due to them drinking a copious amount of water prior to giving the samples (known as "water-loading"). Despite this explanation they were charged with, and found guilty of, adulterating or tampering with urine samples contrary to s 32A(1)(c) of the Penal Institutions Act 1954. The inmates brought applications for judicial review against the Attorney-General and the Visiting Justices at Paparua Prison on the primary ground that they had suffered a breach of natural justice in the way the hearings were conducted by the Visiting Justices.

At the hearings before the Visiting Justices, none of the plaintiffs were legally represented. The applicant's request for legal representation was denied. The charges were found to be proved in all cases and sentences including cell confinement and loss of privileges were imposed.

In the High Court, John Hansen J held that there had been a breach of natural justice and a breach of the applicant's right to justice under s 27(1) of the Bill of Rights, principally because the applicant was not permitted to have legal representation. This was compounded by the Visiting Justice accepting hearsay evidence from a prison officer concerning the effect of water-loading, rather than requiring a scientist to be called and allowing the applicant to cross-examine the scientist. One ground of appeal was that the evidence was inadmissible by virtue of reg 171(b) of the Penal Institutions Regulations 2000, but in light of his finding that there had been a breach of the Bill of Rights in the manner stated above, John Hansen J found it unnecessary to determine the merits of this ground. He therefore declared the Visiting Justices's decision that the appellant was guilty of the offence invalid and set it aside. John Hansen J made no order for compensation because the s 27 breach did not cause any loss to the applicant. He found that had scientific evidence been available and cross-examination allowed, the outcome would have been the same as there was no evidence that water-loading could produce inconsistent test results.

The Court considered the application for special leave in light of the ultimate test of whether the overall interests of justice required that leave be given. The delay in filing the application was 10 weeks. The applicant explained this was due to him moving prisons, resulting in a delay in his receipt of John Hansen J's decision. The Court found that the extent and circumstances of the delay should not prevent a grant of leave if other factors warranted it.

The Court rejected the applicant's contention that leave should be granted because the issues were of high public importance and would affect the future of drug testing in New Zealand. The Court pointed out that the Judge had found a breach of the Bill of Rights in the circumstances. The real challenge in this case was against John Hansen J's decision as to what was an appropriate remedy where such a breach had been found. The Court found that the Judge's decision to declare the Visiting Justice's decision invalid and set aside without compensation, was a sufficient remedy within the range of remedies properly available to him. Accordingly, no issue of public importance arose.

The Court then examined the merits of the appeal. Counsel for the applicant submitted that John Hansen J failed to look at the totality of the breaches of s 27 in determining whether compensation should be awarded. The Court found that the other grounds for judicial review advanced, such as legitimate expectation, were not relevant to whether there had been a breach of s 27. There was no error of principle in the way that the Judge considered the claims. The Court agreed with John Hansen J that the point of appeal regarding reg 171(b) held no practical significance to the outcome of the case for the applicant, even if it were allowed. It followed that the appeal had no prospect of success.

Leave to appeal was accordingly refused.

Immigration

Judicial review of Removal Review Authority's decision – Relevance of s 9 of the Bill of Rights

Chief Executive of the Department of Labour v Taito [2006] NZAR 420 concerned the relevance of care provided by the Taito family to Mrs Tuavao (Mr Taito's mother) to an assessment of their removal from the country.

Mr Taito, his wife, and four of their seven children came from American Samoa on visitors' permits in 2000. Their latest permits expired on 15 March 2002 and since that time they had been unlawfully in New Zealand. Under s 45(1) of the Immigration Act 1987, they were required to leave New Zealand. The family exercised its right of appeal under s 47 of the Immigration Act. The Taitos claimed that it was crucial for the family to stay in New Zealand to care for Mr Taito's elderly and ailing mother, Mrs Tuavao, who was a New Zealand citizen. The Removal Review Authority ("the Authority") dismissed the appeal on the basis that they had not established that there were exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the family to be removed. The Taitos appealed to the High Court under s 115A of the Immigration Act and also brought an application for judicial review. Both the appeal and the application for review were heard together.

In the High Court, Baragwanath J allowed the appeal on different grounds from those advanced by the Taitos' counsel. Baragwanath J considered that the Authority had failed to consider adequately Mrs Tuavao's position and in particular her rights under s 9 of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") not to be subjected to cruel, degrading, or disproportionately severe treatment. Baragwanath J considered Mrs Tuavao's "minimum entitlement" under s 9 of the Bill of Rights was an assurance as to her security. He considered that the Authority's decision left Mrs Tuavao's security uncertain. Baragwanath J discarded the Crown's suggestion that State care would be available to Mrs Tuavao if her other children were not able to look after her because he considered that non-family care would not compensate Mrs Tuavao for loss of family life with its elements of love, devotion, and fidelity that cannot be expected of others. He referred the case back to the Authority for its reconsideration in light of his reasons for judgment. He gave no order on the judicial review application.

The Chief Executive of the Department of Labour sought leave to appeal to the Court against the High Court decision under s 116 of the Immigration Act. Section 116 restricts second appeals under the Immigration Act to appeals on points of law, which, by reason of their general or public importance, ought to be submitted to the Court of Appeal.

The Court held that the Authority's reasons for its conclusion were sufficient having regard to the statutory context in which the Authority operates. It is clear that the Authority must give reasons but they do not have to be lengthy. They must be

sufficient to tell the appellant why his or her appeal has succeeded or failed: *Butler v Removal Review Authority* [1998] NZAR 409 at 420-421 (HC).

The Court held that Mrs Tuavao did not have the right to be looked after by members of her family. Baragwanath J took the view that unless the State could be satisfied that family members who are New Zealand residents can look after Mrs Tuavao adequately then Mr Taito could not be removed from New Zealand. The Court observed that such a right had never been recognised before in New Zealand and that the cases cited by Baragwanath J did not actually support that proposition either: *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (CA); *Advic v United Kingdom* (1995) 20 EHRR CD 125. Moreover, the Bill of Rights does not expressly recognise the right to family life, especially a right to be cared for by one's children in old age. The Court said that if it was to recognise such a right, it would have profound implications for immigration law generally and the Government's immigration policy in particular. It was common ground that the Taitos did not meet the criteria for the Government's family reunification policy. The Court observed that the postulated right was inconsistent with the Court's decision in *Patel v Removal Review Authority* [2000] NZAR 200. The Court was not convinced that New Zealand or overseas caselaw supported the view that the Authority must be satisfied that there is an adequate family care plan before it could authorise the removal of the Taito family.

The Court examined whether the Immigration Act provided for the recognition of such a right and concluded that it did not. The test in s 47(3) of the Immigration Act is whether there are "exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand ...". The Court accepted that an interpretation of s 47(3) consistent with the Bill of Rights was to be preferred. The Court accepted that the authority did not refer to s 9 of the Bill of Rights when considering the facts of this case, but found that understandable. First, because the Authority was not referred to the right, and secondly, because it is inevitable that the applicant will satisfy the s 47(3) test against removal long before the s 9 right is engaged. In *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 at 523 the Court compared the wording of s 9 of the Bill of Rights ("disproportionately severe treatment") with expressions such as "treatment that is so excessive as to outrage standards of decency". The Court considered that, while the removal of the Taitos would cause sadness, distress, and difficulties, it would not trigger the s 9 right.

The Court held that the High Court had erred in failing to consider the interests of the six members of the Taito family separately from the interests of Mr Taito. Baragwanath gave no separate consideration to the situation of Mr and Mrs Taito's children. The Court observed that it could not be said that Mrs Tuavao's s 9 right entitled her to six caregivers. If Mr Taito had been the beneficiary of Mrs Tuavao's rights, that would not have rendered it unjust for Mr Taito's children to leave New Zealand, given they were aged between 15 and 23 at the date of the Authority's decision.

The Court allowed the appeal on the s 115A proceeding. It dismissed the judicial review proceeding because it had already been determined in the Crown's favour. The decision of the Removal Review Authority was restored and confirmed.

Incorporated Societies

Direction by Registrar of Incorporated Societies to change name – whether name “undesirable” in terms of the Incorporated Societies Act 1908

In *Federated Farmers of New Zealand Inc v Federated Farmers of New Zealand (Northland Province) Inc* CA162/05 19 September 2006 the Court had to determine whether a name change was properly directed by the Registrar of Incorporated Societies (“the Registrar”) under the Incorporated Societies Act 1908 (“the Act”). The appellant, Federated Farmers of New Zealand Inc, is the parent society to the respondent, Federated Farmers of New Zealand (Northland Province) Inc. The respondent is incorporated as a branch society under the Incorporated Societies Amendment Act 1920. It is one of 25 such branches, each representing a geographical province. There was a long-running dispute between the parties and they eventually went to arbitration. The arbitrator found that the respondent was no longer a province to which the appellant’s members could be allocated. The appellant formed a new branch representing the Far North region. The appellant also applied to the Registrar under the Act to direct the respondent to change its name and to put the respondent into liquidation.

The Registrar declined to put the respondent into liquidation as the parties were litigating an appeal from the arbitrator’s decision. However, the Registrar did direct the respondent to change its name. The Registrar considered the respondent’s name connoted that the respondent had a status within, and a relationship with, the appellant which in fact it did not. Accordingly, the Registrar considered the respondent’s name was “undesirable” as per s 11A of the Act. The respondent appealed successfully to the High Court. Fogarty J in the High Court held the respondent was still a branch of the appellant, therefore it was wrong to say the parties had no relationship. Fogarty J also said that the Registrar had erred in directing a name change during the currency of the dispute between the parties. The appellant appealed to the Court of Appeal.

The Court allowed the appeal. The Court said that Fogarty J erred in saying the Registrar should not have considered the name change application while the parties were still litigating. The Registrar formed the view that there was enough information to decide the application, and accordingly was entitled to order the name change. It was wrong to say she was bound not to decide the application. Turning to the undesirability issue itself, the Court said the Registrar was entitled to find that the respondent’s name connoted a relationship with the appellant that did not exist. The Court referred to the decision of the High Court in *Flight Centre (NZ) Ltd v Registrar of Companies* (1994) 7 NZCLC 266,612, where it was said that descriptive names attached to geographical labels would not be “undesirable” in terms of the old Companies Act 1955. The Court distinguished *Flight Centre* on the basis that in the present case, the phrase “Federated Farmers” was distinctive, not descriptive. Attached to a geographical label (“Northland”), this connoted a Northland branch of the appellant. Although the High Court was correct to say the respondent was still technically a branch in terms of the Incorporated Societies Amendment Act, it had lost any real relationship with the appellant, contrary to what its name implied.

Insurance

Insurance – insured’s duty of disclosure – whether material non-disclosure – waiver of disclosure by insurer – inducement

QBE Insurance (International) Ltd v Jaggard and Jaggard CA134/05 13 December 2006 involved the liability of a public liability insurer following storm damage to vessels moored at Lyttleton Harbour.

QBE was the insurer for the marina companies which ran into design and finance difficulties in developing a new marina at the Harbour. In 1999 problems with the marina’s floating breakwaters were exposed with the result that substantial redesigning was necessary. The design company drew up plans, but informed the marina companies that it did not accept any liability for use made of the designs until they had been peer-reviewed. Due to the financial constraints facing the marina companies, they pressed on ahead regardless. While the repairs were being carried out the Jaggard’s vessel was damaged in the storm. Since the marina companies were subsequently placed into liquidation the Jaggards claimed against QBE under s 9 of the Law Reform Act 1936.

QBE avoided the policy citing material non-disclosure on the part of the marina companies as the reason for the avoidance.

Panckhurst J found in favour of the Jaggards, concluding that while there had been material non-disclosure, QBE had waived the need for its disclosure.

The Court also found in favour of the Jaggards, but its reasoning was not the same as Panckhurst J’s. First, the Court was not persuaded that there was a material non-disclosure. Instead, it considered that a document styled “project background” stated sufficient facts to make it clear to QBE that work was underway despite the design company not having signed off on the design and this put QBE on notice that there was in all probability no warranty. In this context, the Court considered that QBE waived further disclosure when it required completion of only a short form renewal of policy disclosure document. In any event, since QBE could not fairly claim to be dealing with the marina companies on the basis that the design company was warranting its design, this fact was not material and did not require disclosure.

While it had not been considered in the High Court, the Court was of the view that it was best to make findings as to inducement in the event that there was material non-disclosure. The Court applied the test for inducement devised by the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581. On the state of the evidence, the Court was not satisfied on the balance of probabilities that QBE was induced to enter the contract of insurance by the non-disclosure.

Accordingly the appeal was dismissed.

Intellectual Property

Copyright – artistic works – whether designs underlying packaging copied

In *Holdfast NZ Ltd v Henkel KGAA* CA248/04 17 May 2006 the Court considered whether Holdfast had breached copyright by copying the underlying designs of the packaging for Henkel's products.

Henkel is a large German company that manufactures and sells adhesives, including super glues. Holdfast is a New Zealand company that manufactures and sells a similar product, which it calls "FIXIT Super Glue". In 1999, Henkel decided to repackage its super glue products and commissioned an Italian design company, Cipidue, to design the new packaging. Cipidue came up with the "Blue Image Design" and this was used in the launch of Henkel's super glue products in countries around the world, including the "Loctite SuperAttak", "SuperBonder", and "QuickTite" products. Holdfast's director, Mr Henderson, attended a trade fair in the United States where he picked up a sample of the Loctite SuperAttak. Holdfast then copied the SuperAttak packaging incorporating the Blue Image Design in a new range of super glues under the name "SuperBonder". Henkel issued proceedings against Holdfast alleging breach of copyright related to its Blue Image Design. The parties settled the proceedings by Holdfast undertaking to stop using the packaging that incorporated Henkel's Blue Image Design. Subsequently Mr Henderson gave a designer a sample of Holdfast's offending SuperBonder packaging with instructions to use it as a start point to produce new packaging for the renamed product "Ultra Bonder". He directed that it be quite different from Henkel's Blue Image Design and retain the key features of the former Holdfast livery. Holdfast sent a copy of the final packaging to the New Zealand General Manager of Henkel (who did not reply) and took advice from its patent attorneys who advised that the new packaging would not infringe Henkel's copyright. When Holdfast launched its Ultra Bonder product, Henkel commenced proceedings against Holdfast claiming breach both of the undertaking and of artistic copyright. In the High Court, Harrison J held that Holdfast's Ultra Bonder packaging infringed Henkel's artistic copyright in its SuperBonder and QuickTite products and so he ordered consequential relief.

Although the pleadings appeared to assert that the Blue Image Design used in both the QuickTite and the SuperBonder packaging was the subject of copyright, on appeal Henkel advanced its claim for artistic copyright in terms of the Cipidue drawings. It was not pleaded that Holdfast had breached Henkel's copyright in the SuperAttak package which Holdfast had originally copied. Henkel submitted that its SuperBonder and QuickTite products were indirect copies of Cipidue drawings in which it possessed copyright, and alternatively, copies of drawings deriving from the Cipidue drawings that were not produced but must be inferred both to have existed and to have been the subject of copyright in Henkel.

The members of the Court differed as to their reasons but were unanimous in holding that Holdfast's appeal be allowed.

Baragwanath J dismissed Henkel's claims to copyright in the drawings immediately underlying the QuickTite and SuperBonder packaging that Henkel claimed were

based on the Blue Image Design. He observed that while copyright can exist in a series of drawings, where it is alleged that copyright has been infringed in relation to one of a series of drawings, each drawing must be considered on its own: *Merchant Adventurers Ltd v M Grew & Co Ltd* [1972] Ch 242 at 255; *UPL Group Ltd v Dux Engineers Ltd* [1989] 3 NZLR 135 at 143 (CA). Consequently, where copyright in a particular part of a series of drawings is allegedly infringed, whether there has actually been copying can be established only by comparison between the infringing article and the particular drawing in the series. He held that Henkel could not establish that the whole of its Blue Image Design had been infringed when no specific drawings of QuickTite and SuperBonder packaging deriving from the Blue Image Design had been produced. In his view, Henkel had not proved ownership of the copyright in the unidentified drawings that Henkel stated were derived from the Blue Image Design. He declined to infer that the artistic work came from Henkel's head office in Germany without any evidence to prove that claim.

However, Baragwanath J was prepared to assume that Henkel's pleadings embraced the Cipidue drawings (or could be amended to do so) since they were relied upon by Henkel in evidence and in argument in the High Court. He observed that there were four elements which a plaintiff who alleges a breach of copyright must establish: a work in which copyright can subsist; that copyright does subsist; that the plaintiff owns the copyright; and that it has been infringed by the defendant: *P S Johnson & Associates Ltd v Bucko Enterprises Ltd* [1975] 1 NZLR 311 at 375 (SC). The test for infringement is set out in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 (CA) and includes: the reproduction must be either of the entire work or of a substantial part; there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof; and there must be some causal connection between the copyright work and the infringing work. The copyright must be the source from which the infringing work is derived. Baragwanath J held that the real issue was whether Holdfast's UltraBonder package infringed Henkel's copyright in the Cipidue drawings. He held that taken together the features of Henkel's packaging did not constitute a distinctive pattern of such originality as to give rise to a copyright which Holdfast has infringed. Each of the elements of Henkel's design is part of the common things of life and therefore requires relatively distinctive treatment for that collocation to give rise to copyright.

Baragwanath J construed Holdfast's original undertaking as relating to future breach of Henkel copyright and attaching penal consequences to such breach, not as contractually extending Henkel's right to protection. There being no breach of copyright the Judge held that there was no breach of undertaking.

Chambers J agreed with the final conclusion to allow the appeal but decided the case on narrower grounds than Baragwanath J. He took the view that Henkel had not identified the work which it contended had been wrongfully copied. Henkel claimed that the artistic works were the packaging for its SuperBonder and QuickTite products. Harrison J had held that the Blue Image Design incorporating the SuperBonder and QuickTite packaging was a new graphic work and as such an artistic work for the purposes of s 14 of the Copyright Act 1994. Chambers J pointed out that Henkel had not pleaded that the Blue Image Design was the copyright work because a design as such cannot be a work. A work must exist in some material form as a drawing. On appeal, therefore, Henkel identified three works to which Harrison J's

finding could be attached as comprising the Blue Image Design, including the Cipidue drawings, the QuickTite packaging and the SuperBonder packaging. Henkel's counsel concentrated on the Cipidue drawings, arguing that they were the underlying drawings to Henkel's SuperAttak packaging, which Holdfast had originally copied and then allegedly copied indirectly a second time. Counsel veered away from arguing that the artistic works were the QuickTite and SuperBonder packagings because the evidence of when those packagings were introduced in New Zealand showed that Holdfast could not have copied them.

Chambers J dealt with the Cipidue drawings by saying that as Henkel had never pleaded the drawings as an artistic work, it should not be able to rely on the Cipidue drawings on appeal. He disagreed with Baragwanath J that the pleadings impliedly included the Cipidue drawings or that the pleadings could be amended to include them. The Judge considered that Henkel had further failed to identify which of the Cipidue drawings was the work which Holdfast was alleged to have copied. Even if the Cipidue drawings, or one of them, had been pleaded, he would not have found that Henkel had established infringement of copyright because a comparison of Holdfast's UltraBonder and one of the Cipidue drawings showed that Henkel could not have established that a substantial part of one of the drawings had been copied.

In relation to the undertaking, Chambers J considered that the undertaking was properly described as no more than a promise given by Holdfast as a party to a contract of partial settlement. The undertaking did not cover anything beyond the packaging that Holdfast was then using for its SuperBonder product. Holdfast did not accede to Henkel's demand for undertakings regarding future activity – although it offered to consider that topic, Holdfast never took up the offer. He considered that Henkel was now attempting to use the undertaking for quite a different purpose than it was originally used for.

William Young P agreed that the appeal should be allowed. He considered that Henkel's best argument was that Holdfast's UltraBonder packaging involved indirect copying via SuperAttak packaging of the relevant underlying Cipidue drawing. Contrary to Chambers J's view, he considered that the pleadings did encompass a claim that Henkel's copyright in the Cipidue drawings was breached. He agreed that Holdfast's UltraBonder packaging did not infringe copyright in either SuperAttak packaging or the underlying Cipidue drawings for the reasons given by Baragwanath J. In his view, Henkel's claim for breach of copyright in the SuperBonder and QuickTite packaging failed for lack of evidence establishing the ownership of drawings linking those packagings and the Cipidue drawings. He agreed with Chambers J as to why the claim of breach of an undertaking failed.

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

Trade Marks – Trade Marks Act 2002 – section 18 – whether goods can be a mark – meaning of “use” – factors for determining whether “distinctive”

In *Fredco Trading Limited v Miller* (2006) 8 NZBLC 101,761, the Court was asked to examine the operation of s 18 of the Trade Marks Act 2002 (“the Act”). Specifically, the Court was asked to decide whether the mark in question had a distinctive character as a result of its use.

Since early 1980, Miller had sold a kiwifruit vine tie known as the Klipon. In 2002, Fredco began selling a vine tie that was virtually identical in shape and configuration to the Klipon tie. In response to the sale of this new tie, Miller registered the Klipon as a trade mark. Fredco wanted to rely on s 18, which provides that non-distinctive trade marks shall not be registered, in order to invalidate the registration.

The Court began by finding that the Klipon itself (that is, the goods) could be a mark, given that the Act specifically recognises that a shape can be a mark. Next, the Court turned to the question of whether the use of the Klipon had given it a distinctive character. The question of what is meant by “use” was briefly considered, the Court noting that the wording of s 18(2) indicates that it may be that “use” must be use as a trade mark. However, if the inquiry is to determine whether a functional shape has acquired a secondary meaning in the marketplace which transmits source information, then the use of the functional shape itself may be considered.

Finally, the Court discussed the factors that may be relevant to whether a mark has acquired a distinctive character. These are: the market share held by the mark; how intensive, geographically widespread, and longstanding use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identify the goods as having come from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations. As a consequence, the Court found that the scale of use of the Klipon tie (about one billion units sold since 1980) was a relevant consideration. Fredco’s appeal against the decision of Venning J was therefore dismissed.

Land Law

Crown Forestry Licences – termination – continued ownership and use of roading also terminable

In *KT1 Co and KT2 Co v Attorney-General & Ors* CA188/04 17 May 2006 the Court considered the interpretation of Crown Forestry Licences (CFLs), in particular, provisions relating to termination in circumstances where land had been returned to Māori claimants pursuant to s 17 of the Crown Forests Assets Act 1989 (“the Act”).

The appellants were owners of roading on land over which CFLs were executed (roading was categorised as a forestry asset separate to land). The appellants argued they were entitled to continue to use roads that passed through land that had been returned to Māori claimants that had previously been subject to a CFL. Upon the termination of the CFL the appellants had restricted rights in the land but were required to return the land to the Māori owners when husbandry of trees ceased at the commencement of the notice period. The land in question was adjacent to areas that the appellants were currently logging and they wanted to use the roads to access their current logging sites.

The Court held that the appellants' use of the road network was always dependent on the existence of a valid CFL as the roads could not be used without using the land on which they occurred. The Act could not be interpreted as providing that ownership of a forestry asset carried a right or interest in the land. The Act states expressly that a licensee has no right in the land over which the CFL is granted, thus it cannot be that a purchaser of a road has a greater interest in the land merely by implication. The owners of the road had rights of use that were always terminable or liable to restriction.

The Court allowed the appeal in part, altering the wording of the declarations made in the High Court.

Settlement procedures – electronic transfer of funds – completion of settlement – fax notification

In *Rick Dees Ltd v Larsen* [2006] 2 NZLR 765 Rick Dees Ltd (the purchaser) had contracted to purchase ten residential units from Mr Larsen (the vendor). On the date of expiry of the settlement notice, the settlement funds were paid by way of electronic funds transfer into the vendor's solicitors' trust account just before 5.00pm. The vendor had earlier stipulated the payment of a bank cheque into the account. A fax confirming the transfer, together with an undertaking not to reverse the transaction, was not received by the vendor until just after 5.00pm. The purchaser's solicitor had attempted to send the fax before 5.00pm but was met by an engaged signal.

The Court held that the agreed procedures for remote or fax settlement were not essential elements of the purchaser's settlement obligations. The obligation in the agreement was to make payment and the transfer of funds by way of electronic funds transfer satisfied this obligation. Although the vendor envisaged that a bank cheque would be paid into the account, it was not stipulated that this was the only acceptable means of payment. Further, electronic funds transfers can be equated with bank cheques.

Similarly, the Court considered that notification and proof of payment was required under the agreement but was not an essential element of the purchaser's settlement obligations. Payment under the agreement could have been made up to and including 5.00pm. Had payment been made at 5.00pm then fax notification of payment could not physically have been dispatched until after this time. In the absence of an express provision dealing with the matter, notification could take place within a reasonable time of payment. Here, notification took place within ten minutes of payment which satisfied the reasonableness requirement.

The Court allowed the appeal and remitted the matter to the High Court for consideration of the appropriate relief.

The Supreme Court has granted leave to appeal.

Removal of caveats – abuse of process – specificity of description of interest to support caveat – constructive trust – “Quistclose trust”

In *Zhong v Wang* (2006) 5 NZ ConvC 194,308, Mr Zhong sought to have caveats he had lodged on properties owned by Mr Wang reinstated after they had been removed by the High Court. The caveats supported the interest Mr Zhong claimed in the properties under a constructive, or alternatively a *Quistclose*, trust.

Mr Zhong had wanted to immigrate to New Zealand, and for this purpose, had given approximately \$1m to Mr Wang for investment in a New Zealand company in which Mr Wang had an interest (so that he would fall within the “investor” immigration category). Mr Zhong said that it was agreed that after a two year period, the money would be returned. When the money was not returned, Mr Zhong suspected that the money had been used by Mr Wang to purchase houses in Auckland. Mr Zhong therefore brought an action in debt and restitution and a separate action based on the above-mentioned trusts, as well as lodging caveats on the properties.

Mr Wang argued that the caveats constituted an abuse of process, the separate claim in trust and the caveats being lodged for the sole purpose of securing Mr Zhong’s position pending the resolution of the claims in debt and restitution (for which a caveat could not be lodged). The Court disagreed. There was nothing to prevent a plaintiff from bringing separate claims. The Court was still required to determine whether Mr Zhong’s case was arguable. Removing the caveats would, in the Court’s view, prejudice Mr Zhong’s ability to make his case. Equally, Mr Wang could not be heard to say that he would be prejudiced if Mr Zhong could establish the grounds upon which the caveats ought to remain.

The next question was whether the caveats were sufficiently particularised under s 137 of the Land Transfer Act 1952. The question is whether the caveats adequately described the land and the interest (and its derivation) claimed. The Court reviewed two lines of authority represented by *Buddle v Russell* [1984] 1 NZLR 537 (HC) and *New Zealand Mortgage Guarantee Ltd v Pye* [1979] 2 NZLR 188 (SC). The Court preferred the *Buddle v Russell* line of cases. What is important is that the registered proprietor and the Court understand the nature of the interest claimed and the basis of that claim. In this case, while the description was brief, the nature of the interest would have been self-evident to Mr Wang. The Court said that the purpose of the caveat procedure is to enable those with proper claims to proprietary interests to protect themselves against loss by forbidding dealings with land pending resolution of substantive claims. The underlying purpose of the caveat regime could be undermined if too strict an approach were taken to the detail required to describe the interest and its derivation from the registered proprietor.

Turning to the substantive matters, the first interest in the properties claimed was via a constructive trust. Mr Zhong said that he reposed trust and confidence in Mr Wang, such that Mr Wang was a fiduciary. The Court considered it arguable that Mr Wang was an agent for Mr Zhong, agency being one relationship which traditionally gives rise to fiduciary obligations. If so, Mr Wang was not authorised to use the money paid by Mr Zhong for the purpose of acquiring property for his own benefit. Accordingly, the Court was satisfied that the caveats should remain.

Mr Zhong's alternative argument based on a "*Quistclose* trust" (*Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL)) was, however, rejected (William Young P dissenting). The majority reviewed much of the judicial and academic debate surrounding *Quistclose* and concluded that an analysis of the facts which tried to fit within the *Quistclose* decision was "strained". The money was not advanced to Mr Wang so that it could be applied in a particular way, but for the general purpose of making an investment.

William Young P was not prepared to dismiss the possibility that there was a *Quistclose* trust in relation to the funds paid over by Mr Zhong. He thought it arguable that the funds were paid on terms which required their retention both for limited purposes and as an identifiable fund capable of being later recovered by Mr Zhong. On this analysis, the relevant purpose – the purpose that arguably created the *Quistclose* trust – was repayment to Mr Zhong. Mr Zhong would in effect have had a continuing security interest in the money which he paid over which might be within at least the broadest conception of what constitutes a *Quistclose* trust as described by Lord Millett in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at [68] (HL).

Sale and purchase of land – whether due diligence condition in fact an option – whether agent was acting for vendor and purchaser

In *B S Developments No 12 Ltd v P B & S F Properties Ltd* CA73/05 30 May 2006 the Court considered the scope of a real estate's agency when communicating non-fulfilment of a due diligence condition. The Court also took the opportunity to comment on what it perceived as a deficiency in a standard form agreement for the sale and purchase of real estate.

Mr Dyer, a real estate agent acting on behalf of the appellant, pressed the owners of the respondent company with successive unsolicited offers to purchase a property the respondent owned. At first the owners were not interested, but eventually they decided to accept. The agreement contained a due diligence condition, the satisfaction of which was stated to be "at the sole and absolute discretion of the purchaser". The time limit for the satisfaction of the condition was ten working days from the date of the agreement (in this case, 11 July). The agreement provided that if the condition were not fulfilled by 11 July, either party "may at any time before the condition is fulfilled or waived avoid [the] agreement by giving notice to the other" (cl 8.7(5)). On 8 July Mr Dyer arranged a meeting with the owners and a representative of the purchaser. Mr Dyer was told that if an extension of time were sought, it would not be given. The meeting took place on 10 July and an extension of time was sought. The meeting became heated and the extension was refused. On 11 July Mr Dyer sent a fax to the respondent's solicitors, saying that the purchase was not unconditional and the contract was at an end. On 6 August it transpired that the appellant was acting as if it had purchased the property, instructing agents to market it. The appellant was inquiring as to where it should direct payment of the deposit under the agreement. The respondent's solicitors attempted to disabuse the appellant of the notion that the contract was still on foot, but the appellant lodged a caveat on the property and brought proceedings for specific performance in the High Court.

MacKenzie J found for the respondent, saying Mr Dyer was arguably acting as agent for both parties and was acting as agent for the appellant when sending the 11 July

fax. In the alternative, the Judge said Mr Dyer had received notice from the appellant as the respondent's agent. The Judge commented that cl 8.7(5) could only apply where the purchaser advises that the condition is not and cannot be fulfilled prior to the date for fulfilment. The condition had to still be capable of fulfilment for cl 8.7(5) to apply. The purchaser appealed.

Dismissing the appeal, the Court made preliminary comments concerning the effect of the due diligence condition. The Court said that, read literally, the purchaser had to convince itself that it was satisfied. Thus the vendor had no grounds for criticising the purchaser for failing to take all reasonable steps to satisfy the condition. The effect of the condition was to convert an agreement for sale and purchase into an option to purchase. The Court disagreed with MacKenzie J as to the effect of cl 8.7(5). The Court said the effect of cl 8.7(5), when coupled with the Court's recognition that the condition was in the mould of an option, was this: the vendor allows the purchaser to act at its discretion within the due diligence period, whilst remaining committed to the sale until the period has ended and the condition is not satisfied. This had the practical effect of keeping the option running until one of the parties avoids the contract, but in the vendor's case this would have to be done after the lapse of the due diligence period.

Turning to the facts, the Court considered the effect of the 11 July fax was at the heart of the case. The Court said MacKenzie J was entitled to reach the conclusion that Mr Dyer initially approached the owners as agent for the appellant and that he continued to act as agent for the appellant after the agreement was signed. This included setting up the 10 July meeting on the appellant's behalf. The Court did not rule out the possibility that Mr Dyer acted as a common agent, but said that in any case, the appellant had clothed Mr Dyer with apparent authority to represent it and, as such, was estopped from denying that authority and was bound by the contents of the 11 July fax. Accordingly, the agreement for sale and purchase was avoided on 11 July and, from that time onwards, the appellant had no rights in the property.

Caveats – vendor exercising right of cancellation – whether delay brought about by vendor

In *Dunlop and Ors v Pope and Ors* CA42/05 15 June 2006 the Court determined that the respondents did not have caveatable interests in respect of separate sale and purchase agreements with the appellants.

Before title was issued in respect of the separate properties, the vendors (the appellants) purported to exercise rights of cancellation, relying amongst other things on the delay in the issue of title. The purchasers thereafter lodged caveats. The purchasers argued that the vendors were seeking to take advantage of a delay brought about by themselves, the land having increased in value.

The Court considered that the respondents, while asserting a breach of the contract, did not provide any evidence that the appellants had caused the delay in the issuing of title. The caveats were therefore lapsed, the respondents failing to establish a caveatable interest.

Caveat – certificate of title limited to parcels – claim for adverse possession

Boskett and Anor v Drummond and Ors CA190/05 21 December 2006 involved a dispute about 1.5 acres of land between two neighbours. The Drummonds were the registered proprietors (in a certificate of title limited to parcels) of the disputed land which, however, fell on the Bosketts' side of a drainage ditch dug in the nineteenth century. When the Drummonds applied to obtain an unqualified title, the Bosketts lodged a caveat to prevent such a title issuing. The Drummonds applied to remove the caveat and the Bosketts sought an order that it not lapse based on adverse possession of the disputed land. Miller J held that the caveat should be removed as the Bosketts did not have an arguable case of adverse possession.

Section 3 of the Land Transfer Amendment Act 1963 provides that where any person has been in possession of land for a continuous period of not less than 20 years and continues in possession, he or she may make a claim for adverse possession. The Bosketts claimed adverse possession for two periods of time – the period 1974-1996 and the 20 years prior to the bringing of the application. Further, before the Court of Appeal, the Bosketts raised a new ground, namely that they were entitled to claim through their predecessors in title under s 200 of the Land Transfer Act 1952 ("the LTA"). To succeed the Bosketts had to show a reasonably arguable case that in 1929 their predecessors in title had a matured claim to adverse possession of the disputed land.

The Court rejected all three claims. In respect of the claim under s 200 of the LTA, the Court concluded that even if the predecessors in title had possession in 1929, it could not be said to be adverse to the interests of the Drummonds' predecessors. Section 22 of the Fencing Act 1908, which was in force in 1929, provided that where a ditch separated two properties, possession of lands either side of the ditch could not be deemed adverse possession. In respect of the claims under s 3 of the 1963 Amendment Act the Court found that Mr Boskett's selling of the property in 1996 interrupted the Bosketts' adverse possession. Since the section presupposed continuous possession prior to the application being made, this was fatal to the Bosketts' case.

Law Practitioners

Striking off

In *Complaints Committee of the Waikato/Bay of Plenty District Law Society v Harris* [2006] 3 NZLR 755 the Court restored the ruling of the Law Practitioners Disciplinary Tribunal, striking Mr Harris off the roll of barristers and solicitors, following Mr Harris' successful appeal to the High Court.

Mr Harris was a lawyer based in Cambridge. He became involved in the implementation of a fraudulent loan scheme by which homeowners were stripped of the equity in their property and often left owing debt to a financial institution. Mr Harris knew the leader of the fraudulent scheme and was generally aware of his criminal background. He was asked to provide legal advice to the homeowners, as

well as to facilitate the legal aspects of the loan scheme. Mr Harris was brought before the New Zealand Law Practitioners Disciplinary Tribunal on a number of charges concerning his failure to protect the interests of his clients. Most of the charges were found to be proved and to amount to misconduct. The Tribunal ordered that Mr Harris' name be struck off the roll of barristers and solicitors. A Full Court of the High Court allowed Mr Harris' appeal, holding that the Tribunal's order for striking off was disproportionately severe. The High Court reduced the penalty from striking off to suspension for two and a half years and prohibited Mr Harris from practising on his own account unless authorised by the Tribunal to do so. The Committee appealed to the Court of Appeal on the ground that the High Court erred in substituting a different penalty from that imposed by the Tribunal.

The Court held that it had jurisdiction to determine the appeal. For the purpose of s 67 of the Judicature Act 1908 the Tribunal is not a court of judicature. That being the case, the standard right of appeal conferred by s 66 of the Judicature Act applied. The majority of the Court (Glazebrook and O'Regan JJ) said that where an appeal to the High Court involved the re-evaluation of the factual basis upon which a decision as to penalty was made, the High Court would often be required to reassess the penalty itself. However, the Court said that this depended on the significance of the different factual findings. In this case the High Court upheld the Tribunal's findings of misconduct in relation to all but one charge and for generally the same reasons. The High Court endorsed the Tribunal's reasons for its decision to strike off Mr Harris (that he succumbed to pressure and allowed himself to be used by a fraudster). The High Court did not therefore disagree on the facts or the charges but on the evaluation of those facts. The Court accepted that a different evaluation of the facts, if significant enough, could lead to a penalty being revised. However, there were no significant differences with regard to the analysis of the transactions involving any of the clients. Any minimal difference was not sufficient to have justified the High Court considering the penalty afresh.

Chambers J dissented from the majority view. He considered that the essential complaint of the Committee on the appeal was that the High Court was unjustified in interfering with the Tribunal's sentencing decision. The Committee submitted that the High Court had failed to apply the principles stated in *Bolton v Law Society* [1994] 1 WLR 512 (CA), which were said to be that it is only in a "very strong case" that an appellate court will be justified in interfering with a disciplinary tribunal's sentence. The Committee said that this was not such "a very strong case". Chambers J did not agree with the Committee that the High Court erred in its application of *Bolton*. He held that the High Court was entitled to analyse the transactions and their effect on the clients differently. Once the High Court had re-evaluated the transactions it was incumbent on it to reassess the appropriate penalty. It was equally open to the High Court to find that Mr Harris' misconduct warranted striking off or to find that suspension was, in the altered evaluation of the transactions, the appropriate response. Chambers J had his own doubts about the High Court's re-assessment and was not convinced that the Tribunal was necessarily wrong in its analysis of the fraudulent loan scheme. However, he considered that the Court had no way of clarifying those concerns because the Committee chose not to put the transcript of evidence or the exhibits before the Court. In those circumstances, Chambers J was unable to say that the High Court's re-evaluation of the scheme was wrong and therefore the Court was not able, in his view, to say that the penalty imposed was wrong. He considered that

the majority had formulated a view of the facts different to the High Court's and was not entitled to do that when it had none of the relevant evidence.

The appeal was allowed, the order made by the High Court was quashed, and the penalty imposed by the Tribunal, striking Mr Harris' name off the roll of barristers and solicitors, was restored.

Solicitors' costs – review by Registrar – role of assisting counsel – relevance of memoranda provided by counsel at the review hearing

Filmer v Jamieson Castles (a firm) [2006] NZAR 444 concerned an appeal against the decision of Allan J dismissing an originating application under s 149 of the Law Practitioners Act 1982 ("the Act") to review a decision of the Registrar in relation to a fee complaint.

The appellants were shareholders and directors of a company, Vusion International Ltd. They consulted the respondents, an Auckland law firm, in relation to a dispute that had arisen with a former director of the company who was attempting to wrestle control of the company, as well as consultancy fees. The appellants incurred legal fees of over \$200,000. Part of this bill of costs (\$158,974.10) was subjected to review by the Auckland District Law Society under s 145 of the Act, who deducted the bill by \$4,711.50. Not happy with this outcome, the appellants appealed to the Registrar under s 148 of the Act. Under s 148(3) of the Act, the Registrar exercised his discretion to have a third counsel attend at the hearing and assist him. The Registrar declined to alter the bill of costs. Following Allan J's dismissal of their appeal, the appellants raised two arguments before the Court. First, that there had been a breach of natural justice in that the Registrar failed to give the appellants an adequate opportunity to be heard. Secondly, that counsel attending the hearing at the Registrar's request could not assist him, or, if he did assist, then the views of assisting counsel must be made known to the parties for comment.

In relation to the first argument, the hearing had been adjourned during counsel for the appellants' cross-examination. This was at the suggestion of counsel assisting the Registrar. Counsel then exchanged memorandum. On the appellants' contention the memoranda were prepared in lieu of cross-examination. The Registrar, however, stated that he could not make certain findings because certain matters were not put to the respondent's representatives in cross-examination. Allan J had formed the view that first, the Registrar did in fact take account of the memoranda, and secondly, any rights to cross-examination had been waived. The Court agreed with Allan J's assessment, stating that there was no reason to believe that the memoranda were to be treated in lieu of cross-examination – they were in fact not evidence. Considering the issue broadly as a matter of natural justice, the appellants were at all times given a reasonable opportunity to be heard.

In relation to the second issue – assistance of counsel – the Court agreed with Allan J that there were insufficient facts from which to draw the inference that an experienced Registrar had essentially abdicated his duty. The Court considered that while the actual decision must be that of the Registrar and not counsel, it was inappropriate to lay down hard and fast rules. The Court stated that the Act contemplates assistance,

including assistance in drafting once the Registrar determines his or her general reasons. The appeal was accordingly dismissed.

Local Government

Rateability of land – statutory rating exemption – meaning of “except as an endowment”

Auckland City Council v Royal New Zealand Foundation of the Blind CA112/05 29 August 2006 was an appeal by the Council from a decision of Keane J declaring property owned by the Foundation unrateable under the Local Government (Rating) Act 2002.

Since the late nineteenth century, the Foundation has owned a property in Parnell. Originally the Foundation used the property to provide schooling, and later even accommodation, for the blind. The Foundation’s primary focus was on institutional care. Since the 1970s that focus has shifted towards supporting the blind (and now the partially sighted) in the community, which requires a good deal of funds. To this end the Foundation leases some of the land to a Trust which in turn sublets the land to commercial tenants for profit.

Rates were never paid on any part of the land, but with the coming into effect of the Local Government (Rating) Act, the Council maintained that the land was rateable. The Foundation applied for a declaration, which Keane J granted, that the land was not rateable.

The Act provides that “land that is owned or used by, and for the purposes of, the [Foundation], except as an endowment” is not rateable.

The arguments of both counsel focused on the words “for the purposes of”. The Council submitted that land was rateable unless owned in order to facilitate directly the fulfilment of the Foundation’s purposes; the Foundation submitted since the land is used to obtain rents to fund the provision of services, the land is necessarily owned for its purposes.

Having traced the passage of rating legislation from 1876 and the charitable exemptions generally, the Court came to consider the meaning of the phrase “except as an endowment”. The Court placed more significance in this phrase than the parties had. It said that both the parties and Keane J appeared to have assumed that the property of a charitable trust is held as an endowment only if there has been a prior act of endowment by a third party. But the Court considered that it could also refer to assets of a charity which had been set aside for the purpose of producing income. It considered the focus should be on the purpose for which land is held, rather than a historical inquiry as to how it was originally acquired by or settled on the Foundation. The statutory language as a whole pointed to an intention that property held for investment purposes was rateable. The appeal was therefore allowed.

The Supreme Court has granted leave to appeal.

Maritime Law

Limitation of Claims – Meaning of “Ship” under the Maritime Transport Act 1994

In *Birkenfeld v Yachting New Zealand Incorporated* [2006] NZAR 654, the Court decided that a rigid inflatable boat (“RIB”) was a “ship” for the purposes of s 85 of the Maritime Transport Act 1994 (“MTA”).

Ms Birkenfeld was windsurfing when a RIB driven by Bruce Kendall and owned by Yachting New Zealand hit her. Ms Birkenfeld was severely injured in the crash and brought proceedings against Mr Kendall, Yachting New Zealand, and the International Sailing Federation Ltd seeking \$15 million in damages. Yachting New Zealand sought to limit its liability to \$400,000 under Part 7, s 85 of the MTA.

Although the RIB was only 5.4 metres long and weighed 520 kilograms, the Court considered that it was a vessel used in navigation, and therefore came within the statutory definition of “ship” in the MTA.

Ms Birkenfeld argued that because Part 7 gives effect to the Convention on Limitation of Liability to Maritime Claims 1976 (“the Limitation Convention”), the statutory definition should be read down to reflect the purposes of that convention. Accordingly, a “ship” should only be a vessel used for trading purposes.

Ms Birkenfeld further submitted that the extent of liability is measured under s 87 by reference to weight, and weight is calculated by reference to the International Convention on Tonnage Measurement of Ships 1969 (“the Tonnage Convention”), which excludes ships of less than 24 metres. In her view then, the 5.4 metre RIB must be excluded from the ambit of s 87.

The Court found that the definition of ship in the MTA was sufficiently wide to include a RIB, and the purpose of the Limitation Convention did not alter that conclusion. Furthermore, the Tonnage Convention provides an alternative mechanism for weighing ships where the gross tonnage cannot be ascertained using the regular procedure, meaning the Tonnage Convention does apply to ships shorter than 24 metres.

The Supreme Court has refused leave to appeal.

Public Works

Public Works Act – not offering land back to “original” owners – whether there is an obligation to offer airspace – whether breach of statutory duty

In *Attorney-General v Edmonds* CA97/05 28 June 2006 the Court was asked to determine whether a breach of s 40 of the Public Works Act 1981 gave rise to a continuing cause of action.

The appeal related to a block of land at 2 Lambton Quay, Wellington, which had been compulsorily acquired by the Crown in 1942 for wartime purposes. The Edmonds family were the original owner's successors. Section 40 outlines an obligation to offer back land taken for a public work when it is no longer required. Since 1942, the land had been earmarked for a number of public works, such as a large government centre, and was eventually transferred to the Wellington City Council.

The Court examined the legislative context of s 40, and considered that the underlying policy of the Act was to increase the protection of rights of property owners when land is taken. The duty to offer the land back to the original owner is imposed timeously when the land is no longer required. In this way, it is analogous to an option to purchase. In this case, there was only one breach of statutory duty, namely, the failure to offer back in a timeous way. This did not give rise to a continuing cause of action.

Whether that breach in fact happened was a question of fact. The Court considered that while there may have been periods when there was no specific proposal directly affecting the site, this was not determinative given the ongoing commitment to the proposed government centre. The question is whether the proposals reached a level of detail consistent with there being a need for and commitment to the use of the site for public works.

Turning to the issue of whether the obligation in s 40 extended to offering back the airspace over a piece of land, the Court determined that in this case no such obligation existed. The practicalities of requiring consideration in every case as to whether there is a need to offer airspace back even if the underlying land is still in use places too high a burden on the Crown. If such a burden did exist, it would need to be expressed in legislation. The Court did not discount the possibility of there being some cases where there might be an obligation to offer the airspace back, these would be rare and may be confined to situations where there are definite plans for use of the airspace for a non-public work.

Social Security

Benefit advances – s 125 of the Social Security Act 1964 – subject to “terms and conditions” – whether can charge interest

In *Warnock v Chief Executive of the Ministry of Social Development* [2006] NZAR 459 the Court confirmed the ability of the respondent to charge interest on advances made to beneficiaries under the now repealed s 125 of the Social Security Act 1964 (“the Act”).

Section 125 enabled advances to be made to beneficiaries for the paying of essential repairs to his or her home, “subject to such terms and conditions as the Director-General may determine”. Mrs Warnock had obtained an advance complete with interest, secured against her property. The Court was faced with the same questions posed in the High Court by way of case stated from the Social Security Appeal Authority: was the Authority correct in law to determine that s 125 permitted the

levying of an interest as the respondent saw fit, and did the Authority err in law in determining that the respondent could charge interest under a general policy? The appellant argued that there was no statutory power to charge interest, and that this was not incidental to the exercise of any express power. The Court, however, considered that on the words of the statute, the terms and conditions on which an advance is made can be thought naturally to include requirements as to the payment of interest. In regards to question two, the Court stated that it could not formally respond because the question in the form stated never actually arose before the Authority. However, the Court provided, as an observation, the view that the Director-General could evolve a base-line policy as to interest, but that the Director-General was equally capable of providing for a mechanism to waive interest if the circumstances of a particular case warranted this.

The Supreme Court has refused leave to appeal.

Tax

Whether Farnsworth principle applies to the dispute resolution procedures under the Tax Administration Act 1994

In *Commissioner of Inland Revenue v Zentrum Holdings Ltd* [2007] 1 NZLR 145, a Full Court was required to decide whether the *Farnsworth* principle (*Commissioner of Inland Revenue v V H Farnsworth Ltd* [1984] 1 NZLR 428 (CA)) continued to apply to the new disputes resolution procedures in the Tax Administration Act 1994. In *Farnsworth*, the Court of Appeal held that questions arising in the case stated procedure under the Inland Revenue Department Act 1974 were necessarily limited to those arising from the Commissioner's objection.

In the present case, Zentrum Holdings Ltd had had certain deductions of interest disallowed by the Commissioner relying on the general anti-avoidance provisions in the Income Tax Act 1994. Zentrum challenged this assessment in the Taxation Review Authority and the Authority held that the relevant transactions did not amount to illegitimate tax avoidance.

In the High Court the Commissioner decided that it wished to argue, in addition to the tax avoidance argument, that the transactions were shams. Zentrum accordingly brought an interlocutory application for an order restricting the Commissioner to the assessed ground, namely, tax avoidance. Keane J concluded that the *Farnsworth* principle prevented the Commissioner from raising the additional ground and granted the order.

This Court reviewed the disputes resolution procedure under the Tax Administration Act and concluded that the *Farnsworth* principle no longer applied. Central to the reasoning in *Farnsworth* had been s 36 of the Inland Revenue Department Act which had no direct counterpart in the Tax Administration Act. Furthermore, the existence of the specific evidence exclusion rule in s 138G which applies where disclosure notices are served indicates that there is no absolute rule confining the parties to the

positions formally taken in their Notice of Proposed Assessment (“NOPA”) and Notice of Response (“NOR”).

A secondary argument of Zentrum involving a time bar with respect to the new argument was rejected. The appeal was accordingly allowed and argument remitted to the High Court.

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

Dispute resolution – Whether High Court can grant adjournment of challenge proceedings to compel further operation of internal administrative process

In *Commissioner of Inland Revenue v ANZ National Bank Ltd & Ors* CA254/05 20 December 2006 the Court considered the relationship between alternative dispute resolution and curial review with respect to taxation assessments. The Tax Administration Act 1994 (“the Act”) creates a dispute resolution procedure in cases where the Commissioner of Inland Revenue (“the Commissioner”) wishes to investigate a taxpayer for possible non-compliance with the Act. The procedure entails the Commissioner issuing a notice of proposed adjustment (“NOPA”) in respect of the taxpayer alleged to be in breach, and the taxpayer issuing a notice of response (“NOR”). There is an administrative process which complements this regime. It is not contained in the Act, but in an Inland Revenue Department (“IRD”) publication. The effect of the administrative process, which is triggered at the Commissioner’s behest, is that if the adjudication unit of the IRD accepts the taxpayer’s position, the assessment is cancelled. If the adjudication unit confirms the Commissioner’s assessment, the taxpayer can challenge the assessment in the Taxation Review Authority or the High Court. The Commissioner is not obliged under the Act to proceed with the administrative procedures in any given case.

The Commissioner alleged that the taxpayer respondents had avoided tax in relation to the 2000 tax year, although this allegation had implications for subsequent tax years. However, the adjudication unit did not play its usual part following the issuing of a NOPA and a NOR because the time bar for assessment arose. The Commissioner, therefore, proceeded directly to the issue of assessment. The taxpayers challenged the Commissioner’s assessment in the High Court, but then sought an adjournment to bring the challenge proceedings to a halt. The object of this was to require the Court to compel the adjudication unit to follow its usual procedures with respect to the tax years beyond 2000. It was anticipated that if the adjudication unit found in the taxpayers’ favour for the later years, this would effectively obviate the challenge proceedings in respect of the 2000 tax year.

In the High Court, the taxpayers relied on that Court’s previous decision in *Alpe v Commissioner of Inland Revenue* (2001) 20 NZTC 17,372, in which it granted an adjournment to taxpayers who had commenced challenge proceedings so as to permit them to explore alternative dispute resolution. In *Alpe* the Court made a direction that the Commissioner must diligently pursue the administrative process involving the adjudication unit. In the present case in the High Court, MacKenzie J distinguished *Alpe*, saying the rationale for the granting of an adjournment was not present on the facts. The Judge noted that the Commissioner had decided against referring the

matter to the adjudication unit and the taxpayers had not sought judicial review of that decision.

On appeal, the Court of Appeal considered that *Alpe* had been wrongly decided. It distinguished between the NOPA/NOR procedure, which had the imprimatur of Parliament, and the administrative process of the adjudication unit, which was an internal matter for the IRD. The High Court could not, in its case management function, stay a dispute with which it was seized and compel the Commissioner to implement an internal administrative process, which was itself non-mandatory. Accordingly, in this case the taxpayers were not entitled to an adjournment or a curial trigger of the administrative process and the dispute remained with the High Court for resolution.

Tort

Deceit – fiduciary duties – implied terms of contract – historical joint venture agreement – ss 4 and 28 of the Limitation Act 1950

In *Amaltal Corporation Ltd v Maruha Corporation and Maruha (NZ) Corporation Ltd* CA232/04 1 June 2006 Amaltal appealed against Priestley J's findings of deceit, breach of fiduciary duties, and breach of implied terms of an agreement in relation to the parties' joint venture operating between 1985 – 1991. In addition, the Court was asked to reconsider the Judge's view that the proceedings were not time barred by the Limitation Act 1950.

In 1985 the parties entered into a joint venture, forming the company Amaltal Taiyo, with Amaltal holding a 75% share, and Maruha a 25% share. Both parties maintained equal control of the company. Amaltal Taiyo, in mid-1987, entered into a separate joint venture with Maruha, known as the Surimi Joint Venture ("Surimi JV"). The Surimi JV was to utilise hoki quota acquired by Amaltal Taiyo. To fund this quota, Amaltal Taiyo borrowed approximately ¥1.1 billion from the Industrial Bank of Japan. This loan was guaranteed by Maruha and Amaltal, and was to be repaid over a five-year period at a rate of ¥220 million each year. To cover any potential exposure under the loan, the directors of Amaltal sought a guarantee of fish-catch from Maruha. This was refused. Maruha instead agreed to give Amaltal Taiyo a guarantee of the minimum annual net profit from the Surimi JV (payments were made in each year of the five year venture). The profit guarantee was to be calculated on the basis of a profit and loss account, as though Amaltal Taiyo's interest in the Surimi JV was a stand-alone entity. The profit guarantee did not expressly cover whether the cost of the hoki quota lease could be amortised for tax purposes. Amaltal decided that Amaltal Taiyo should make the attempt to amortise the quota lease. The amortisation was accordingly recorded as a deduction in its tax accounts, but it was not included in the internal management accounts. The money flowing to Amaltal Taiyo on the basis of the profit guarantee and the management account was therefore greater than that established by the tax accounts. The "over-payments" were subsequently forwarded to Amaltal, who used the money in its day-to-day operations. Dissolution of the Surimi JV was eventually done on the basis of the management accounts also, not referring to the now \$5.2 million which had been advanced by Amaltal Taiyo to Amaltal to meet any contingent tax liability if amortisation was not successful, which

in fact it was, in 1994. Maruha claimed that it had been “cheated” out of this money as it had been led to believe, by representations made by Amaltal, that the money was “tax money”. Maruha was aware that Amaltal, at the outset, would attempt to amortise the lease, but it was led to believe that amortisation had been unsuccessful and did not form the basis of any subsequent deduction claims.

The Court reversed the findings of Priestley J in relation to breach of fiduciary duties and implied terms of the agreement. The parties were patently in an arm’s length commercial transaction, and none of the distinguishing features of a fiduciary relationship were present. Any additional terms to the agreement (such as mutual confidence) could not be appropriately implied.

The Court set out the grounds that must be established in any successful action in deceit: a misrepresentation as to a past or existing fact; fraud (lacking honest belief in the truth of a statement); reliance; and damage. The Court noted that findings of deceit at the High Court level in common law jurisdictions are often set aside, despite the onerous standard of review, on the basis that dishonesty has not been established (citing, e.g., *Derry v Peek* (1889) 14 App Cas 337 (HL), *Jaffray & Ors v Society of Lloyds* [2002] EWCA Civ 1101, and *Amertek Inc v Canadian Commercial Corp* (2005) 76 OR (3d) 241 (Ont CA)). The Court noted that Priestley J had not made an explicit (and necessary) finding of dishonesty. While there was no “smoking gun” indicating dishonesty (such as conspiratorial evidence), the Court undertook its own assessment and drew the inference of dishonesty. The claim in deceit was therefore confirmed.

The final issue was whether the claim in deceit was time-barred by s 4 of the Limitation Act 1950, the proceeding commencing six years from the accrual of the cause of action. The Court considered s 28, which provides that the period of limitation does not begin to run in a case based on fraud until the plaintiff discovers the fraud of the defendant, or could with “reasonable diligence” have discovered the fraud. The Court concluded that the action was not time-barred. Maruha had been “deflected” in this case by the deceitful actions of Amaltal, to quote Mahon J in *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (HC). The Court also adopted the formulation of Millet LJ in *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 418 (CA), in considering that the plaintiff must establish that it could not have discovered the fraud without exceptional measures that, reasonably, it did not have to take.

The Supreme Court has granted Maruha leave to appeal.

Negligence – Misfeasance in public office – claim against Department of Corrections by victims of parolee’s reoffending – strike out application

In *Tai Hobson v Attorney-General* CA74/05 17 May 2006, and *Susan Couch v Attorney-General* CA238/05 17 May 2006, the Court considered whether Mr Hobson’s and Ms Couch’s claims in negligence and misfeasance in public office against a probation officer and the Department of Corrections (“the Department”) should be struck out.

In 1997 William Bell was sentenced to five years imprisonment following the aggravated robbery of a service station. Upon release, Mr Bell was required to, amongst other things, attend counselling following drug and alcohol assessment as directed by his probation officer, and to undertake such employment as was directed by his probation officer. Mr Bell was initially supervised by a senior probation officer, but soon came under the supervision of “X”, a newly appointed probation officer of some 10 months standing. Allegedly, with the knowledge of X, Mr Bell was accepted into a liquor licensing course, during which he was assigned to work at the Panmure RSA Club. On 8 December 2001, Mr Bell callously and systematically bludgeoned each of the four people present at the RSA with the butt of a shotgun, shooting one in the chest. Three of the victims died. Ms Couch survived, but now suffers from serious physical and emotional injury. Mr Hobson is the husband of one of the murder victims, and it was claimed that he suffered mental anguish, shock, pain, and general suffering. Both Mr Hobson and Ms Couch claimed damages for pain and suffering (\$50,000 for Mr Hobson, \$1,500,000 for Ms Couch) and exemplary damages (\$500,000 for both), based on negligence and misfeasance in public office.

Heath J had struck out Mr Hobson’s cause of action in negligence and breach of statutory duty (the second not pursued on appeal). Sargisson AJ also made orders that the question of whether Ms Couch’s statement of claim disclosed a reasonable cause of action be removed to the Court of Appeal.

The Court was unanimous in expressing criticism over the manner in which the claimant’s case had been pleaded.

In relation to Mr Hobson’s claim, the Court was of the view that he was too far removed from any possible duty of care in negligence that could be placed on X, or the Department. There was no capacity for Mr Hobson to become the vicarious beneficiary of a duty owed to his wife (if owed at all), nor was there any legally recognisable damage. The same problem arose under the claim of misfeasance in public office – it would be impossible to prove that X had actual foresight that damage would result to Mr Hobson from her actions. The Court accordingly concluded that this claim should also have been struck out.

Ms Couch’s claim of misfeasance in public office was also struck out, the Court unanimous in its view that X’s actions could not be said to have been reckless, deliberate, or dishonest, in the legally required sense when carrying out her statutory duties under s 125 of the Criminal Justice Act 1985.

For the majority, William Young P and Chambers J (writing separately) considered that Ms Couch’s claim in negligence should be struck out. William Young P considered that in this instance the asserted duty had been directed to the alleged acts or omissions of the defendant. There were, in his view, serious complications in identifying a class of persons to whom any duty was owed that was distinct from the public at large (who are all at risk of a parolee’s re-offending). Furthermore, in his view, a more rigorous approach by the Department with regards to supervision would not have necessarily led to a different result, giving rise to a completely speculative causation inquiry. While William Young P was content to proceed for the sake of argument on the basis that there was sufficient proximity between Mr Bell and Ms

Couch (his workmate), to impose a duty (including a “duty to warn”) in such an instance would lead to the imposition of a duty in relation to all similar offenders. In his view this ran counter to the objective of reintegration that lies at the heart of the parole regime. Chambers J concurred with the reasoning of William Young P, focusing also on the inability of Ms Couch to claim under the relevant heads of damage. Any compensatory claim was barred by the accident compensation legislation, and any claim based on the vicarious liability of the Department for exemplary damages would be unlikely to meet the stringent standards of *S v Attorney-General* [2003] 3 NZLR 450 (CA). He too saw the claim for exemplary damages against the Department itself as problematically raising the spectre of indeterminate liability for an indeterminate class and time. Finally, Chambers J considered that the imposition of a duty of care against the Department was inconsistent with its statutory role, in light of the Department’s inability to decide who comes under its supervision, and its limited powers to deal with parolees, as well as the principle of rehabilitation.

Hammond J would have kept Ms Couch’s claim in negligence live. He preferred to focus on first principles, arguing that a court will be justified in striking out a claim if the court can be confident that no further investigation or argument of any kind could provide any appreciable assistance to the task of reaching an outcome. It may be appropriate to air issues even if the Court feels it has little basis, where further investigation is required. There is, in essence, an increased risk of interlocutory error in new claim situations. Despite the inadequacy of the pleadings, Hammond J considered that there was a centrality to the complaint: that Mr Bell, with his particular history, should not have been allowed or encouraged to become employed in this environment without, at least, close supervision. He considered that, at least in relation to Ms Couch, it was yet possible that a narrow duty of care on X, or the Department, could be devised. The fact that Ms Couch’s claim would be limited to exemplary damages was not, according to Hammond J, dispositive. In his view, there was real force in the view that such a new claim in negligence may align with traditional rationales for tort law, including public accountability.

The Supreme Court has granted Ms Couch leave to appeal.

Privacy – whether inadmissible videotaped confession a “private fact” – highly offensive test – whether public interest outweighed privacy interest – prior restraint

In *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 the Court was required for the first time to apply its decision in *Hosking v Runting* [2005] 1 NZLR 1, in which it confirmed that there is a discrete cause of action for the tortious invasion of privacy under New Zealand law.

The case concerned a murder that took place in 1994. The wrong man had been sent to prison, and the police suspected that his nephew, Mr Rogers, was in fact the murderer. At the behest of the police, Mr Rogers confessed to and reconstructed the murder on videotape. It was intended that this videotape would be adduced in evidence against Mr Rogers, but in *R v Rogers* [2006] 2 NZLR 156 the Court ruled the videotape inadmissible (“the admissibility decision”). The Court said it was obtained in breach of Mr Rogers’ rights to counsel and silence. Mr Rogers was subsequently acquitted.

During the period between the creation of the videotape and Mr Rogers' acquittal, a police officer passed a copy of the videotape to TVNZ, who wished to broadcast it. However, a Full Court of the High Court (Venning and Winkelmann JJ) ordered a permanent injunction restraining TVNZ from doing so. TVNZ appealed to the Court of Appeal. The Court unanimously allowed the appeal and set aside the injunction.

Delivering the judgment for himself and O'Regan J, Panckhurst J agreed with the High Court that Mr Rogers had a reasonable expectation of privacy in respect of the contents of the videotape. Panckhurst J confirmed this had to be assessed at the time of publication. He said that although Mr Rogers would have had an expectation that the videotape would be made public in the context of the criminal process, that did not mean that he would have had an expectation that it would be made public for all purposes. The Judge also noted that as a result of the admissibility decision, the videotape was never played at Mr Rogers' trial. Panckhurst J held that the tort of invasion of privacy was not limited in its application to inherently private facts, but that the facts in issue in this case attracted a relatively low-level privacy interest. He also concluded that publication would be highly offensive to a reasonable person in Mr Rogers' position, given the publication was intended to be to a national audience on television, rather than in the confines of a court room.

Having held that the elements of the tort had been made out by Mr Rogers, O'Regan and Panckhurst JJ nevertheless considered TVNZ could avail itself of the defence of legitimate public concern. Panckhurst J reiterated that in *Hosking* it was said that the degree of legitimate public interest required for the defence to be successful was inversely proportionate to the extent of the privacy interest. Given the privacy interest here was limited, the public interest required for a successful defence was not substantial. Panckhurst J said that the admissibility decision was "reached against a background of conflicting lines of authority" and the public was entitled to view the videotape in the context of a public debate as to whether the Court should have excluded it.

Panckhurst J said the threshold for prior restraint as a remedy for breach of privacy was high, and cases crossing it would be rare. Otherwise, prior restraint could exercise a chilling effect on freedom of expression. Given this was a case with a high public interest, the threshold for prior restraint was not met. Panckhurst J also noted that if TVNZ were to broadcast the videotape in a manner impugning Mr Rogers' acquittal, he could bring an action in defamation. Accordingly, said Panckhurst J, it made sense that the thresholds for prior restraint under the torts of defamation and invasion of privacy were consistent.

In a concurring judgment, William Young P doubted whether the facts in this case were "private" such as to attract the protection of the tort. He placed emphasis on the very high threshold for prior restraint in free speech cases, especially those where the plaintiff seeks orders for reputational reasons. This hurdle alone was enough to defeat Mr Rogers' claim. He considered that the suppression of the videotape would limit legitimate public discussion on a matter of genuine public interest – namely, whether the admissibility decision was correct. The President agreed with Panckhurst J that the admissibility decision was not reached against a background of "well settled jurisprudence" and thought the debate would be "esoteric" without the videotape. William Young P also placed some reliance on s 14 of the New Zealand Bill of Rights



Act 1990, which guarantees freedom of expression. He said that in cases where the privacy of the facts in issue was doubtful, s 14 should tip the balance in favour of freedom of expression.

The Supreme Court has granted leave to appeal.

B IMPORTANT CRIMINAL CASES

Adequacy of Directions / Summing up

Sexual offending – multiple accused – duty of judge to put defence case – inconsistent verdicts – counsel incompetence – application to adduce fresh evidence

In *R v A, B, C and D* CA301/05, CA295/05, CA310/05, CA288/05 11 April 2006, A, B, and C, appealed against conviction and sentence, and D appealed against conviction. All appellants had been convicted for abduction and rape, while A and B had also been convicted on counts of unlawful sexual connection by digital penetration and oral sex respectively.

The charges against the appellants related to offending at a Surf Life Saving Tower at Mt Maunganui over the Christmas/New Year period in 1988/1989. In essence, the complainant was lured to the tower in the belief that she was attending a date, whereupon she was sexually violated by the appellants. The complainant had also alleged that during the course of these sexual assaults, she was violated by A with an object, with B offering encouragement. The appellants contended that the complainant had consented, while A maintained that he never used the object in question and only had intercourse with her once. The appellants were convicted in the High Court on all counts preferred against them, except those charging A and B jointly with unlawful sexual connection relating to the use of an object.

D appealed his conviction on the basis that Ronald Young J in the High Court had failed to put D's case to the jury. D argued that Ronald Young J had essentially failed to distinguish D's account from that of his co-accused. It was a separate narrative that could have provided grounds for a jury to accept D had reasonable grounds to believe the complainant was consenting. The Court agreed, stating that the duty of the trial judge to put the defence's case to the jury is a fundamental obligation when ensuring a fair trial. The duty prevails even if the defence is weak, improbable, or even laughable, although this does not entail repeating defence counsel's arguments or topping up a weak defence. The Court stated that even in a short and simple trial, the trial judge should hesitate before relying solely on counsel's closing address. D's conviction was therefore quashed and a re-trial (the common course of action when this ground of appeal is successful) ordered.

All appellants also raised common arguments of counsel incompetence. It was alleged that D's trial counsel had inappropriately, and without instructions, produced to the complainant during cross-examination, the alleged object used in the sexual violation. The subsequent reaction was described as dramatic, affecting the case for all of the appellants, even those who did not face charges in this respect. The Court addressed the question of whether this action could have caused or materially contributed to a miscarriage of justice (*Rv Sungsuwan* [2006] 1 NZLR 730 (SC)). The Court was of the view that it did not. The jury acquitted on the charges in relation to the object, and it may have done so due to its very production.

The appellants also argued that the verdicts (acquittal with regards to the object charges, but conviction in regards to the other charges) were inconsistent. The Court considered that once a prima facie inconsistency is established, it must inquire into whether there is any rational or logical explanation. In considering the issue however, the Court emphasised that the view that a jury must have “disbelieved” a complainant to acquit on one account, therefore rendering the conviction inconsistent, is fallacious. Credibility is not static. The Court concluded that there were logical reasons for the jury not to be persuaded to the requisite degree that the alleged incident with the object had occurred.

Several other grounds of appeal were lodged. C argued that the prosecutor at trial had stated in closing that to accept the appellant’s version would mean that they accept that the complainant welcomed intercourse in “degrading circumstances” and was a “slut”. C argued that there was no evidence to support this moral disposition, while no such evidence could be led to rebut the contention unless leave was sought under s 23A of the Evidence Act 1908. The Court considered, however, that both the Crown and the defence had been inviting the jury to consider the probabilities of matters unfolding as they did. In relation to the “slut” comment, the Court was satisfied that although the comment should not have been made, no miscarriage had arisen, mainly due to Ronald Young J’s sanitation of the proposition in summing up.

Further grounds relating to the summing up of Ronald Young J were dismissed, as was an application to adduce fresh evidence. The “fresh” evidence related to the complainant’s conduct post-violation. Following *R v Bain* [2004] 1 NZLR 638 (CA) the Court was of the view that the evidence was not credible and could have been pursued at trial with reasonable diligence.

A, B, and C’s appeals against sentence were dismissed.

The Supreme Court has refused leave to appeal.

Jury directions – standard and burden of proof – the “domestic analogy” – direction regarding “absolute certainty” – model direction

In *R v Wanhalla and Court* CA321/05 and CA324/05 24 August 2006, a Full Court was required to consider the appropriate direction to a jury on the standard of proof. The appellants had been convicted of aggravated burglary and three counts of injuring with intent to cause grievous bodily harm. They argued that Judge Abbott had misdirected the jury on the standard of proof, that is, the meaning of “beyond reasonable doubt”. His summing up had included the domestic analogy (“it is often said that members of the jury should be as sure about a conclusion of guilt as they would want to be about making an important decision in the context of their own personal lives”) and a comment that “the Crown was not required to prove a charge to the point of absolute scientific or mathematical certainty.”

William Young P, Chambers and Robertson JJ reviewed Australian, English, and Canadian authorities and formulated a model direction (at [49]). The direction is not mandatory. The important point was that it was conveyed to the jury that it should convict if sure of the defendant’s guilt. The majority found that the Judge was entitled to tell the jury that absolute or mathematical certainty was not required. In

addition, because of the pedigree of the domestic analogy, the appeal was dismissed. However, since the direction has the potential to puzzle jurors, the Court noted it is not helpful and should no longer be used.

Glazebrook and Hammond JJ also gave judgments concurring in the result of the majority.

Glazebrook J discussed the origins of the requirement of proof beyond reasonable doubt, reviewed the directions given on reasonable doubt in various jurisdictions, and examined studies of juror comprehension of the requirement of proof beyond reasonable doubt. In Glazebrook J's view, the expanded direction suggested by the majority should only be given when it appears absolutely vital that the jury be given more assistance in the circumstances of the particular case. Further, the direction may need to be tailored to the circumstances of the particular case.

Glazebrook J held that, in this case, there was no risk that the jury misconstrued the standard of proof. Overall, Judge Abbott made it clear that the jury had to be sure of guilt before convicting. Although the domestic analogy should not be used, in this case its use was aspirational ("as sure as they would want to be") and thus its capacity to trivialise the decision, or to mislead, was very much diminished.

The judgment of Hammond J provided an historical examination of the direction, followed by a discussion of two methods of jury decision-making: the story model and the meter model. He then emphasised the importance of prefacing the reasonable doubt direction with explicit reference to the presumption of innocence. The importance of summing-up the respective cases of the prosecution and defence to the reasonable doubt direction was also emphasised. Hammond J agreed that the domestic analogy should not be used.

Bylaws

Bylaw banning open air fires – incorporation of "dead" New Zealand Standard

In *Parlane v Waipa District Council* [2006] NZRMA 457 Mr Parlane appealed certain convictions for breaches of the Waipa District Urban Area Fire Control Bylaw 2000 ("the Bylaw"). Mr Parlane had been lighting open air fires, contrary to the Bylaw. An open air fire was defined, in part, as one that was not contained in an incinerator constructed to New Zealand Standard (NZS) 5202. Mr Parlane attacked the validity of the Bylaw, arguing that as NZS 5202 had been "withdrawn" by Standards New Zealand before the Bylaw was passed, the prosecution could not prove that the incinerator used by Mr Parlane was inappropriate.

Hubble DCJ had taken the view that the Council could refer to, adopt, or modify the standard as it wished. Rodney Hansen J had considered that, once revoked, the standard ceased to exist and could not be incorporated. Accordingly, he applied s 17 of the Bylaws Act 1910, severing the clause from the bylaw entirely and making all commercial fires open air fires. The Court adopted a different view. Examining the Standards Act 1988 ("the Act"), the Court noted that the existence, publication, and

validity of the Bylaw had been proved (s 22(1) of the Act). The Court rejected Mr Parlane's metaphysical argument that the standard must be "alive" for it to be referred to. The Council was free to make use of any standard evolved by Standards New Zealand, even one that had been revoked by Standards New Zealand – such was its democratic role.

The Supreme Court has refused leave to appeal.

Defences

Manslaughter – principles relating to extension of time – requirement that unlawful act be objectively dangerous – consent as a defence to assault

In *R v Lee* [2006] 3 NZLR 42 the Court discussed the approach to be applied to applications for an extension of time to appeal under s 388(2) of the Crimes Act 1961 and the availability of consent as a defence to assault and other crimes involving bodily injury. Mr Lee was convicted of manslaughter on the grounds of causing death by an unlawful act, namely assault. Ms Joanna Lee (no relation) died while Mr Lee performed an exorcism on her during which he sat on her chest and applied pressure to her neck. Paterson J in the High Court ruled that, if the jury accepted that Mr Lee caused Joanna's death by manual strangulation, then the issue of Joanna's consent was irrelevant. Mr Lee sought an extension of time to appeal against his conviction. His appeal was out of time by approximately 2 years and 10 months.

The Court held that the approach articulated in its previous decision of *R v Knight* [1998] 1 NZLR 583 to applications for an extension of time to appeal is correct. The test is a balancing one which ascertains where the interests of justice lie. All relevant factors must be taken into account, including the wider interests of society in the finality of decisions, the strength of the proposed appeal, whether the liberty of the subject is involved, the practical utility of any remedy sought, the extent of the impact on others affected and on the administration of justice, and any prejudice to the Crown.

Balancing all the relevant factors in this case, the Court considered that those favouring an extension of time outweighed those counting against it. The strongest factor in favour of the application was the merits of the appeal, as the Judge should have left the question of consent with the jury. The factors weighing against an extension were the long delay, the principle of the finality of litigation (in that Mr Lee made a conscious decision not to appeal), and the difficulty in conducting a retrial. On the other hand, in the circumstances it was understandable that Mr Lee accepted the verdict, given what the Judge had told him the law was.

The Court held that, despite the long delay, Mr Lee's private interest in having a fair trial, conducted properly in accordance with the law with the possibility of an acquittal, outweighed the public interest in maintaining the formal conviction in this instance. The formal conviction was achieved by the jury being directed on a wrong legal basis with regard to consent, on the Crown's application, without the Court having any meaningful assistance from counsel pointing to any opposing view and on

a point Mr Lee cannot have been expected to understand. In addition, there was a strong public interest in ensuring that trials are fair and perceived to be fair and that they are conducted in accordance with the law. The Court therefore granted Mr Lee's extension of time to appeal.

The Court held that the Judge's failure to leave consent to the jury was an error of law. Consent, which encompasses an honest belief in consent, is preserved as a defence by s 20(1) of the Crimes Act. The question of consent is therefore governed by the common law, apart from ss 61 and 61A, dealing with surgical operations, and s 63, which provides that no person can consent to the intentional infliction of death.

The judgment contains an extensive discussion on the state of the common law on consent at the end of the nineteenth century, later developments in the common law in the United Kingdom, and the position in other jurisdictions. The Court then assessed the limits of the defence of consent in New Zealand.

The test in New Zealand at common law is not a results based test. The Court concluded that a person can consent to the intentional infliction of harm short of death unless there are good public policy reasons to forbid it which outweigh the social utility of the activity and the high value placed on personal autonomy. Apart from sparring matches or playfights and organised matches conducted with a referee according to established rules, consent is not a defence in relation to fighting. Those involved in sparring matches and playfights must not be acting in reckless disregard for the safety of others and must not intend to cause bodily injury for consent to be operative. Where grievous bodily harm is intended or where a perpetrator acts in reckless disregard for the safety of others, public policy factors may require the judge to withdraw the defence of consent from the jury. The judge should take into account the right to personal autonomy, the social utility (or otherwise) of the activity, the level of seriousness of the injury intended or risked, the level of risk of such injury, the rationality of any consent or belief in consent, and any other relevant factors.

Where consent is left to the jury, it is for the jury to decide whether the Crown has proved both lack of consent (either explicit or implied) and lack of honest belief in consent or whether the Crown has proved that what happened does not come within the scope of any consent and that the perpetrator did not honestly believe that it did.

The Court held that in this case consent was available as a defence as a matter of law, subject to a possible exclusion on public policy grounds if Mr Lee has been reckless or intended to cause Joanna grievous bodily harm. There was an ample evidential basis, both with regard to Joanna's consent to the exorcism (the main issue in this regard would be whether Joanna withdrew consent) and Mr Lee's honest belief in consent, for the defence to have been left with the jury. The failure to do so was thus an error of law. Accordingly, the Court allowed the appeal, quashed the conviction and ordered a retrial.

Elements of Offences

Possession of Cannabis for sale – whether growing cannabis plant could be a “controlled drug”

In *R v Gillan* [2006] 2 NZLR 781 the Court considered the question of whether a growing cannabis plant could be the subject of a charge of possession of cannabis for the purpose of sale or supply in accordance with s 6(1)(f) of the Misuse of Drugs Act 1975 (“the MODA”). This question was posed to the Court in accordance with s 380(1) of the Crimes Act 1961.

A police search of Mr Gillan’s home found 24 mature cannabis plants and 11 seedlings. Mr Gillan was charged and pleaded guilty to cultivation of cannabis but denied that there was any commercial element to his offending. Mr Gillan was also charged with possession of cannabis for supply. This charge was proffered on the assumption that a conviction would obviate the necessity for the Crown to prove commerciality at a disputed fact hearing. Judge Abbott concluded that growing cannabis plants could not be the subject of a charge for possession of cannabis for supply or sale and directed the jury to find Mr Gillan not guilty.

The Court determined that Judge Abbott was correct to find that a growing cannabis plant was a “prohibited plant” and not a “controlled drug” and, therefore, could not be the subject of a charge of possession for the purpose of supply or sale. The Court stated that the definition of “cannabis plant” as “fresh dried or otherwise” was not wide enough to include a growing plant. The Court held that the presumptive quantity in s 6(6) of the MODA of 28 grams of cannabis would be undermined if stalk and root matter (the weight of which constantly change in a growing plant) were taken into account. Furthermore, a growing plant may not be more than a single cannabis seedling.

The question was answered in the negative.

Forgery – meaning of “false document” – whether photocopy of false document is itself a false document

In *R v Walsh* CA208/05 26 June 2006 the Court considered the definition of “false document” in s 263 of the Crimes Act 1961 (pre-2003 amendment). At the time of the offending the definition provided that a false document was one:

- (a) Of which the whole or any material part purports to be made by any person who did not make it or authorise its making; or
- (b) Of which the whole or any material part purports to be made on behalf of any person who did not authorise its making ...

Mrs Walsh had created false letters, purportedly from credible financial institutions, by taking real letters from the institutions and replacing the bodies of text with material typed by her husband. The result was a letter with text inducing recipients to invest money that appeared to be from a legitimate source. Mrs Walsh faxed these

mock-ups from Amsterdam to recipients in New Zealand. The issue in the case was whether the documents that emanated from the recipient fax machines were “false documents” (it was uncontested that the documents put into the sender machine were “false documents”).

A majority of the Court dismissed Mrs Walsh’s forgery conviction appeal and held the documents were false, although separate lines of reasoning were expressed by each of the Judges. O’Regan J took the view that, in terms of s 263, a “material part” of each letter emanating from the recipients’ fax machines purported to be made by persons who did not make it. This material part was the doctored text inserted by Mrs Walsh. Accordingly, this brought the letters that came out of the fax machines within the definition of “false document”. In this regard, O’Regan J considered that *R v Sorich* [1945] GLR 267 (SC) was wrongly decided.

Glazebrook J took the view that the document emanating from the recipient machine was the same document as was put in at the sender’s end: if the sent document was the forgery, so too was that which arrived. Glazebrook J said a more restrictive interpretation would limit the scope of successful forgery prosecutions in the digital age, where many cases involved the use of imaging.

In dissent, William Young P pointed to common law authority supporting the proposition that a copy of a forgery is not itself a forgery (including *Sorich*). He also noted that some overseas jurisdictions had enacted provisions directed at this very situation. The fact New Zealand did not have such a provision indicated that Parliament had decided against enacting one, especially given it could have done so during the 2003 amendment of the crimes against property provisions in the Crimes Act.

The Court unanimously dismissed Mrs Walsh’s appeal against sentence.

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

Tax evasion – delegated authority under the Tax Administration Act 1994 – standard to be applied in determining intent to evade

In *R v Gilchrist* (2006) 22 NZTC 20,043 the Court was required to deal with the issues of delegated authority under the Tax Administration Act 1994 (“the Act”) and the requisite mens rea in tax evasion cases. The tax liability in question was for GST arrears owed by E-Tax Trust. The Inland Revenue Department (“IRD”) had been seeking recovery of the arrears for some time, but with little success. Mr Gilchrist contacted IRD and negotiated to pay the arrears by instalment. The IRD agreed, but requested details from E-Tax Trust relating to its trustees, its debtors, and the amounts it was owed. A list of debtors was supplied, but payment was not forthcoming. The IRD said if payment were not received, it would issue third party deduction notices to E-Tax Trust’s debtors. Mr Gilchrist took umbrage with this proposal, complaining of a breach of privacy. The next day Mr Hutchins, a Senior Investigator at the IRD, issued a notice pursuant to s 17 of the Act denying Mr Gilchrist’s complaints, asking for a current list of the E-Tax Trust’s debtors, and pointing out that a failure to comply would lead to prosecution. The letter did not expressly state Mr Hutchins’ authorisation to make such a request. Mr Gilchrist queried the lawfulness of the

request and advised he would be seeking an injunction against the IRD. Mr Gilchrist then executed a deed of assignment of the E-Tax Trust debts to E-Tax Trust Ltd for no consideration. He signed for both the assignor and the assignee and advised debtors they now were in debt to E-Tax Trust Ltd. In the correspondence that followed between Mr Gilchrist and the IRD, Mr Gilchrist never mentioned the assignment whilst still referring to the debtors of E-Tax Trust. Mr Gilchrist was charged with tax evasion and convicted. He appealed to the Court of Appeal.

The appeal was dismissed. The Court considered that the existence of Mr Hutchins' delegated authority under the Act was a question of fact and the absence of a formal statement of delegated authority was of no consequence. Section 7(3) of the Act provides that in the absence of proof to the contrary, the delegation of powers by the Commissioner of the IRD was to be presumed. Mr Hutchins' authority was to be presumed from reading the letter, which purported in its tone and content to be written by an IRD officer with delegated authority.

The Court also dealt with the mental element of the offence. It referred to *Taylor v Attorney-General* [1963] NZLR 261, where McGregor J defined the mental element as being "an intention to endeavour to avoid payment of tax known to be chargeable". The Court said that Judge Mackintosh was entitled to find that there was "underhand dealing" in the present case and that the mental element of the offence was met. The Court said the assignment of the debt to E-Tax Trust Ltd was a deliberate manoeuvre to frustrate the IRD's ability to collect the tax arrears which E-Tax Trust owed. Mr Gilchrist had attempted to conceal his removal of the debtors from the Commissioner's reach.

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

Evidence

Co-conspirators rule of evidence – admissibility on blackmail charge – summing up

In *R v Qiu* CA495/05 3 May 2006 the Court considered whether evidence of threats made by persons other than Ms Jiang Qiu should have been admitted against her at her trial for conspiracy to endanger the safety of someone with intent to obtain a cash benefit under s 237(1) of the Crimes Act 1961.

The Crown alleged that Ms Qiu, along with unknown others, demanded \$8,000 from the victim as a fee for introducing him to his future wife. Ms Qiu threatened to tell the New Zealand Immigration Service that his marriage was a false marriage and to break his legs. Windows were smashed at his home and he received several threatening phone calls from an unidentified Chinese male. In the case against Ms Qiu, the Crown relied on the threats made by others, engaging the co-conspirators rule of evidence. On appeal the issues were whether evidence of threats made by persons other than Ms Qiu were admissible and whether Courtney J's summing up on the co-conspirators rule was sufficient.

The Court held that threats made by others are admissible under the co-conspirators rule. The rule is that the acts and declarations of a co-conspirator may be admitted for the purpose of establishing the truth of any express or implied assertion contained in them, against each and every other co-conspirator, provided that these acts were committed in furtherance of the conspiracy, and provided that a foundation of independent evidence is laid. Independent evidence is evidence other than evidence of the other alleged co-conspirators' doings which links the given co-conspirator to the conspiracy: Gillies *The Law of Criminal Conspiracy* (2ed 1990).

In order to bring evidence within the co-conspirators exception the Crown needs to establish that there was a conspiracy and that the accused participated in it: *R v Morris (Lee)* [2001] 3 NZLR 759 at [15] – [20] (CA). The test as to whether the accused was involved in the conspiracy is whether there is “reasonable evidence of common intention”. The Court held that there was sufficient material for Courtney J to draw the conclusion that Ms Qiu was part of the alleged conspiracy. In particular: at the first meeting between Ms Qiu and the victim she threatened to get someone to break his legs; she intimated her involvement in the broken windows, although at that time she was on crutches with both legs broken and was unlikely to have done it herself; the coincidence of the content of the threats made by the unknown callers and those made by Ms Qiu; and the coincidence in time of the events involving Ms Qiu and the contact from unknown callers.

Ms Qiu's counsel submitted that Courtney J was wrong to take into account the factors involving reference to the other co-conspirators as this was not independent evidence but hearsay. The Court did not accept this submission. The Court said that it considered the first two factors referred to by Courtney J as sufficient to constitute reasonable evidence that Ms Qiu was a participant in the alleged conspiracy. However, the Court did comment that the last two factors were not hearsay because they were not being relied on for the truth of the assertions made but rather for their coincidental effect. The others' words are properly described as “verbal acts” in this context: *R v Jackson* (1987) 11 NSWLR 318 at 324. The Court held that the trial judge was entitled to rely on all four factors in finding that Ms Qiu was involved in the conspiracy.

The Court commented that once the evidence of a co-conspirator's physical and verbal acts is admitted, it is then for the jury to determine whether they are sure that the other was acting in concert with the accused. If they are so satisfied, then it is possible that the co-conspirator's physical and verbal acts may be used by the jury for a number of purposes, as the finding that the parties were acting in concert will mean that each was the other's partner in crime. The evidence of the other's acts may help the Crown establish the various elements of the crime with which the accused is charged. In that enquiry, the evidence, in so far as it consists of statements by others, may be used as proof of the truth of those statements. It is in that respect that the co-conspirators rule is, at least in part, said to be an exception to the hearsay rule.

The Court held that although the trial Judge's summing up on the use that was to be made of the evidence was economical, it was correct and covered the essential points. The appeal was dismissed.

The Supreme Court has granted leave to appeal.

Self-represented accused – mode of evidence order – jury question

In *R v Sharma* CA360/04 and CA364/04 6 July 2006 the Court commented on mode of evidence orders made regarding evidence given by child complainants against a self-represented accused. Dr Sharma was convicted of two counts of male assaults female (one representative), one count of assault with a weapon against his wife, and one count of assault on a child (representative). There were four trials on the matter, with Dr Sharma representing himself at all but the first trial. It was ordered that Dr Sharma's children give evidence by closed-circuit television (CCTV) and that their evidence-in-chief be in the form of pre-recorded evidential videos. Before the second trial, counsel was appointed for the purpose of conducting the cross-examination of the children. Dr Sharma indicated that he had no objection to this course but wished to be seated alongside counsel so the children could see him on screen. Evidence was given in this manner at the trial subject to the appeal.

Dr Sharma appealed against his conviction on several grounds, including that the mode of evidence orders prejudiced his right to a fair trial and undermined his defence as he could not directly cross-examine the children. Although the mode of evidence rulings were made under the inherent powers of the court to regulate its own procedures rather than the Evidence Act 1908, the Court accepted that the present case must be assessed against the statutory background. In this regard, there was nothing wrong in principle with the children being seen as vulnerable in the same way that child complainants in sexual cases may be. The Court considered that Dr Sharma had full opportunity to cross-examine his children through counsel. He was not able to point to any areas that had not been covered during cross-examination or any failures on the part of counsel to follow his instructions. In addition, the children gave their evidence in this case in the "presence" of Dr Sharma in the sense that he was clearly visible to them on the screen. There was thus no substance in Dr Sharma's complaint about the process followed.

Dr Sharma's appeal was, however, allowed in part on other grounds. The jury had asked to see the transcript of the wife's evidence in relation to the specific count of male assaults female. Dr Sharma remained in the cells while Judge Barry Morris discussed the matter with the prosecutor and possibly the counsel who had conducted the cross-examination of the children. The Court said that where a judge, in answering jury questions, consults with counsel, this should include both parties and normally take place in the presence of the accused. Natural justice would require an unrepresented accused to be present and to be allowed to put forward his views on the answer. There was, therefore, a failure of natural justice in this case. Further, the Judge did not properly answer the question as he did not read the detailed cross-examination relating to the victim's injuries which was an important part of the defence case and relevant to the jury's question.

Other matters of concern were the lack of direction concerning expert evidence and the possibility that the doctor could have been taken as commenting on the complainant's credibility. Although some of these matters may not have led to a miscarriage of justice when considered in isolation, collectively they did so in relation to one specific count of male assaults female, particularly due to the problems with the jury question. The conviction on this count was quashed and no retrial was ordered. The Court's concerns did not, however, taint the other verdicts.

The Supreme Court has refused leave to appeal.

Witness competence – intellectually handicapped witness – whether there is a standard of proof

In *R v S* CA498/05 10 August 2006 the Court considered the competency of a complainant, M, who although 18 years old, was intellectually handicapped.

Mr S sexually assaulted various boys connected to his de facto partner, including M. M was 12 – 13 years old at the time. Asher J in the High Court exercised his inherent jurisdiction to allow M to give evidence by way of closed circuit television, forming the view that M had the mental ability of a seven year old and could not read.

After M gave evidence in the High Court, Mr S applied for a discharge on all those counts relating to M, on the basis that M was not a competent witness. Asher J dismissed the application and ruled M a competent witness. He concluded that M understood the gravity of the courtroom experience, the obligation to not “make things up”, and that he had a sound understanding of dates and sequences. Mr S appealed, arguing that M’s answers to questions concerning “truth” and “lies” were contradictory and demonstrated more than an inability to grasp concepts in the abstract.

Giving due allowance to the Judge at first instance, the Court was not persuaded that Asher J erred in his assessment of M’s competence. Noting that the notion of a particular standard of proof with regard to a competence assessment is inapt, the Court considered that the judge must be satisfied as to the competence of the witness, after conducting an evaluative assessment of the relevant evidence with regard to the significance of the decision.

Recent complaint evidence – multiple complaints

In *R v Daleszak* CA145/06 27 November 2006 the Court considered the admissibility of recent complaint evidence and in particular, the circumstances in which multiple complaints were admissible. Mr Daleszak was convicted on one count of rape. He appealed against conviction.

After the alleged rape, the complainant rang her daughter in Australia but did not complain about the rape. She did state that Mr Daleszak had been “hassling her”. The complainant also made a phone call to her sister the next morning but did not mention the rape. She did, however, make arrangements to see her sister later in the day. The first complaint was not made until the complainant was at work, where she told two different work colleagues in quick succession. The complainant told the first colleague simply that she had been raped. The complainant made a more detailed complaint to the second colleague. In the District Court, Judge Perkins admitted complaint evidence from the two work mates and the sister.

The Court held that the conversations with the daughter and sister did not constitute a “complaint” and that the complaint made to the first work colleague was made at the first reasonable opportunity. The complaint does not need to be made to the first person the complainant comes into contact with.

The Court found, however, that the evidence of complaint from the second work colleague and the sister was not admissible. The complaint to the second work colleague was not part of an incremental disclosure. The complaint was more detailed but was essentially making the same point as the first complaint, that is, that she was raped. The second complaint had no additional probative value. Mere repetition of complaint cannot boost a complainant's credibility. The evidence of the sister was hearsay.

The Court also considered the impact of statements made by witnesses to the effect that the complainant had regularly complained of being hassled by Mr Daleszak. The Court stated that a failure to object to these statements did not alleviate concerns regarding the effect of these statements on the jury. The closing statement by the prosecutor was also scrutinised for excessive repetition of the statement "why would the complainant lie?" The appeal was allowed. The conviction was quashed and a new trial ordered.

Governor-General's Reference

Reference of conviction to Court of Appeal by Governor-General – fresh evidence principles – whether to order retrial or grant stay

In June 2004 the Governor-General referred to the Court the question of the conviction of Rex Haig for the murder of Mark Roderique in 1994. In *R v Haig* CA267/04 23 August 2006, the Court concluded that the conviction was unsafe and quashed it.

The murder had occurred in the following circumstances. Haig, the deceased, David Hogan, and Tony Sewell were on a fishing boat, the *Antares*, which was moored in Jackson's Bay in Westland. Haig was the captain. A fight developed between Hogan and the deceased which resulted in the deceased being chased from the ship by Hogan and Haig and struck over the head with a length of wood or metal pipe by Haig. While Haig, Hogan, and Sewell went to the local Talley's, the deceased went back to the boat. There is no evidence he left the boat alive. That afternoon the *Antares* left Jackson's Bay.

Some months later the police launched an investigation into the disappearance of the deceased, his parents having raised concern at not having heard from him in that time. In their initial statements to police, Haig, Hogan, and Sewell all maintained that the deceased had not been on the vessel when it left Jackson's Bay.

Later, Hogan gave a statement implicating Haig as the deceased's murderer. The Solicitor-General gave immunity to Hogan and Sewell and they were the primary Crown witnesses at his trial.

Numerous witnesses had come forward since the trial and had sworn affidavits to the effect that Hogan had admitted to them that he was in fact the murderer. An application was made to adduce this evidence. The Court reviewed New Zealand,

English, and Australian authorities both on the principles to be applied in fresh evidence cases which come to the Court via s 406(a) of the Crimes Act 1961 (a Governor-General's reference), and the application of the proviso. It concluded that the Court should continue to apply the approach expressed by Tipping J in *R v Bain* [2004] 1 NZLR 638 (CA) but that the primary issue of whether there was a miscarriage of justice must never be lost sight of and flexibility was necessary.

Overall, the Court was satisfied that it should quash the conviction. The new evidence cast major doubt on the reliability of Hogan's evidence and provided an evidential foundation for the proposition that Hogan had killed the deceased.

However, a majority of the Court held reservations about the tactic of Haig to keep silent on the question of what actually happened. It was clear that, whatever happened to the deceased, Haig knew what it was. Accordingly, it was arguable (and the Crown did argue) that an adverse inference could be drawn against Haig, in the sense explained in *Trompert v Police* [1985] 1 NZLR 357 (CA). In the circumstances of the case, however, the majority did not think this was a controlling consideration.

On that point Hammond J wrote separately. His objection to the Crown's argument went much deeper than the majority's. He found the prospect that an appellant should ever be required to "speak out" on a miscarriage appeal to be quite wrong in principle. He was troubled by any judicial incursion into the right to silence without legislative authority.

On the question whether it should order a retrial the Court noted that that would be the ordinary course of action, but that a number of factors pointed against that course in the present case. A number of key witnesses have since died; the recall of witnesses will have dimmed; and Haig had served the non-parole component of his life sentence.

Land Transport

Excess breath alcohol – respective roles of judge and jury where charges laid indictably – malfunction of breath testing device as a defence

In *R v Allen* CA15/06 4 May 2006 the Court considered the effect of the 2001 amendments to the Land Transport Act 1998 ("the Act") on the respective roles of judge and jury in cases where charges are laid indictably under the Act. Mr Allen allegedly refused to undergo a roadside breath test. Taken to a police station, he was given an evidential breath test that was beset with irregularities. He made six unsuccessful attempts to generate adequate breath samples. Only one successful sample was taken. Usually, the machine records a positive result from the lower of two successful tests. Additionally, the result card that was produced by the machine jammed. The printed result card did not record the serial number of the testing machine or the steps taken in reaching the test result. Usually both of these are recorded. At trial, the evidence dealing with the manner in which the test was taken was heard by Judge MacLean and jury. The Judge ruled the result card admissible. Mr Allen appealed.

Dismissing the appeal, the Court said that pursuant to the Court's previous decision in *R v Livingston* [2001] 1 NZLR 176, evidence relevant to the admissibility of the result card ought to have been heard by the Judge alone. This holding also applied to the evidence concerning the alleged refusal to undergo the roadside breath test, because it went to the existence of circumstances permitting the taking of an evidential breath test. The Court, however, noted that in light of the 2001 amendments to the Act, the jury's role had been severely truncated and normally the only issue it would have to decide in breath alcohol cases was whether the accused was driving a motor vehicle on a road. The new s 75A of the Act allows for a certificate of compliance to be provided in respect of a breath testing device. The certificate must be treated as conclusive evidence of matters stated in the certificate (s 75A(3)). The upshot of this was that, in light of the 2001 amendments, there is no defence that a breath testing device has malfunctioned. If a motorist has concerns about the result of a breath test, the appropriate course of action is to undergo an evidential blood test, which renders an evidential breath test irrelevant. Accordingly the appellant, by trying to have the result card excluded, was seeking to revivify a defence that Parliament had clearly abolished.

Excess blood alcohol – circumstances where reliability of blood alcohol analysis can be put to the jury – miscarriage of justice – application of the proviso

In *R v Wilson* CA433/05 3 July 2006 the Court was required to consider the provisions in the Land Transport Act 1998 ("the Act") relating to the presumptive liability of a blood alcohol analysis in cases where charges are laid indictably. Mr Wilson was convicted of driving with excess blood alcohol pursuant to s 56(2) of the Act. Because this was his third offence, the charges were laid indictably. The analyst who performed the blood alcohol analysis of the blood sample taken from Mr Wilson by police certified that Mr Wilson's blood alcohol level was 127 milligrams of alcohol per 100 millilitres of blood. The legal limit is 80 milligrams. Mr Wilson arranged for a second analysis to be performed, which yielded a result of 149 milligrams. Notified of the discrepancy between the tests, the original analyst re-analysed her sample, arriving at a figure of 128 milligrams.

At trial, Mr Wilson's counsel submitted that the discrepancy between the three tests indicated there was a real possibility that the samples were unreliable, notwithstanding all three figures were well above 80 milligrams. The trial Judge, Judge Rea, cited the Court of Appeal's decision in *R v Livingston* [2001] 1 NZLR 167 as authority for the proposition that the issue of reliability should only be put to the jury if there was an evidential foundation for it. The Judge satisfied himself there was no evidential foundation. He accordingly directed the jury that, as a matter of law, it had been proved that Mr Wilson's blood alcohol level was over 80 milligrams. Mr Wilson appealed following conviction.

The Court said Judge Rea had erred in not putting the reliability issue to the jury. The Court referred to *Livingston*, where Tipping J had said that in breath alcohol cases the issue of the reliability of the breath testing device could only go before the jury if there was an evidential foundation. Tipping J drew an analogy between this presumptive reliability and s 75 of the Act, which says that a certificate of blood alcohol analysis is sufficient evidence of matters stated in the certificate in the

absence of proof to the contrary. The Court said, however, that s 75 did not apply in the present case because the analyst who gave the certificate appeared as a witness and the analysis commissioned by Mr Wilson produced a result of 20 milligrams more than that of the original analysis (the combined effect of ss 79(3)(a) and 79(4)). Accordingly, the certificate of analysis was inadmissible in evidence and the analysis of the blood sample was given orally. In such cases, the Court said no presumption arises: the jury is simply required to evaluate the oral evidence of the analysts and determine whether the elements of the offence are proved to the usual standard. If reliability of analysis were to become an issue during this evidence, the jury would have to evaluate it.

The Court then considered the application of the proviso to s 385(1) of the Crimes Act 1961, which provides that the Court may dismiss an appeal even if the point raised in the appeal is decided in the appellant's favour, provided it is satisfied that no substantial miscarriage of justice has actually occurred. The Court reviewed the authorities on the proviso: *R v McI* [1998] 1 NZLR 696 (CA), *R v Sungsuwan* [2006] 1 NZLR 730 (SC), and *Weiss v R* (2005) 223 ALR 662 (HCA). After traversing the evidence, the Court said it was satisfied on the tests postulated in each of these cases that the proviso should apply. The Court was sure the jury would have convicted Mr Wilson had the issue been left to it to decide (*McI*); the decision of the Judge did not deprive Mr Wilson of the reasonable possibility of an acquittal (*Sungsuwan*); and, on the Court's assessment of the record, the Crown had proved its case beyond reasonable doubt (*Weiss*). Accordingly, the proviso was applied and the appeal was dismissed.

The Court also dismissed an appeal against sentence.

The Supreme Court has refused leave to appeal.

Procedure

Severance of charges – two complainants – separate incidents – not adducible as similar fact evidence

In *R v Owen* CA147/06 21 June 2006 the Court considered the issue of severance. The appellant faced eight counts of sexual offending in relation to two separate complainants.

In the District Court, Judge Dawson declined the severance application on the ground that the evidence from each of the complainants was relevant to the offences alleged by the other complainant. The Court disagreed, determining that the principal issues in the offending against each of the complainants were different in significant respects. For complainant 1 the issues were whether the offending occurred; and identity. For complainant 2 the issue was consent. The Court found that there was not sufficient similarity in the offending to establish a consistent pattern of offending. The Court held that the evidence of each complainant would not be admissible as similar fact evidence as the probative value did not outweigh the prejudicial effect.

Accordingly, the Court allowed the appeal and ordered separate trials for counts arising from the two separate incidents.

Insolvency offending – amended charge – sentencing – mere offer of reparations insufficient

In *R v Holt* [2006] DCR 669 the Court considered whether Judge McLean was correct to amend the charges against Mr Holt in relation to insolvency offending.

Mr Holt was found guilty by a jury in the District Court on two counts of offending under the Insolvency Act 1967: managing a business while an undischarged bankrupt; and operating a business while bankrupt. He was sentenced to nine months imprisonment on the first count and concurrently to three months on the second count.

On appeal Mr Holt submitted that the charge of managing a business while an undischarged bankrupt could not stand as it had been amended by Judge Mclean without jurisdiction, from a charge of being employed by a relative's company while bankrupt. The Court held that when deciding whether to grant an amendment to a charge the Court must balance the public interest in effective prosecution of offences against the public interest in ensuring prosecuting authorities commence proceedings within the period prescribed by statute, safeguarding the defendant against continuing uncertainty. The fact that the proposed amendment may involve the introduction of new or different legal elements into a prosecution will not necessarily preclude the granting of amendment. In this case, evidence relevant to Mr Holt's trial on the amended charge was much the same as required for the original charge: both the original and the amended charges related to broadly the same factual matrix; the amendment could not be said to be of such character as to amount to circumvention of any limitation period; and it was in the interests of justice to grant leave to amend the charge in this case.

With respect to the sentence appeal, the Court held that the Judge was correct in sentencing Mr Holt on the basis that he was not able to pay any reparation. The mere offer of reparation can be accorded little weight. The Court held that a deterrent sentence was required for premeditated, flagrant offending. The Court dismissed the appeals.

Guilty pleas – application to withdraw – relevance of ss 321(1), 355, and 356 of the Crimes Act 1961 to pleading at a call-over

In *R v Ratu* CA22/06 19 July 2006 Mr Ratu had attempted to withdraw his pleas of guilty to one count of sexual violation and one count of threatening to kill, contending that he had been suffering from various ailments. The pleas were entered at a call-over. Mr Ratu had also signed a summary of facts presented to him by then-counsel acknowledging his desire to plead guilty, but the summary did not mention the threatening to kill charge. Judge Kerr had declined the application.

The Court considered the relationship between ss 321, 355, and 356 of the Crimes Act 1961 ("the Act"). Section 321 provides a process for pleading guilty prior to trial, including subsection (1), which provides that an accused will in such circumstances

sign a written request. Sections 355 and 356 provide that an accused who is called upon to plead may have the indictment read out, and that they then may plead guilty or not guilty. Mr Ratu argued that the guilty plea was a nullity on the basis that the procedure set out in s 321 of the Act (a signed written request) had not been followed. In the alternative, he argued that he should have been granted leave to withdraw his guilty pleas to avoid a miscarriage of justice: *R v Le Page* [2005] 2 NZLR 845 (CA).

The Court rejected Mr Ratu's contention that s 321 is the only means by which a plea can be taken prior to the accused being given in charge of the jury. The Court was of the view that s 356 of the Act will operate so as to make a plea of guilty effective at any point where the accused is properly called on to plead to the indictment, rejecting Mr Ratu's submission that s 356 applies only to the practice to be adopted at a trial. Section 321(1) remained significant in that it remains the means by which the accused can request to be brought before the Court, rather than wait for trial or a call-over. The Court was of the view that there was no issue in describing the call-over as a sitting of the court, meaning that if prior to the call-over an accused who had been committed for trial wished to plead guilty to the crime, he or she would need to make a request to do so under s 321(1).

The Court also rejected Mr Ratu's submission that he should be granted leave to withdraw his pleas. In relation to the sexual violation charge, there was no genuine misunderstanding or mistake on the part of Mr Ratu. Also, in relation to the threatening to kill charge, although Mr Ratu signed a statement of facts that did not mention this charge, it was conveyed to him by the Judge when providing a summary on which the guilty plea was taken.

The appeal was accordingly dismissed.

Sentencing

Totality principle – combined effect of two sentences imposed on separate occasions

In *R v O'Leary* CA258/05 3 March 2006 the Court allowed an appeal against sentence on the grounds that the cumulative term of seventeen and a half years imprisonment was against the totality principle and manifestly excessive. In relation to complainant 1, Mr O'Leary was convicted on four counts of indecent assault, two of inducing indecent acts, and one of rape. In relation to complainant 2, he was convicted on three counts of indecent assault, one of attempted rape, and one of rape. Mr O'Leary was sentenced to eleven and a half years imprisonment for this offending. This sentence was applied cumulatively upon a previous sentence of six years imprisonment imposed a year earlier for unrelated sexual offending.

Courtney J in the High Court fixed a sentence of seven years for the rape of complainant 1 coupled with concurrent terms of two years for the indecent assaults and one year for inducing an indecent act. In relation to complainant 2, concurrent sentences of six years six months for the rape, five years for the attempted rape and eighteen months for the indecent assaults were imposed. Because the offending against the two complainants was unrelated, the respective sentences were imposed

cumulatively. Courtney J determined that the thirteen years and six months was in breach of the totality principle and reduced the sentence by two years.

The Court stated that Courtney J had taken the correct approach in taking the rape convictions as the lead sentences and dealing with the offending against the two complainants cumulatively. The Court determined, however, that she had erred in relation to the length of the two effective sentences and the totality principle.

The Court discussed the relationship between ss 84 and 85 of the Sentencing Act 2002, determining that the twin requirements of s 85 (that meaningful individual sentences are to be imposed but subject to the totality principle) override the dictates of s 84 as to when cumulative and concurrent sentences are to be imposed. There are situations when offending is disconnected, yet concurrent sentences are nonetheless the only appropriate course.

The Court held that where an offender has been sentenced for multiple offences, individual sentences must be fashioned which reflect the seriousness of each offence. This is an overarching requirement. However, the sentence must also be structured in such a way to ensure that the total period of imprisonment is not wholly out of proportion to the gravity of the offending. Longer concurrent sentences or a combination of concurrent and cumulative sentences may have to be preferred.

The Court allowed the appeal and reduced the sentences for rape to five years, to be served cumulatively. The effective sentence of ten years was to be served concurrently with the previous sentence of six years imprisonment.

Murder Sentencing – ss 102 and 104 of the Sentencing Act 2002

In *R v Smail* CA196/06 15 September 2006 the Court considered the presumption of life imprisonment when convicted of murder and the meaning of “manifestly unjust”. Mr Smail murdered his paraplegic flatmate by stabbing him in the neck, believing that his actions were necessary to stop his flatmate’s suffering. Mr Smail was sentenced to 12 years imprisonment with a minimum non-parole period of seven years. The Solicitor-General appealed against sentence on the grounds that life imprisonment should have been imposed in accordance with s 102 of the Sentencing Act 2002.

The Court stated that the presumption in favour of life imprisonment in s 102 is not easily displaced and the discretion not to impose life imprisonment is limited to where offending is at the lowest end of the range of culpability for murder. Determining what is manifestly unjust requires assessment of both the offender and the circumstances of the offending.

The Court found that Fogarty J erred in determining that life imprisonment was manifestly unjust because of the level of stress suffered by Mr Smail as a flatmate and part-time caregiver of the victim. The Court held that while the men were friends, Mr Smail had suffered some stress, and Mr Smail had reached the view that the victim was better off dead, this did not suffice to displace the presumption of life imprisonment.

The Court further determined that while the victim was a vulnerable person, therefore giving rise to the presumption of a minimum non-parole period of 17 years in accordance with s 104(g), that presumption was displaced.

The appeal was allowed and the sentence was quashed. A sentence of life imprisonment was imposed with a minimum period of 13 years.

Totality principle – combined effect of two sentences for separate offending

In *R v Tate* CA28/06 15 September 2006 the Court allowed an appeal against sentence on the grounds that the cumulative term of nine and a half years imprisonment was manifestly excessive. Mr Tate pleaded guilty to two charges of arson, conspiracy to commit arson, and attempted arson. Judge Saunders sentenced him to a concurrent sentence of four years imprisonment for the arson-related charges. This sentence was to be served cumulatively upon a term of five and a half years imprisonment already being served by Mr Tate for methamphetamine offending.

Although the arson offending occurred long before the methamphetamine offending, the Court determined that there was no reason why all of the offending could not have been considered at one time. The Court held, therefore, that the correct inquiry was what additional penalty the arson offending would have attracted had it been dealt with at the same time as the methamphetamine offending.

The Court allowed the appeal, determining that an overall sentence of eight and a half years was appropriate. The sentences of four years imprisonment on the arson charges were quashed and a sentence of three years imprisonment was imposed.

Mitigating Factors – Importing Class C Drug Pseudoephedrine

In *R v Qiu* CA202/06 17 October 2006 the Court allowed an appeal against sentence on the grounds that, because insufficient weight had been given to mitigating factors, the sentence was manifestly excessive.

This case concerned the importation of 4.8 kg of pseudoephedrine from China. Mr Qiu had been paid \$1,000 to recruit associates to accept delivery of the drugs and then organise the transfer of the drugs to his house.

The Court approved Judge Bouchier's method in following the approach in *R v Ho* HC AK CRI 2005-92-00567 12 April 2005 and classifying the offending as falling within category two, being for offenders who are crucial players but not masterminds of the importation scheme. The Court held that given the amount of pseudoephedrine imported the starting point of five years was within the Judge's discretion. The Court stated that while category two offending indicates a starting point of three to five years, if the circumstances require it, a higher starting point could be taken.

The Court determined that Judge Bouchier erred in giving only a discount of 15% for mitigating factors. Given Mr Qiu's guilty plea and relative youth (he was aged 19 at the time of offending) a sentencing discount of 25% more properly reflected the ends of justice.

The appeal was allowed and a sentence of four years and three months imprisonment was quashed and a sentence of three years and nine months imprisonment was imposed.

Appeal against forfeiture order – proceeds of crime – disproportionate treatment

In *Cooksley-Mellish v Solicitor-General* CA209/05 27 March 2006 the Court held that Judge Lance had erred in ordering forfeiture of the appellant's lifestyle block after he was convicted of cultivating cannabis for the purpose of supply.

The appellant had won a first division prize in Lotto and put most of his winnings into a ten-acre lifestyle block in Northland. He also bought a shade house and raised a crop of cannabis. The police raided the property and found cannabis with an estimated value of \$47,000 and evidence of a recent harvest. The appellant admitted cultivating cannabis and was convicted and sentenced to two years imprisonment. The Solicitor-General applied for a forfeiture order against the appellant's property pursuant to the Proceeds of Crime Act 1991. Judge Lance ordered the forfeiture of the property on the basis that it was tainted property, being property used to commit or to facilitate the commission of the offence or the proceeds of the offence.

Section 15(2) of the Proceeds of Crimes Act contains the factors considered in making a forfeiture order. These include: the use that was ordinarily made, or was intended to be made of the property; whether there was any undue hardship that was reasonably likely to be caused to any person by the operation of a forfeiture order; the nature and extent of the offender's interest in the property and the nature and extent of any other person's interest in it; and any other matter relating to the nature and circumstances of the offence or the offender, including the gravity of the offence.

The Court held that, in this case, the appellant's cannabis related activities could more fairly be seen as subordinate to the property's main use as the appellant's place of residence. The Court considered that the loss of equity in the property (\$355,000) would cause undue hardship for appellant, who was aged 50 years old and disabled. The Court held that the consequences of the forfeiture would be out of proportion to the offending, which lacked many of the aggravating features often found in large-scale cannabis growing operations. In particular, there was no evidence of selling or of personal gain. The forfeiture arguably also amounted to disproportionately severe treatment or punishment in terms of s 9 of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights"). The Court noted that it has previously accepted that it is appropriate to have regard to s 9 of the Bill of Rights when considering forfeiture under the Proceeds of Crime Act. The Court allowed the appeal and set aside the order for confiscation of the appellant's property.

Cumulative sentencing – effect of earlier sentence

In *R v Stout* CA450/05 22 May 2006 the Court affirmed the use of cumulative sentencing by the sentencing judge, Judge Blackie, but allowed the appeal because he had been mistaken as to the length of the existing term of imprisonment.

On 24 April 2004 the appellant and two others were in a car that was stopped by police. There was cannabis and a large amount of cash in the car and as a result the

appellant was charged with possession of cannabis for the purpose of supply. The appellant was also charged with a number of firearm offences arising out of incidents that he had been involved in earlier that day.

The appellant pleaded guilty to the firearm offences and was sentenced to three years imprisonment on 26 November 2004. On that same day the appellant was sentenced on a burglary charge that had been committed some four years earlier, and also on another charge of possession of cannabis for supply that he pleaded guilty to (that offence having been committed on 15 August 2004). The appellant received a sentence of nine months imprisonment for the additional burglary and cannabis charges that was concurrent as between those two offences but was cumulative on the three year term for the firearm offences. The result was an effective sentence of three years and nine months imprisonment.

On 13 October 2005 the appellant was convicted following a trial of the remaining charge of possession of cannabis for supply. He was sentenced to 12 months imprisonment on that charge, to be cumulative on the existing sentence imposed on 26 November 2004.

The Court did not accept that Judge Blackie had failed to comply with the totality principle or had erred in imposing a cumulative sentence in a situation where the offending was contemporaneous but unrelated. However, the Court noted that he had sentenced on the erroneous basis that the appellant was serving a term of three years and six months imprisonment. The Court allowed the appeal to reflect Judge Blackie's apparent intention to reflect the appellant's criminality, appropriately, with a total sentence of four years and six months. The Court quashed the sentence of 12 months imprisonment and replaced it with a sentence of nine months imprisonment cumulative on the existing term.

Assault with a weapon – sentencing judge's assessment of the facts – appropriate starting point

In *R v Heke* CA96/06 6 July 2006 the Court considered whether the sentencing judge, Judge Adeane, had adopted a wrong starting point in sentencing the appellant on a charge of assault with a weapon.

A jury found the appellant guilty of assaulting a man with an empty wooden beer crate. Judge Adeane, who was also the trial judge, sentenced the appellant to two years imprisonment and imposed special conditions on his release. The appellant appealed against the length of the sentence on a number of grounds.

The appellant submitted that Judge Adeane proceeded on the incorrect assumption that the appellant had joined in with others in the beating of the victim, and that the appellant had been implicated in the earlier burglary of the premises which the victim had come to investigate. The appellant disputed Judge Adeane's conclusion as being inconsistent with the jury's acquittal of the appellant on the charge of assault using a bottle as a weapon. The jury only found the appellant guilty of the assault with the beer crate, which, on the correct summary of facts, came after the general assault, involving punching, kicking, and hitting with bottles, had come to an end. The appellant stated, and the Crown confirmed, that it was not part of the Crown case that

the appellant had been involved in the earlier burglary. Judge Adeane must have drawn the inference that the appellant was implicated in the burglary from a deposition statement, and so, in the appellant's view, it was unfair to sentence on that basis because the Crown had not led any evidence at trial on that matter.

The Court accepted that Judge Adeane had sentenced the appellant based on an erroneous view of the facts. The Crown accepted that the appellant's summary of facts was accurate and that it was wrong to treat the appellant as if he had been involved in the earlier burglary and had taken part in the earlier group assault of the victim.

The Court did not accept the criticism that the Judge had regarded lack of remorse as an aggravating factor, but did consider that the Judge had failed to have regard to appropriate appellate authorities. A comparison of the offending in this case with the offending in *R v White* CA180/99 21 July 1999 and *R v McMillan* CA317/01 31 October 2001 led to the inevitable conclusion that Judge Adeane's starting point of two years was outside the acceptable range. The Court said that 17 months imprisonment was the appropriate starting point in this case.

The Court did not accept the submission that Judge Adeane had failed to take into account the appellant's youth and the progress he had made since his arrest for the offending. The Court said that the Judge was obviously mindful of the appellant's youth but considered that any discount that would have been warranted was cancelled out by the seriousness of the appellant's prior offending for robbery and aggravated robbery. Judge Adeane was therefore within his allowable discretion in assessing mitigating factors, and so no adjustment to the starting point of 17 months imprisonment was made.

The appeal was allowed and the sentence of two years imprisonment was quashed. In substitution the Court passed a sentence of 17 months imprisonment. The Court affirmed the special release conditions imposed in the District Court.

Importation of pseudoephedrine – multiple importations – cumulative sentences – appropriate starting point and totality principle

R v Xie CA397/05, *R v Guo* CA398/05, *R v Zhang* CA399/05 8 August 2006 concerned multiple drug offences. The three offenders were involved in the illegal importation from China into New Zealand of six shipments of pseudoephedrine Contac NT capsules (a Class C controlled drug). The total shipment of drugs was 409,240 capsules of Contac NT containing 36.81 kg of pseudoephedrine.

In the High Court, Priestley J sentenced the “mastermind” to a total period of six years and four months, with a four year minimum period of imprisonment. The two remaining offenders were sentenced to four years imprisonment, each with a minimum two year period of imprisonment. Priestley J considered that the offending was not separate and distinct and, therefore, cumulative terms could not be imposed. There is a maximum penalty of eight years for the offence of importing a class C controlled drug.

The Solicitor-General sought leave to appeal against the sentences imposed on the three offenders on two bases. First, that Priestley J erred in principle in declining to impose cumulative sentences for each importation. Secondly, that the overall sentences did not reflect the totality of the offending and were therefore manifestly inadequate.

The Court said that ss 84 and 85 of the Sentencing Act 2002, which provides guidelines on when to impose concurrent and cumulative sentences, were subject to the totality principle. In the present case, the sentences imposed did not adequately reflect the totality of offending. The Court said that the guidelines set down in *R v Fatu* [2006] 2 NZLR 72 (CA) were more relevant to pseudoephedrine sentencing than other class C drug sentencing decisions because importing or supplying pseudoephedrine was the first step towards manufacturing methamphetamine. The Court noted that 100,000 capsules of Contac NT was capable of ultimately producing a minimum of 4.5 kg of pure methamphetamine. This importation was, therefore, at the most serious end of the scale. If the charges were importing or manufacturing that amount of methamphetamine, a 20 year starting point would be appropriate. In that light, the Court considered that an eight year starting point was more appropriate for importing pseudoephedrine capable of producing 4.5 kg methamphetamine, and as the amount actually imported was more than four times that amount, a 12 year starting point was appropriate. But as it was a Solicitor-General appeal, the Court adopted an 11 year starting point, allowed for mitigating factors and concluded by sentencing the mastermind to a total of eight years and nine months imprisonment, made up of cumulative sentences. The appropriate sentences for the remaining two offenders was five and a half years imprisonment. All the minimum terms of imprisonment imposed in the High Court were confirmed on appeal. The Court said that the individual sentences allocated were not terribly important, but what was important was correctly working out the sentence appropriate for the totality of offending. The Court said that it would be wrong in future for this judgment to be cited as authority with respect to any particular sentence.

Re-assessment of sentence – sexual offending by mature woman against male youth

In *R v L* CA115/05 4 September 2006 the Court re-assessed the appropriate sentence under s 386(1) of the Crimes Act 1961 (“the Act”) after the Supreme Court set aside one of two convictions entered against the appellant.

The case involved two counts of sexual offending by a mature woman against a teenage male complainant. The first count was one of attempted sexual violation by unlawful sexual connection and the second was actual sexual violation by unlawful sexual connection during non-consensual sexual intercourse. The offending was committed before the 2005 amendment to s 128 of the Act, which, amongst other things, made the offences of sexual violation by unlawful sexual connection or rape, gender neutral.

In the High Court, Laurenson J refused to adopt the usual eight year tariff for sexual violation by rape. He had regard to the sentences imposed in *R v Herbert* CA70/98 21 May 1998 and other High Court cases involving sexual offending by a woman against young boys, and came to the view that the appropriate starting point in this case was six years imprisonment. The appellant was sentenced to four and a half years

imprisonment on the charge of actual sexual violation and to a concurrent term of three years imprisonment on the charge of attempted sexual violation.

On her first appeal, the Court dismissed the appellant's appeal against conviction but allowed an appeal by the Solicitor-General against sentence, increasing the lead sentence to five and a half years imprisonment. The Court endorsed the principle expressed in *R v A* [2003] 1 NZLR 1 (CA) that sentencing for sexual violation should be gender neutral, and considered that the starting point should have been in the region of seven to eight years imprisonment. Following a successful appeal to the Supreme Court, the conviction on the attempted sexual violation count was set aside for jury misdirection. No re-trial was ordered on that count and the case was remitted to the Court of Appeal for reassessment of the appropriate sentence.

Section 386(1) gives the Court a discretion to adjust the sentence or sentences even if there is no appeal against sentence before the Court. The correct approach is for the Court to consider the sentence that it thinks proper, not the sentence which it considers the trial judge would have given in the changed circumstances: *Collie v R* [1997] 3 NZLR 653 at 667 (CA).

The Court considered that, in light of the unusual circumstances and the history of the case, and in the context of the overall offending, the attempted sexual violation was relatively minor compared with the actual sexual violation that took place subsequently. Accordingly, the Court reduced the sentence by nine months from five and a half years to four years and nine months imprisonment.

Concurrent or cumulative sentence – totality principle – Separate sexual offending against two complainants – effect of disability

In *R v Hall* CA412/05 17 May 2006 Judge McKegg had sentenced Mr Hall to an effective sentence of four years imprisonment for sexual offending against three adolescent complainants (two counts of sexual violation and three counts of indecent assault). The Solicitor-General appealed.

In the District Court, Judge McKegg imposed a sentence of four years on the sexual violation counts; and 12 months imprisonment on the counts of indecent assault. All sentences were to be served concurrently. The Crown argued that as the offending related to separate offending on separate occasions, a cumulative sentence was warranted in terms of s 84 of the Sentencing Act 2002 ("the Act"). The Crown further submitted that even if concurrent sentences were available, the Judge was obliged to assess the case with regards to the totality principle (s 85 of the Act).

The Court recapitulated the view expressed in *R v Tranter* CA486/03 14 June 2004 that although there is no "tariff" for offending of this nature, the appropriate sentencing range has to be assessed in light of the change in maximum sentence for sexual violation from 14 years to 20 years imprisonment in 1993. Furthermore, the Court stated that a starting point in excess of five years may well be appropriate in serious cases. The Court was of the view that given the separate nature of the offending, the degree of grooming, and breach of trust, a starting point of at least seven years was appropriate in this case having regard to the totality principle in

relation to concurrent sentencing. A two year reduction was given to account for Mr Hall's serious ailments. Accordingly, the Court increased the effective sentence to five years imprisonment.

Further discount after co-conspirator honours promise to give evidence post-sentencing

In *R v Stark* CA104/06 31 July 2006 the Court considered the availability of a further discount in sentencing where an accused promised to give evidence against a co-conspirator, received a discount for the promise in sentencing, and then subsequently honoured the promise. Mr Stark and another man, Mr Rhys, developed a system for importing "Fantasy", a class B controlled drug. After his arrest, Mr Stark made a full confession and signalled an intention to plead guilty. He identified Mr Rhys to police and assisted in apprehending him. He also signed a deposition describing his and Mr Rhys' involvement and indicating a willingness to give evidence against Mr Rhys.

At sentencing, Wild J imposed a sentence of four years imprisonment. This was the result of a 50% discount from a starting point of eight years imprisonment in light of the guilty pleas and assistance to police. Following this, Mr Stark gave evidence at the preliminary hearing of the charges against Mr Rhys who pleaded guilty.

Mr Stark appealed to the Court seeking a further reduction owing to the fact he honoured his promise to give evidence against Mr Stark. He also submitted the sentence he received was manifestly excessive, the eight year starting point being too high. The Court said the starting point taken by Wild J, and the 50% discount, were both entirely appropriate. However, the Court said some allowance had to be made for the fact that Mr Stark had honoured his promise. The Court said this exercise had to be kept within the "bounds of realism", that it was necessary to still reflect a deterrent aspect in the sentence. The Court concluded that a further discount of 10% was appropriate. Accordingly, the Court substituted the four year sentence with a sentence of three years and six months imprisonment.

Additional assistance to authorities after sentencing – appropriate standard discount

In *R v Hadfield* CA337/06 14 December 2006 the Court considered how sentencing judges should approach the issue of an offender's assistance to the authorities, and what the appropriate standard discount is for such assistance.

Mr Hadfield flew into Auckland International Airport from Japan in February 2005. When customs officials indicated they wished to search him, he volunteered that he had 800g of pure methamphetamine concealed on his person. He offered to, and did in fact, assist in the detection and apprehension of four other people who were involved in the importation. Without his assistance, the police would not have discovered their identity. Mr Hadfield pleaded guilty at the earliest possible time to one count of importing methamphetamine. On 20 May 2005, Venning J sentenced him to six years imprisonment. He gave a discount of five years (45%) on the basis of Mr Hadfield's guilty plea and assistance to the authorities (presumably, to the date of sentencing). Following the sentencing, Mr Hadfield gave evidence at the trials of two of the others. Mr Hadfield then sought leave to appeal out of time, on the basis that a further discount was appropriate for additional assistance provided to the authorities

since he was sentenced. The Court granted an extension of time given that he could not appeal until he had finished providing assistance to the authorities.

The first issue considered by the Court was how sentencing judges should approach the task of providing discounts for an offender's assistance to the authorities which is, in part, yet to be provided. The Court observed that there appeared to be a practice developing whereby sentencing Judges gave credit for assistance to the authorities already provided by the time of sentencing, but not for any anticipated future assistance. If such future assistance eventuated, then the expectation was that the Court would reduce the sentence on appeal. For example see *R v Sanchez-Silverio* CA196/05 4 November 2005, *R v Stark* CA104/06 31 July 2006, and *R v Zhou* CA314/05 1 November 2006. The Court does have jurisdiction to reduce sentences on appeal because of further assistance: see s 385(3) of the Crimes Act 1961. However, the Court said that taking into account factors which have occurred since the imposition of the sentence appealed from should be reserved for "exceptional circumstances". The Court decided that the more appropriate course was for sentencing Judges to take into account anticipated future assistance at the time of sentencing and to give the offender whatever discount the Judge thought appropriate for all assistance to the authorities, whether actual or prospective. In the odd case where the offender failed to live up to his or her promise of future assistance, the remedy is for the Solicitor-General to seek leave to appeal out of time against the sentence, on the basis that an undue discount had been wrongly obtained by the offender. To the extent that *Stark* may have suggested it was inappropriate for sentencing judges to factor in future promised assistance, it should be regarded as overruled.

The Court also considered the practice of sentencing judges not to refer in their sentencing notes to the assistance which the offender has given to the authorities or to the discount the offender has derived therefrom, with the aim of minimising offenders' personal risk. The problem with that practice is that, if the sentence comes on appeal, the Court of Appeal has to guess how the Judge reached his or her conclusion. The Court considered the solution to be for the sentencing Judge to record his or her reasoning on the assistance point and any discount in respect thereof in a separate confidential memo. This could be kept, along with the police advice as to assistance, in a sealed envelope on the file marked "Not to be opened save by leave of a judge". The envelope could then be made available to the Court of Appeal in the event of an appeal against sentence.

The Court went on to consider whether in this case Mr Hadfield should get a further discount for his post-sentence assistance to the authorities, and if so how much that discount should be. Because of Venning J's discretion regarding Mr Hadfield's assistance to authorities, the Court could not know whether the Judge took into account future promised assistance or ignored it. In the circumstances, the Court considered it only fair to assume that he ignored it. The Court then referred to Court of Appeal authorities pointing to a standard discount of 60% for significant assistance to authorities. The Court also reviewed overseas authorities in New South Wales and the United Kingdom. While 50% seems normally to be the maximum discount in New South Wales (see *R v Chu* NSW CCA BC9805504 16 October 1998 and *R v El Hani* [2004] NSW CCA 162), the position in the United Kingdom is that the amount of mitigation varies from about one-half to two-thirds reduction according to the

circumstances of the case (see *R v Guy* [1999] 2 Cr App R (S) 24; *R v King* (1985) 7 Cr App R (S) 227 at 230). In *R v A and B* [1999] 1 Cr App R (S) 52 at 56 the Court said that the extent of the discount will depend on “the value of the help given and expected to be given”. If the information given is unreliable, vague, lacking in practical utility or already known to the authorities, no identifiable discount may be given or, if given, any discount will be minimal. If the information given is accurate, particularised, useful in practice, and hitherto unknown to the authorities, enabling serious criminal activity to be stopped and serious criminals brought to account, the discount may be substantial. The New Zealand approach to date seems to be midway between the approaches adopted in those two jurisdictions. The Court concluded it was appropriate to treat Mr Hadfield in line with the New Zealand authorities, which suggest that a 60% discount is appropriate. The Court observed that, in due course, it may be appropriate for a Permanent Court to provide a guideline on this topic.

The appeal was allowed and the sentence of six years imprisonment quashed. In substitution, a sentence of four and a half years imprisonment was imposed.

Whether sentencing guideline judgments apply retrospectively

In *R v Wilson* CA334/05 31 July 2006 the Court was required to determine whether sentencing guideline judgments apply with retrospective effect. Mr Wilson was sentenced on 10 August 2005 to a term of eight years imprisonment on a charge of wounding with intent to cause grievous bodily harm (including concurrent sentences on other charges). The conduct leading to Mr Wilson’s prosecution occurred on 29 December 2004. Between this date and the date of Mr Wilson’s sentencing, the Court of Appeal, on 30 June 2005, introduced new guidelines for sentencing for serious violent offending: *R v Taueki* [2005] 3 NZLR 372. In sentencing Mr Wilson, Judge Blackie applied the *Taueki* guidelines rather than the older guidelines in *R v Hereora* [1986] 2 NZLR 164 (CA), which those in *Taueki* had replaced. Mr Wilson appealed against his sentence, saying Judge Blackie was wrong to apply the *Taueki* guidelines given that at the date of his offending, the relevant guidelines were those in *Hereora*.

The Court dismissed the appeal. The Court referred to the decision of the Supreme Court in *Morgan v Superintendent, Rimutaka Prison* [2005] 3 NZLR 1. In that case, the majority suggested that provisions guarding against retrospective penalties in the Sentencing Act 2002 (s 6) and the New Zealand Bill of Rights Act 1990 (s 25(g)) referred only to maximum penalties prescribed by law for an offence. Accordingly, following *Morgan*, it did not offend against s 25(g) or s 6 to apply *Taueki* retrospectively. The Court noted that in *Taueki* itself, the guidelines pronounced were stated to have prospective effect only. However, the Court pointed out that this had nothing to do with a concern about flouting a rule against retrospectivity. Rather, the Court was concerned with avoiding unfairness to litigants whose counsel had not had the benefit of preparing submissions in the light of the new guidelines. The Court pointed out that in another guideline judgment, *R v Fatu* [2006] 2 NZLR 72 (CA), the opposite approach was taken.

The Court also considered that no unfairness would result in applying *Taueki* to Mr Wilson’s offending. *Taueki* did not herald a significant change in the sentencing tariff for violent offending. Indeed, the Court said that the sentence imposed upon Mr

Wilson would have been acceptable under the old guidelines as pronounced in *Hereora*.

The Supreme Court has refused leave to appeal.

Whether reduction of sentence available remedy for appellate delay – whether s 398 of the Crimes Act 1961 inconsistent with the Bill of Rights

In *R v Manawatu* CA111/05 10 November 2006 a Full Court heard an appeal against two sentences, earlier appeals against which had been dismissed under the ex parte procedure found by the Privy Council to be invalid in *R v Taito* [2003] 3 NZLR 577. The sentences were for three years imprisonment (1995) and eight years imprisonment (1998). The appellant, as per the Court of Appeal's decision in *R v Smith* [2003] 3 NZLR 617, was entitled to a rehearing of his appeals against both sentences. In his *Smith* appeal, the appellant conceded that the sentences were not manifestly excessive, but sought a reduction solely on the grounds that there had been appellate delay. The Court was also asked to issue a declaration of inconsistency with the New Zealand Bill of Rights Act 1990 in respect of s 398 of the Crimes Act 1961.

The effect of s 398 is that the judgment of the Court of Appeal in a criminal case must be delivered by a single judge unless the Court directs that the question is such that separate judgments should be pronounced. In other words, it encapsulates a presumption of unanimity. The appellant argued that s 398 discriminated against criminal appellants. However, s 398 was, at the time of the judgment in *Manawatu*, currently in the process of being repealed (cl 14A of the Criminal Procedure Bill). Clause 14A was added as the result of concerns raised by the President of the Court of Appeal with the Rules Committee and the Government. Accordingly, the Court said that the Court's position on s 398 had been raised through the appropriate channels and acted upon. Thus a declaration of inconsistency, assuming an inconsistency existed, was "gratuitous and unnecessary".

On the question of the remedy for appellate delay, the Court accepted that there was a possibility that delay could be remedied by a reduction in sentence. However, in the present case, there was no identifiable prejudice to Mr Manawatu that would justify such a course being taken. The Court stated that the present case was very different to a case such as *Mills v H M Advocate* [2004] 1 AC 441 (PC). In that case, although the appeal against sentence was meritless, Mr Mills had been on bail for three years during the period of relevant appellate delay, during which he had not offended, and appeared to have reintegrated himself into the community. The Privy Council stated that Mr Mills had been left in a state of uncertainty and anxiety concerning his position and to send him back to prison would have led to possible hardship to Mr Mills' family.

Even if there had been appellate delay in the present case (a point which the Court did not decide), Mr Manawatu was not entitled to a reduction in sentence as a remedy in light of his concession that the sentence appeals per se were meritless. The remedy for any appellate delay was rather the *Smith* rehearing to which all *Taito* appellants are entitled.

Leave to appeal to the Supreme Court has been sought.

Trial Errors

Trial counsel incompetence – failure to adequately cross-examine complainant – failure to follow instructions

In *R v Toeke* CA44/06 24 August 2006 the Court considered whether trial counsel's failure to sufficiently cross-examine the complainant amounted to a miscarriage of justice. Mr Toeke was convicted on one count of sexual violation by digital penetration.

Trial counsel failed to cross-examine the complainant about the circumstances surrounding the offending. The Court determined that this failure could have led the jury to believe that the defence was accepting the complainant's version of events. The Court was concerned that the failure to cross-examine may have been viewed as a significant retreat from Mr Toeke's police interview and that this would have impacted negatively on his denial. This was significant given the importance of credibility to the case. The failure was magnified by the prosecution emphasising the lack of challenge in its summing up. Trial counsel also failed to follow instructions in not cross-examining the complainant. Following *R v Sungsuwan* [2006] 1 NZLR 730 (SC), the Court determined that trial counsel's misconduct amounted to a miscarriage of justice and allowed the appeal. The conviction was quashed and a new trial ordered.

Jury question – Standard of proof – Judge's failure to respond creating real risk of miscarriage of justice

In *R v Hayman* CA478/05 23 June 2006 the Court considered the impact of a jury question indicating confusion regarding the level of proof.

After withdrawing to deliberate, the jury sent a communication expressing trouble with "the level of proof". The Judge and counsel discussed the communication and decided that further directions would be given in half an hour. Before further action could be taken the jury indicated they had reached a verdict.

The Court held that the communication expressing trouble with the "level of proof" indicated possible confusion about the crucial part of the jury's task. This put the Judge on notice and he ought to have responded immediately and reiterated the fundamental precepts. The failure to re-direct before the jury returned with their verdict resulted in a real risk of a miscarriage of justice.

The Court rejected an argument that a Judge must specifically direct the jury that there is no onus on the accused to prove any assertion offered by an accused by way of defence. A general direction regarding the burden of proof is usually sufficient.

The Court held it is not necessary in every case where the prosecution has asked the rhetorical question "why would the complainant lie?" for the Judge to direct the jury in accordance with *R v T* [1998] 2 NZLR 275 (CA). The critical issue is whether there is a risk that a jury may view the burden of proof as being shifted from the

Crown. If the summing up makes it clear that the onus of proof rests with the Crown, then no specific *R v T* direction is required.

The appeal was allowed. The conviction was quashed and a new trial ordered.

Trial counsel incompetence – failure to comply with client’s instructions

R v Walling CA355/05 20 March 2006 was an appeal against conviction on one count of being a party to a kidnapping. The Crown case at trial was that the appellant had provided support and back-up to the two principal offenders as they took the complainant from an address at Mt Maunganui in a vehicle to another address. The appeal was based on a miscarriage of justice said to have arisen from the appellant’s trial counsel’s failure to follow instructions and general incompetence during the trial.

The police had interviewed the appellant over six and a half hours about his involvement in the kidnapping. It was the appellant’s testimony that the interviewing officer recorded in his notebook admissions that the appellant said were never made. The appellant said that he asked the interviewing officer to correct the record but the officer refused, keeping the appellant in the interviewing room for a number of hours. When the appellant still refused to sign the notebook, he was charged with being a party to the kidnapping. The original notebook was mislaid prior to trial.

The appellant had denied the partial admissions attributed to him by the interviewing police officer and asked counsel to challenge them by way of a pre-trial voir dire before a judge alone. For no apparent reason, trial counsel failed to comply with the appellant’s instruction to undertake a voir dire at which the appellant could have given evidence on the issue in the absence of a jury. Had such an application been successful a discharge would have followed almost inevitably, given the absence of support for conviction in the depositions. The risk of miscarriage was accentuated when, at trial, trial counsel simply failed to put in cross-examination of the police officer the appellant’s instructions that he denied the alleged incriminating passages of the statement. Trial counsel acknowledged that he had ignored the appellant’s instructions to call him to give evidence on his own behalf because he thought that the appellant would not make a good impression on the jury.

The Court said that the law is quite clear that counsel has no authority to defy the instructions of his client: *R v McLoughlin and Isaacs* (1984) 1 CRNZ 215 at 216 (CA). Ordinarily the consequence of allowing the appeal would have been a new trial. However, the appellant had served his sentence of 18 months imprisonment with leave to apply for home detention and the Crown accepted that a new trial was unwarranted. The Court pronounced an order of acquittal on the kidnapping charge.

GST fraud – trial by judge alone – brevity of reasons for judgment – reparations to be set at “realistic level”

In *R v Hawken* (2006) 22 NZTC 19,876 the Court heard an appeal against the appellant’s six convictions for GST fraud on the Inland Revenue Department (“the IRD”).

The appellant was a property dealer. The Crown case at trial was that in several land sales the appellant, on behalf of companies in which he had a direct or indirect interest, made claims for refunds of GST knowing they were false, on occasion supported by false documents created by him.

After a trial in front of Judge Singh by judge alone, the appellant was convicted on four counts of using a document with intent to defraud, one count of forgery and one count of knowingly not providing information. He was sentenced to 12 months imprisonment on each count to be served concurrently, and ordered to pay reparation to the IRD. The appellant initially filed appeals against all six convictions but during the course of argument abandoned the appeals against two of the counts of using a document with intent to defraud and the count of forgery. This left the appeals against two counts of using a document with intent to defraud (counts 2 and 3) and one count of knowingly not providing information (count 9).

The Court upheld the conviction on count 2. The Court agreed with Judge Singh that the land sale agreement was conditional on resource consent matters and, therefore, the appellant was not entitled to issue a tax invoice. Having found that no valid GST refund could have been sought by the appellant the Court then found that there was evidence that the refund of GST was sought with an intention to defraud.

On count 3 the Court held, contrary to Judge Singh's finding, that there was insufficient evidence of an intention to defraud and allowed the appeal against conviction. The conviction was quashed and a verdict of acquittal was entered on that count.

The Court dismissed the appeal against conviction on the count of knowingly not providing information. The appellant, on behalf of an associated company, had sought a GST refund from the IRD for the purchase of a property. The vendors cancelled the sale, but the appellant failed to inform the IRD of that fact. The Court found that there was sufficient evidence to conclude that the appellant was at the very least an agent of the company and was responsible for the company's failure to inform the IRD of the cancellation of the agreement.

Some additional comments were given by the Court in relation to the brevity of the facts and reasons for judgment provided by Judge Singh. The Court referred to its earlier comments in *R v Eide* [2005] 2 NZLR 504 and stressed the particular importance in fraud prosecutions of the trial judge giving an adequate summary of facts and reasons for judgment where the trial is by judge alone on indictment.

The Court noted that quashing count 3 and entering the verdict of acquittal had no effect on the appellant's overall sentence and confirmed that the sentence of 12 months imprisonment was appropriate for the totality of the offending. In relation to the sentence of reparation, the Court observed that Judge Singh had not complied with s 36 of the Sentencing Act 2002 which requires a judge to determine the total amount of reparation, the date of any lump sum payment and the frequency and amounts of any payments by instalments.

In *R v Hawken (No 2)* CA307/05 21 June 2006 the Court allowed the appeal against the sentence of reparation and quashed it. The Court pointed out that at the time the



sentence of reparation was imposed, the appellant had no income and no assets and had debts of \$10,000. In those circumstances the Court said it was highly unlikely that the appellant would be able to pay the sum of \$120,000 owing to the Crown. The Court referred to its earlier statement in *R v Bailey* CA306/03 10 May 2004 that any reparation order must be set at a realistic level, given the financial circumstances of the person against whom it is made.
