

WAIKATO LAW REVIEW

TAUMAURI



VOLUME 11

2003

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Editor: Professor Peter Spiller

Editorial Committee: Peter Spiller, Al Gillespie, Brenda Midson, Gay Morgan, Linda Te Aho, Leah Whiu and Ruth Wilson.

Computer Consultant: Kathryn Marr.

The *Waikato Law Review* is published annually by the Waikato University School of Law. Subscription to the *Review* costs \$20 per year (plus postage for overseas subscribers); and advertising space is available at a cost of \$200 for a full page or \$100 for a half page. Back numbers are available. Communications should be addressed to:

The Editor
Waikato Law Review
School of Law
Waikato University
Private Bag 3105
Hamilton
New Zealand

North American readers should obtain subscriptions direct from the North American agents:

Wm W Gaunt & Sons Inc
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
U S A

This issue may be cited as (2003) 11 *Waikato Law Review*.

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ISSN 1172-9597

EDITOR'S INTRODUCTION

I am pleased to present the eleventh edition of the *Waikato Law Review*. I thank the authors who submitted articles to the *Review*, the referees to whom articles were sent, and the staff of the Waikato Law School who have assisted.

The *Review* is proud to publish the Harkness Henry Lecture of John Burrows, the long-standing and esteemed professor of law at the University of Canterbury. His lecture on statutes and the ordinary person proved to be a vintage performance, with characteristic lucidity and accessibility. Through the publication of the Lecture, kindly sponsored by the partners of Harkness Henry, John Burrows' valuable messages will reach a wider audience.

The growing prestige of the *Review* continues to be reflected in the articles received from outside the University of Waikato. The *Review* is pleased to publish an article on the highly topical issue of native title by John Tate of the University of Newcastle in Australia, and an article on the application of international law by Julian Hermida of McGill University in Canada.

A graduate of the Waikato Law School, Thomas Gibbons, has written on his proposal for a Contracts (Consolidation) Act for New Zealand. The student publication in the *Review* is written by Rosemary Robertson, who is one of the top LLB honours students currently in the School. Hers is the winning submission in the annual student advocacy contest kindly sponsored by the Hamilton firm McCaw Lewis Chapman.

The other contributions to the *Review* were written by staff at the University of Waikato. These submissions, and the others noted above, underline the Waikato Law School's continuing commitment to its foundation goals, in particular, professionalism and law in context.

Professor Peter Spiller,
Editor, *Waikato Law Review*.

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KPMG Centre
85 Alexandra Street
Hamilton
New Zealand

Postal Address

Private Bag 3077
Hamilton
New Zealand

Communication

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THE HARKNESS HENRY LECTURE
STATUTES AND THE ORDINARY PERSON

BY JOHN F BURROWS*

Everyone is deemed to know the law. It would be good if ordinary members of the community could consult the law that affects them, and understand it, particularly if it imposes duties on them. If they cannot understand that law they do not know what their conduct should be unless someone explains it to them. If the law is obscure, there is a risk that they might lose respect for it.

Today most of our law is contained in statutes. So our question becomes: how far is it possible for an ordinary person to read a statute and understand his or her rights and obligations?

Some say it will never be possible. Bennion, whose large tome on *Statutory Interpretation* is a bible on the subject, is vehement. He describes the view that statutes should be understandable by the ordinary person as facile, and as pandering to an impossible dream.¹ The ordinary person, he believes, will always need legal advice.

It is this subject I wish to explore.

Let me first settle what I mean by “an ordinary person”. Lord Evershed quoting Shakespeare once described an ordinary man as a man “base, common and popular”.² That seems a little harsh. I will define my ordinary person as a person who

is not a lawyer;
is of reasonable intelligence and education;
is not a practised reader of statutes; *and*
has a real interest in knowing what a particular statute says.

(Some non-lawyers are practised readers of statutes. You probably have in your university administrators who are very familiar with the education legislation, the Official Information Act, the Privacy Act and so on).

* Professor of Law, University of Canterbury, Christchurch.

1 Bennion, F A R *Statutory Interpretation* (4th ed 2002) 686.

2 *Langdon v Horton* [1951] 1 KB 666 at 669.

Obviously statutes are not all of the same kind. They form a spectrum. We may exclude from our discussion those at one end of the spectrum which are obviously directed to a specialist audience. Some of these are pure lawyer's law – statutes on trusts, taxation and property, for instance. They use terms like “estate”, “fee simple”, and “beneficiary”, which are legal terms of art. There can be no better example than the Perpetuities Act 1964. Other statutes at this top end are directed at different types of specialist audience. A good example is the Cadastral Survey Act 2002. The ordinary person will know at first sight that such Acts are not for him or her.

At the other end of the scale, however, there are many statutes which are not specialist and not what we might describe as lawyer's law. They lay down requirements which have to be met by ordinary people, particularly in their employment. There is nothing conceptually mysterious about them. In some ways they can be regarded as laying down administrative rather than legal requirements. For example, if one is involved in a child-care centre, one needs in the day-to-day operation of the centre to be familiar with the Education (Early Childhood) Regulations 1998. Those manufacturing or selling food need to know the requirements of the Food (Safety) Regulations 2002. A landlord should at least have a working knowledge of the requirements of the Residential Tenancies Act 1986. An employer, whether of a large or small staff, needs to know something about the requirements of the Employments Relations Act 2000. The question is whether it is realistic to expect such people to acquire a copy of the necessary legislation, read it, and understand what is expected of them.

It is a fact that such Acts are indeed purchased and presumably read by many people. Parliamentary Counsel Office keeps a list which it describes as its “best seller list”. At the top of that list for 2002 was the Code of ACC Claimants' Rights which sold a staggering 6,047 copies. The Education (Early Childhood Centres) Regulations, then four years old, sold almost 2,000 copies. The Employment Relations Act 2000, although by this time three years old, sold over 2,000 copies.

This is evidence that we live in a compliant society. People are anxious to do things according to law.

But let us now come to the important question. When the ordinary person acquires a statute of this kind, does he or she understand it? Until relatively recently the answer would have been that he or she would not have a hope of doing so. In times past, statutes were not a good read. In the late nineteenth Century, Grove J said:

The language of statutes is peculiar ... and not always that which a rigid grammarian would use.³

Let me go back in history. In very early times in Britain, many statutes were drafted by the judges. Their language was brief, and was described as being rather loose. But in the late fifteenth century it appears that the drafting of statutes was handed over to conveyancers, presumably because it was felt that they had acquired the necessary skills in drafting deeds. But the product that emerged from these people could only be described as unsatisfactory. If we look at a statute from the time of Henry VIII we find it contains almost laughably long sentences containing excessive detail, much repetition, many words which add nothing to the sense, and awkward grammar. It is alarming to find that, centuries later, even in New Zealand, little had changed. The Customs Ordinance 1841 (NZ) was even worse than the examples from Henry's time. It had one sentence of over 700 words. As late as 1957 the Charitable Trusts Act (NZ), which is still in force and used today, contained many of the same problems. Its section 3 contains over 200 words. Moreover, many of these relatively modern Acts contain the antiquated language of years gone by, and add a further complexity of frequent cross-referencing which means that a provision is meaningless on its own and has to be read in conjunction with provisions elsewhere in the Act. The Holidays Act 1981, of substantial interest to the ordinary person, is a good example.

It is interesting to speculate today exactly why this style was thought to be necessary. There is probably a combination of reasons. In the old days drafters were paid by the page: not exactly an incentive to be brief. The transition of the language of the law from French and Latin to English led to many romance words being retained in the law and to much coupling of romance and English words ("goods and chattels", "will and testament", for example). Particularly after 1688, parliamentary supremacy added another dimension: Parliament wished to make it clear that it was the law maker and felt it desirable to spell out its requirements in considerable detail. And finally - and I think in some ways this was the most important factor - it has been said that drafters needed to make their statutes as "judge-proof" as possible. It is well known that in early times judges construed statutes unsympathetically.⁴ Judges regarded many of the statutes as unnecessarily intrusive into the rights of individuals and thus interpreted them as narrowly

3 *Lyons v Tucker* (1881) 6 QBD 660, 664.

4 According to Harlan Stone they treated statutes as "an alien intruder in the house of the common law": (1936) 50 HLR 4, 15. It made one think, said Pollock, that "Parliament generally changes the law for the worse": *Essays in Jurisprudence and Ethics* (1882) 85.

as possible so that they would do the least possible damage. That kind of judicial attitude invited drafters to spell things out in even more detail.

When it is asked who these drafters were drafting for – in other words who their audience was – the answer, I believe, is no-one. The drafter’s job was to get it down on paper as precisely and comprehensively as possible leaving it to others to explain to the audience what it was all about. Thus drafting was not seen as a type of communication at all. The results were obvious. The readers of statute were a privileged elite – the legal profession. They alone had the key, and understanding such language became a skill for which one needed legal training. The language of statutes rendered them inaccessible to the ordinary person. The language was often derided, even laughed at; judges sometimes expressed the hope that one day statute law might be able to be brought closer to the people. Lord Coleridge once said of an Electoral Act that “it is of the last importance that it should be easily comprehensible by the mass of ordinary voters”.⁵ Mackinnon LJ said of certain Rent Acts that “the horrors of these Acts are hastening many judges to a premature grave”.⁶

During the twentieth century there was gradual improvement, which really accelerated in the middle 1990s. Since that time there has been a sea-change in drafting practice in New Zealand. We must thank the Law Commission and Parliamentary Counsel Office for the efforts they have made to achieve it. There is no doubt that these days the communication aspect of statutes has emerged as important, and there is now a desire to make the language of statutes intelligible to the widest possible audience. (I concede there are some doubts as to exactly who this audience is, but it includes at least the “ordinary person” as I have defined him or her). A page of a modern statute looks totally different from its predecessors. Sentences are shorter; where they need to be longer than usual they are usually paragraphed to separate their constituent elements; there are no wasted words; the language is more user-friendly and the statute as a whole is better organised. There are new aids to interpretation too, such as tables (as in the succession rules in the Administration Act), examples (as in the Personal Property Securities Act) and “overview” sections summarising the principles of the Act in clear language.

These advances are to be commended.

5 *Knill v Towse* (1889) 24 QBD 186, 195.

6 (1946) 62 LQR 34.

But is it now the case that the ordinary person can read many of these statutes and clearly understand what they require him or her to do? Often yes, I think. I believe that anyone could read the Education (Early Childhood Centre) Regulations 1998 and get a clear picture of what is required.

That is not say that there are not some pitfalls.

Firstly, there is a risk that the ordinary person may not find all the legislation which is relevant to the topic under consideration. Reading the Education (Early Childhood Centre) Regulations 1998, one could be forgiven for thinking that they were exhaustive of the subject. They lay down a list of requirements which looks comprehensive enough. That is not the case. The Buildings Act 1991 lays down requirements about disabled access to such Centres; the Fire Service Act 1975 lays down requirements about evacuation procedures. The 1998 regulations do, in fact, briefly cross-refer to those provisions, so at least the reader has them flagged for consideration. But that is not so of other requirements. The Education Act 1989, for example, lays down such important rules as that the Centre must have a Charter, and some basic rules for the treatment of young children (for example corporal punishment is not allowed). And the Health (Immunisation) Regulations 1995, which are not mentioned in our 1998 Regulations at all, lay down very important requirements about keeping immunisation registers for the children attending such a Centre. Not many statutes in our system are self-contained codes. It is the case in our system, as in most others in the English-speaking world, that sometimes relevant law is hidden in strangely inaccessible places. A seller of books, for example, probably would have heard of the Consumer Guarantees Act 1993 and the Sale of Goods Act 1908, but may well not know that there are important rules in the Mercantile Law Act 1908 about selling books, such as encyclopaedias, by instalment. The new electronic statutes no doubt help in searching these matters but not all ordinary readers will know of them and may indeed find the information provided confusing. Our bookseller, for example, if he or she searches on the Status website, will find the term “books” used in 752 provisions of Acts and 133 provisions of Regulations.

Secondly, all statutes, being part of the wider legal system, are liable to have links to other parts of that system. To understand a statute properly one may sometimes need to know more than is visible from the printed page of that statute. Thus, the Interpretation Act 1999, the handbook for interpreting all statutes, will probably be a closed book to our ordinary person. In a huge majority of cases that is not going to matter much because, all in all, the Interpretation Act makes little difference to the interpretation of statutes. But sometimes it could matter. Our Early Childhood Regulations, for example,

require that “written notice” of certain requirements be given. The Interpretation Act makes it clear that that can include electronic communication. Those regulations also refer to the “person responsible” for carrying out certain obligations. We as lawyers know from the Interpretation Act that that can include a company. In some situations the New Zealand Bill of Rights Act 1990 can also have implications for interpreting other legislation. More than that, some apparently simple modern provisions have brought baggage with them from a former life. They may be a new plain language version of an older much more complex provision; they may have a common law background; or they may contain words and concepts which have been much interpreted by judges over the years. In such cases, words which may seem plain to the ordinary reader may not mean quite what he or she thinks they do. To take one example from our Early Childhood Regulations, they impose a requirement of “consultation” in certain situations. “Consultation” is a word which has been the subject of much judicial interpretation. Some such words are shrouded in layers of precedent. I think that particular care is needed with employment legislation: it is not for nothing that we have a specialist Employment Court and lawyers who specialise in employment law.

These impediments may sound significant, and sometimes no doubt they are, but I do not wish to exaggerate them. In the great majority of cases our ordinary person can still get a very good picture of what is required of him or her simply from reading the plain language of these new statutes. After one reading he or she will take away a reasonably good understanding of the principles.

But a third problem creates more difficulty, not just for the ordinary person but often also for the lawyer advising him or her. However simply something is drafted it will often still require interpretation. While plain drafting will usually make the *meaning* of a provision clear, it will not always give a clear answer on how that meaning applies to a problem case. There is, in other words, a distinction between meaning and application. This is because (i) words are not precise in the way that mathematical symbols are, and have an aura of vagueness at their boundaries; and (ii) no drafter can ever foresee or provide for everything that is going to happen in the future. So a provision which seems crystal clear when one reads it in the abstract can suddenly collapse into doubt when one tries to apply it to get an answer to a problem. I always like the example in *Claytons’ case*.⁷ The transport legislation contains an apparently simple provision that, if one’s licence has been suspended, one cannot “drive a motor vehicle”. Anyone on

7 *R v Clayton* [1973] 2 NZLR 211.

reading that can understand what it means. But what of a person like Clayton, who was seen in a car in the passenger seat with his hand on the steering wheel assisting his wife who was in the driver's seat? Is he "driving"? (The answer is yes, apparently). Our admirably clear Childhood Centre Regulations could give rise to such problems in virtually every regulation. For example, Regulation 40 provides:

The parent or guardian has a right of entry to the Centre whenever the child is there... [with certain exceptions]

The parent or guardian and those running the Centre will immediately understand that principle. But imagine the following questions. To what parts of the Centre does the parent or guardian have access? How long can the parent or guardian stay – all day every day? And indeed, what is a parent – does this include the birth mother of an adopted child? Does "guardian" include a grandmother who is looking after the child for a week while the parents are away? The answer to none of those questions is as crystal clear as the short principle might lead one to believe at first sight. Over the years statutory provisions have thrown up some remarkable questions. Is a live goldfish an article?⁸ Is a sweet container a toy?⁹ Does the term "imitation fire arm" include a real gun?¹⁰ (The answer to the last two of these questions is "yes" by the way, the answer to the first is "no"). In other words, you cannot capture all of life's vagaries and possibilities in a verbal formula, and that is so whether the style of drafting adopted is plain or obscure. Generally speaking, the modern plain drafting is shorter than its earlier equivalent (although this is not inevitable), and because it contains less detail may be more susceptible to this sort of problem. In the history of our law some of the shortest statutory provisions have caused the most litigation.

So if our ordinary person does not know the answer to a question of this kind, he or she may end up having to seek advice from a lawyer. The lawyer initially will probably not know the answer either, but will better know the interpretive methods that have to be employed to find one.

Please do not misunderstand me. I am not denigrating plain English drafting. Far from it: I am a very strong supporter of it. It enables an ordinary person to understand principle and to get a picture of what is required far more than was ever possible in the old days. And it will often provide a very clear

8 *Daly v Cannon* [1954] 1 WLR 261.

9 *Commerce Commission v Myriad Marketing Ltd* (2001) 7 NZBLC 103404.

10 (2001) 159 CCC (3d) 319.

answer to the problem. However, as we have seen it is not, and could not be expected to be, a panacea for all our problems.

There has never been a statute that did not sometimes require interpretation. In a case where a statute needs interpretation it may end up in court, and what the court says will be decisive. Judges have the final word on what a statute means and how it applies. In 1975, Lord Wilberforce said:

This legislation is given legal effect upon subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals are to be. This power which has been devolved upon the judges from the earliest of times is an essential part of the constitutional process by which subjects are brought under the rule of law – as distinct from the rule of the King or the rule of Parliament; and it would be a degradation of that process if the Courts were to be merely a reflecting mirror of what some other interpretation agency might say.¹¹

But will the interpretation which the court accords the statute be in line with what our ordinary person might expect? If the court produces an answer which the ordinary person would regard as distinctly odd, that person's confidence may suffer a setback. The law will again seem shrouded in mystery. Thus, the English and Scottish Law Commissions once said:

The intelligibility of statutes from the point of view of ordinary citizens or their advisers cannot in fact be disassociated from the rules of interpretation followed by the courts. For the ability to understand a statute depends in the ultimate analysis on intelligent anticipation of the way in which it would be interpreted by the courts.¹²

So, then, are our rules of interpretation developing in accordance with the ordinary person's expectations? My answer to that is a mixed one.

In some ways the answer is yes. For example, in these days headings, sub headings and section headings can be used in the interpretative process.¹³ That did not used to be so.¹⁴ Headings, and other indications on the printed page, are a critical part of how our ordinary person understands a statute.

11 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A/G* [1975] AC 591, 629.

12 *The Interpretation of Statutes* (1969) 3.

13 Interpretation Act 1999, s 5(2)(3).

14 Acts Interpretation Act 1924, s 5(f)(g).

There are also judicial statements that if a statute uses ordinary words the judge should usually not attempt to paraphrase them or give them a legal definition.¹⁵ The judge should simply ask in each case what the ordinary meaning is and how it applies to the facts.

There is also an increasing tendency today to give statutes deriving from the past their most modern meaning. If, for example, an Act or its predecessor was passed in 1950, the court may well ask what it means today, as read through 2003 eyes, rather than what it meant when it was enacted fifty years ago. That question has come to the fore recently in a group of cases in England which had to interpret the term “family” in a statute which gives security to a member of a tenant’s family who is living with that tenant when he or she dies. Does the word “family” include an unmarried partner, whether of the same sex or the opposite sex”? The Act in question was passed in the 1920s and there is no doubt that in those days the answer would have been “no”. Even in 1949 the English Court of Appeal still gave that answer.¹⁶ But now in the twenty-first century the House of Lords has said “yes”.¹⁷ These days the culture has changed, attitudes have changed, and most people reading the Act would think that “family” includes a stable de-facto relationship. The ordinary person would approve of that because, when he or she reads this 1920s Act, he or she reads it through twenty-first century spectacles. He or she knows nothing about the origins of the Act, and probably will not be interested in opinions held about it by those members of the original Parliament which passed it. The ordinary person reads the Act as if it was speaking to him or her at this very moment. Indeed one of the judges in the Court of Appeal which had to consider the provision put it in precisely that way:

Would an ordinary person addressing his mind to the question of whether the defendant was a member of the family have answered “yes” or “no”?¹⁸

I should perhaps point out that in the most recent House of Lords case, Lord Nicholls said that he did not find that question particularly helpful.¹⁹ It is the judge who must answer the question, and a judge is not the typical ordinary person.

15 *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, 39.

16 *Gammans v Ekins* [1950] 2 KB 328.

17 *Fitzpatrick v Sterling Housing Ltd* [2001] 1 AC 27. See also *Dyson Holdings Ltd v Fox* [1976] QB 503.

18 Cohen LJ, cited in *Fitzpatrick*, *ibid*, at 59.

19 *Fitzpatrick*, *ibid*, at 45.

I must also say that cases of this kind, which are growing in number, pose some real questions for any theory of interpretation. Can the meaning of words in a statute really change from time to time, or is it rather that the meaning stays the same but the application broadens? Can you, and should you, detach the meaning given by a modern reader from the intention of the Parliament which originally passed the Act? What does that do to any theory of parliamentary sovereignty? And, in any event, should judges really be changing the law in this way; is the matter not rather one for Parliament?

While those trends of interpretation may be said to recognise the ordinary person, there are others which sometimes may not. I hark back to Lord Wilberforce. It is the judges who say how statutes apply to the community. If in interpreting statutes they take into account factors in addition to ordinary meaning, this may from time to time result in interpretations which are out of line with the ordinary person's understanding and expectation.

First, these days purposive interpretation is the order of the day. Acts are interpreted to give effect to the purpose they were passed to achieve. In a modern state where legislation is one of the main instruments of government policy that is inevitable. But does enthusiastic execution of the purposive approach ever result in an interpretation of words which the ordinary person would find extraordinary? Possibly so. Bennion has no doubt of it. He has said:

There are very many modern cases where courts have attached meanings to enactments which by no stretch of the imagination could be called meanings the words are grammatically capable of bearing.²⁰

Thus, "toy" includes a sweet container;²¹ a dead kiwi is "protected wildlife" which is defined as "an animal living in the wild";²² industrial "plant" includes a horse.²³ Extreme examples of the purposive approach of this kind do render the law less predictable, less certain, and less accessible to the ordinary person. The ordinary person will be inclined to say "I thought I understood this Act, I now find I don't". How important you regard this dissonance as being depends on how you balance the factors of certainty, predictability and accessibility against the importance of realising the purpose of the statute and the social desirability of the result the court has

20 *Understanding Common Law Legislation* (2001) 42-43.

21 *Supra* note 9.

22 *Police v Johnson* [1991] 3 NZLR 211.

23 Mentioned by Lord Wilberforce in *IRC v Scottish and Newcastle Breweries* [1982] 1 WLR 322, 324.

reached. If we think that from time to time an extreme interpretation serves the common good, we will be inclined to excuse a little jiggery-pokery with the words, whatever the ordinary person may think about it.

There is a second development too, which is closely related to the purposive approach. It is the increasing resort by counsel and courts to extrinsic materials to interpret statutes. They include parliamentary materials (Hansard, select committee reports and explanatory notes to bills); reports of the Law Commission and other law reform committees; and treaties, both domestic and international. In principle, this is a good thing; the more one reads around any document the better one is likely to understand it.

But the problem is that the ordinary person reading a statute will usually have at hand only the statute itself. He or she may not know that the other material exists, and, even if he or she does know, might have trouble getting access to it. (For example, some of the reports of the old Law Reform Committees are as rare as hens' teeth these days). So one faces the difficulty that the ordinary person and the courts begin the interpretation exercise on a playing field which is not level. That will only be problematic if, as a result of reading the extrinsic materials, the court places an interpretation on the statutory words which no ordinary person would think they would bear. It is not often that that happens, but sometimes it might. I would draw your attention, for example, to *Frucor Beverages Ltd v Rio Beverages Ltd*²⁴ where, crudely (and probably unfairly) put, the Court of Appeal might be said to have preferred an explanatory note to a bill over the words of the statute. And in another case²⁵ qualifications were notionally read into a statute to square it with an international treaty. I think it is probably fair to say that no person reading the Act alone in those cases would place the meaning on it that the court did.

Nevertheless, in mitigation I would say that in both cases justice was done, and in both of them the statute involved was one the ordinary person would not regard as directed to him or her. Both, in other words, were specialist statutes. Nevertheless, the tendency they exhibit would, if taken too far, be a matter of concern.

It is very plain that the House of Lords is becoming impatient with the overuse of extrinsic materials, particularly Hansard. In *Robinson v Secretary of State for Northern Ireland*, Lord Hoffmann drew into his argument none other than our friend the ordinary person:

24 [2001] 2 NZLR 604.

25 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44.

I am not sure that it is sufficiently understood that it will be very rare indeed for an Act of Parliament to be construed by the Courts as meaning something different from what it would be understood to mean by a member of the public ... who was not privy to what had been said by individual members (including Ministers) during the debates in one or other House of Parliament.²⁶

Let me conclude. There are undoubtedly some traps for the ordinary person in reading statutes, however plainly they may be drafted. Nor will a reading of those statutes automatically solve all that person's problems. But there is no doubt that plain drafting brings the law much closer to the ordinary person. He or she gets from it a better understanding, and a clearer picture of his or her rights and obligations than was ever possible before. Lawyers should be grateful, too, in that plain drafting renders statutes more accessible to them as well. It would be of concern if the courts, in interpreting such legislation, departed too far from the ordinary person's understanding in too many cases or for anything other than the most worthy cause.

26 [2002] UKHL 32.

A CONTRACTS (CONSOLIDATION) ACT FOR NEW ZEALAND

BY THOMAS GIBBONS*

I. INTRODUCTION

This article argues that New Zealand should pass a Contracts (Consolidation) Act. This Act could bring together the provisions from a number of different contract statutes that are currently in force, namely, the Minors' Contracts Act 1969, the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, the Contracts (Privity) Act 1982, the Frustrated Contracts Act 1944, and (possibly) the Contracts Enforcement Act 1956. Encapsulating the provisions of these statutes in one Act would make the law relating to contract more accessible, more consistent, easier to amend and keep up to date, and more responsive to further reform.

The article begins with an overview of New Zealand's five main "contract statutes" in terms of their underlying policy, their provisions, and their operation in the eyes of judges and legal commentators. It also briefly discusses some other contract statutes that are, for our purposes, of less importance. It then goes on to examine the policy and jurisprudence behind consolidation Acts and law reform in general. Particular emphasis is placed on the Law Commission's 1993 *Contract Statutes Review*, how the reforms recommended in that review have languished, and why this delay is unfortunate. The crux of the article is the final section, which evaluates the reasons supporting a Contracts (Consolidation) Act. The article concludes with an affirmation of the desirability of reform in this area.

II. NEW ZEALAND CONTRACT STATUTES

1. Introduction

Between 1969 and 1982, New Zealand enacted five pieces of legislation which are often collectively referred to as "the contract statutes".¹ These statutes - the Minors' Contracts Act 1969, the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, and the Contracts (Privity) Act 1982 - all share the "distinctive feature" of

* Barrister and solicitor, Auckland.

¹ See eg Dawson, "The New Zealand Contract Statutes" [1985] LMCLQ 42; and McLauchlan, "Contract and Commercial Law Reform in New Zealand" (1984) 11 NZULR 36.

conferring broad discretionary powers on the courts to award relief as is thought just in the circumstances of the case.² Additionally, these statutes are all relatively short: the longest is only 19 sections. The latter four also share the common feature of having been designed by the Contracts and Commercial Law Reform Committee, a major player in New Zealand's commercial law reform from the 1960s to the 1980s.³ Together, these statutes have been described as having "dramatically changed the face of the law of contract in New Zealand".⁴ Before this point can be properly evaluated, however, it is necessary to consider each of these statutes – and the policy behind them – in turn. The discussion in this section also provides background to the provisions that make up the primary subject-matter of the proposed Contracts (Consolidation) Act.

2. *Minors' Contracts Act 1969*

Before the passage of this Act, the law relating to contracts made by minors was a complicated mix of common law and statute. There were many different rules for different kinds of contracts, and the rules were difficult to apply and to use. Following an examination of the law by members of the New Zealand Law Society and the Department of Justice, a draft bill – further scrutinised by the Contracts and Commercial Law Reform Committee – was introduced into Parliament and passed as the Minors' Contracts Act 1969.⁵

The Act treats married minors as though they are of full adult capacity.⁶ For minors 18 years or older, it gives the courts considerable discretion both in deciding whether or not to enforce certain contracts, and in deciding on appropriate remedies. The Act allows the Court to grant "such order as to compensation or restitution of property" as the Court thinks just.⁷ For minors below the age of 18 years, the Act explicitly states that the Court may enquire into the "fairness and reasonableness" of contracts,⁸ and is given wide scope in making orders. In exercising its discretion, the Court

² Dawson, *ibid*, at 42. This particular feature will be discussed in more depth below.

³ See Coote, "The Contracts and Commercial Law Reform Committee and the Contract Statutes" (1988) 13 NZULR 160.

⁴ McLauchlan, *supra* note 1, at 39-40.

⁵ See Todd, "Minors' Contracts Act 1969" in *Contracts Statutes Review*, NZLC R25, 229, 229-231.

⁶ Section 4, Minors' Contracts Act 1969. In New Zealand, the age of majority is 20 years.

⁷ Section 5(2)(b).

⁸ Section 6(2).

must consider a number of factors, including the circumstances in which the contract was formed,⁹ the subject matter,¹⁰ and “[a]ll other relevant circumstances”.¹¹ Section 7 gives the Court further powers to award “such relief by way of compensation or restitution of property as the Court in its discretion thinks just”.

The leading case on the Act is *Morrow & Benjamin Ltd v Whittington*,¹² which, while illustrating some difficulties in tying the sections together, has been applauded as providing the “correct” interpretation of the Act.¹³ Overall, the Minors’ Contracts Act has been the subject of very little criticism, probably because it is easy to accept that minors’ contracts should be subject to different rules than contracts made by adults. As one of the first commentaries on the Act observed: “[w]hatever its drawbacks it is a distinct advance on the pre-existing law, and succeeds in avoiding its complexities and injustices”.¹⁴ In historical terms, the Act is significant because it heralds the beginning of an important period of reform in New Zealand’s contract law. In giving the courts such broad discretionary powers of relief, this Act and the four that followed it gave force to substantial changes in the nature of contract law in New Zealand.

3. Illegal Contracts Act 1970

In 1966 the Minister of Justice gave the Contracts and Commercial Law Reform Committee the task of examining the law relating to illegal contracts with a view towards “restatement”, which the Committee members understood as allowing ameliorative change.¹⁵ There was, the Committee felt, almost universal agreement that the law in this area could be improved, and a draft bill was set out for consideration.¹⁶ The Committee had this to say:

Any general reform should, in our view, have the effect of making such contracts as are illegal, of no effect, so that no rights will pass under them and the position of the parties will be the same as if the illegal contract had never been entered into (clause

⁹ Section 6(3)(a)

¹⁰ Section 6(3)(b).

¹¹ Section 6(3)(e).

¹² [1989] 3 NZLR 122.

¹³ Todd, *supra* note 5, at 235.

¹⁴ Burrows, “The Minors’ Contracts Act 1969 (NZ)” (1973) 47 ALJ 657, 657.

¹⁵ *Illegal Contracts: Report of the Contracts and Commercial Law Reform Committee* (1969) 1.

¹⁶ *Ibid.*, 1-2, 13-18.

6 of the draft statute). We would qualify this rule, however, by giving to the court a discretion to order that, notwithstanding the illegality, the contract be enforced in whole or in part. We would make this exception because we recognise that there may be circumstances where it would be impossible or unjust that the parties should be restored to their original position. We therefore make the recommendation set out in clause 7 of the attached draft statute.

The only argument against such a proposal that we feel the need to mention is this. It could be said that any such discretion would (because of the impossibility of foreseeing all possible circumstances) necessarily have to be largely unfettered and that conferring such boundless discretions on the courts is undesirable as a source of uncertainty and an abdication by the legislature of its proper functions in favour of the courts. We acknowledge the force of this contention but consider that to confer on the courts such powers as we propose is very much a lesser evil than to leave the law as it would otherwise stand and we have moreover provided some curbs on the exercise by the courts of the proposed powers.¹⁷

We have in these two paragraphs a useful indication of the reach of the Act. It was to be applicable to a wide range of contracts, including those illegal only in part, and was to confer a broad discretion on the courts to grant “such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just”.¹⁸

We also have recognition of the problems inherent in the granting of such discretion: that it could lead to uncertainty, and could upset the balance between the courts and the legislature. As the extract shows, however, the Committee did not see this as a major problem. It thought that giving the courts broad discretionary powers (however they might be exercised) was preferable to leaving the law as it was.

Commentary on the Act has been mixed. Some have described the Committee’s report as overly short, and the definition of an illegal contract in section 3 of the Act as “evasive”.¹⁹ Others have defended the Act as “deliberately minimalist”, designed to leave such matters as the

¹⁷ Ibid, 9-10.

¹⁸ Section 7, *Illegal Contracts Act 1970*.

¹⁹ Furmston, “The *Illegal Contracts Act 1970 – An English View*” (1972) 5 *NZULR* 151, 152. See also *McLauchlan*, *supra* note 1, at 41. The section reads, in part, “for the purposes of this Act the term ‘illegal contract’ means any contract that is illegal at law or in equity”.

interpretation of section 3 to “judicial policy”.²⁰ Certainly section 7, which seems to grant the courts huge discretion, has been treated in such a manner that clear principles of its application can be discerned.²¹ At any rate, it is clear that the Contracts and Commercial Law Reform Committee of the time did not see the criticisms of the Act as prohibitive of further reforms of this kind.

4. Contractual Mistakes Act 1970

Some years after the report on illegal contracts, the Committee was given the task of examining the effect of mistakes on contracts. Again, the resulting report reviewed the law in this area, expressed certain criticisms, and proposed a draft bill. The report argued that the “single thread” running through the varying common law doctrines of mistake was that the law should:

strike a balance between avoiding the unfairness of holding a party to an inappropriate transaction which was not fully assented to, and protecting other parties to the contract (and those claiming under them) who have a legitimate interest in seeing the contract performed.²²

The Committee considered it dangerous to give the courts too much discretion, particularly in regard to jurisdiction, as this could broaden the law of mistake to the extent that it could overwhelm the general law of contract. For this reason, the Committee observed, the term “mistake” deserved careful definition. This appears a very different approach to that taken for illegal contracts, though the ultimate result was perhaps just as evasive.²³

Of course, the Committee did take things somewhat further. “Mistake” was identified to mean one of three things: a mistake made by one party and known to the other, a mistake made by both parties, or a mistake in respect of a particular matter on which one party had one belief and the other party

²⁰ Coote, “The Illegal Contracts Act 1970” in *Contract Statutes Review*, NZLC R25, 173, 174.

²¹ See the analysis of Finn, “Contracts contrary to law or a statute and the Illegal Contracts Act 1970” in Burrows, J, Finn, J and Todd, S *Law of Contract in New Zealand* (2nd ed, 2002) 403, 448.

²² *Report on the Effect of Mistakes on Contracts* (1976) 3.

²³ *Ibid.*, 12. See supra note 19 and accompanying text. Section 2(1) of the Act reads: “‘Mistake’ means a mistake, whether of law or fact”.

had another belief.²⁴ It was thought desirable to allow the courts “a wide discretion to make such order as best meets the needs of that particular case”,²⁵ and the statute follows this directive. Section 7(3) gives the Court the broad power “to make such order as it thinks just”. The situations in which the courts may grant relief are also broadly defined.²⁶

Early on, the Act was described as “well-intentioned but ill-executed”.²⁷ Overall, the Act attracted little attention, and case law was slow to develop: in the five years following its introduction the Act was the subject of only one reported case.²⁸ This was all to change. *Conlon v Ozolins*,²⁹ for example, was seen by some as an abandonment of the objective theory of contract formation,³⁰ with the Court of Appeal, swayed by the personal circumstances of the parties, using its discretion to give considerable weight to subjective factors.³¹ One scholar went so far as to say that “the potential of this Act for the destruction of the law of contract as generally understood is unsurpassed”.³² Matters settled down somewhat with cases like *Paulger v Butland Industries Ltd*,³³ which expressly moved away from *Conlon v Ozolins*, though the Act continues to invite academic and judicial debate.³⁴

²⁴ Ibid, 15. See section 6, Contractual Mistakes Act 1977.

²⁵ Ibid, 20.

²⁶ See section 6.

²⁷ Finn, “The Contractual Mistakes Act 1977” (1979) 8 NZULR 312, 320.

²⁸ McLauchlan, “Mistake of Identity After the Contractual Mistakes Act 1977” (1983) 10 NZULR 199, 230.

²⁹ [1984] 1 NZLR 489.

³⁰ See Beck, “The New Zealand Contractual Mistakes Act: a lesson in legislation” [1987] LMCLQ 325, 331; and Chen-Wishart, “The Contractual Mistakes Act 1977 and Contract Formation” (1986) 6 Otago LR 334, 336.

³¹ Beck, *ibid* 331 and generally.

³² Dawson, *supra* note 1, at 48.

³³ [1989] 3 NZLR 549. Though see the comments of McLauchlan, “The Demise of *Conlon v Ozolins*: ‘Mistake of Interpretation’ or Another Case of Mistaken Interpretation?” (1991) 14 NZULR 229 for criticism of *Paulger*; and Finn, “Mistake” in Burrows, Finn, and Todd, *supra* note 21, at 285, 302 for comment on how the proper interpretation of s 6(1)(a)(iii) – and hence the scope of the Act – remains a problem.

³⁴ See eg Dugdale, “A Code is a Code is a Code” (2002) 8 NZBLQ 129; and McLauchlan, “The Contractual Mistakes ‘Code’: A Polite Response to Mr Dugdale” (2002) 8 NZBLQ 132.

5. *Contractual Remedies Act 1979*

The Contractual Mistakes Act 1977 was closely followed by the Contractual Remedies Act 1979. However, the latter had a far longer gestation period. The Contracts and Commercial Law Reform Committee first reported on misrepresentation and breach of contract in 1967. Over 10 years later, in January 1978, the Committee reissued its report with a draft Contractual Remedies Bill.

The 1967 report recognised the need, based on common law, to interpret contractual intentions objectively.³⁵ However, many of the rules relating to contractual remedies were thought to be “too complex and correspondingly difficult to apply in practice”.³⁶ The English Misrepresentation Act 1967 was thought to be inadequate as a model on the basis that it allowed too much judicial discretion: “[t]here should be known rules so that the parties may be encouraged and enabled to settle their disputes out of court”.³⁷ There was some debate among the writers of the report over whether courts should be allowed to look into pre-contractual negotiations.

The 1978 Committee summarised the 1967 findings as being:

- (a) that a party to a contract who is induced to enter into it by the misrepresentation (whether innocent or fraudulent) of another party should be entitled to damages from such other party as if the representation had been a term of the contract;
- (b) that the law applicable in situations of repudiation or breach of contract should be reformed and codified by statute.

This summary pointedly ignores the broad judicial discretion granted by the proposed Bill. The Court was given the power both to look into pre-contractual negotiations and to have regard to, among other matters, “all the circumstances of the case, including the subject-matter and value of the transaction, [and] the respective bargaining strengths of the parties”.³⁸ In addition, the courts were given the power to make an order for relief “subject to such terms and conditions as the Court thinks fit”, and taking into account a number of considerations, including “[s]uch other matters as it thinks proper”.³⁹

³⁵ *Misrepresentation and Breach of Contract* (1978) 33-38.

³⁶ *Ibid*, 62.

³⁷ *Ibid*, 70.

³⁸ *Ibid*, 14-15 (clause 4).

³⁹ *Ibid*, 21 (clauses 9(3) and 9(4)(f)).

In final form, the Contractual Remedies Act has been described as “the most important and far reaching” of the contract statutes proposed by the Committee.⁴⁰ Under section 9, the Court can make an order for relief when a contract is cancelled by any party.⁴¹ An order of this kind can be for the transfer of property subject to the contract,⁴² payment of “such sum as the Court thinks just”,⁴³ or directing a party to do or refrain from doing any act or thing, “as the Court thinks just”.⁴⁴ Section 9 also specified certain matters that the Court should take into account in making such an order, including the terms of the contract,⁴⁵ expenditure incurred,⁴⁶ and, notably, “[s]uch other matters as the court thinks fit”.⁴⁷

The Act clearly grants considerable discretion to the Courts. It did not take long for contract scholars to express disquiet. Following the decision in *Gallagher v Young*, where Greig J remarked on the “wide discretion under s 9 to give justice as between the parties”,⁴⁸ one commentator described section 9 as “a super-remedy – as long as the [particular] case is pleaded under s. 9, established rules as to damages go out of the window, and the criterion is what the court thinks just”.⁴⁹ Another scholar thought that the discretion allowed under section 9 brought “unnecessary and undesirable uncertainty to important areas of the law of contract”.⁵⁰ However, while the proper application of the section remains unclear – at least to some⁵¹ - the emergence of a substantial body of case law on the Act has made it easier for lawyers to work with this legislation.⁵²

⁴⁰ Burrows, “The Contractual Remedies Act 1979” (1980) 1 *Canta LR* 82, 82.

⁴¹ Section 9(1), Contractual Remedies Act 1979.

⁴² Section 9(2)(a).

⁴³ Section 9(2)(b).

⁴⁴ Section 9(2)(c).

⁴⁵ Section 9(4)(a).

⁴⁶ Section 9(4)(c).

⁴⁷ Section 9(4)(f).

⁴⁸ [1981] 1 *NZLR* 734, 740.

⁴⁹ Dawson, *supra* note 1, at 55.

⁵⁰ McLauchlan, *supra* note 1, at 42. See also the discussion of *Newmans Tours Ltd*, *supra* note 115 and accompanying text; and Coote, “Remedy and Relief under the Contractual Remedies Act 1979 (NZ)” (1993) 6 *JCL* 141.

⁵¹ Todd, “Remedies for breach of contract” in Burrows, Finn, and Todd, *supra* note 21, at 741, 810.

⁵² Burrows, “Contractual Remedies Act 1979” in *Contract Statutes Review*, NZLC R25, 61, 62.

6. Contracts (Privity) Act 1982

The report on this topic, presented to the Minister of Justice in 1981, “review[ed] the legal principle that only the parties to a contract ... can have rights or obligations under that contract”.⁵³ Aside from the special importance of consideration in contract law, the Committee saw the doctrine of privity as having “a firm basis in legal policy, resting on the proposition that, generally speaking, the parties to a contract have control over its effect, operation and performance”.⁵⁴ Yet the common law, with some exceptions, did not really provide for this.⁵⁵ The Committee was adamant that “[i]f it is the law .. that where by contract A promises B to pay C, A cannot be compelled, at the suit of B or C or both, to make payment, then the law should be changed immediately”.⁵⁶ Preferring broad policy-oriented reform over incremental development, the Committee proposed a Contracts (Privity) Act to allow for situations like this. Legislation was passed in 1982.

Like the other statutes already discussed, the Contracts (Privity) Act 1982 confers “broad discretionary powers to award relief as the court thinks just” within the space of a few short sections.⁵⁷ Section 4 of the Act establishes that third parties may seek to enforce a contract which confers benefits on them, and section 7 allows the Court, in certain circumstances, to make an order authorising the variation or discharge of this kind of agreement “if it is just and practicable to do so” and “on such terms and conditions as the Court thinks fit”.⁵⁸ Similar discretion is also given in relation to compensation.⁵⁹ This Act has attracted less attention than some of the other statutes mentioned. Perhaps this is because it is “more closely drawn than its predecessors”.⁶⁰ In its first years of operation, it was considered in relatively few cases, and it has been suggested that no serious problems have arisen since.⁶¹

⁵³ *Privity of Contract* (1981) 1.

⁵⁴ *Ibid*, 5.

⁵⁵ *Ibid*, 28.

⁵⁶ *Ibid*, 48.

⁵⁷ Dawson, *supra* note 1, at 42.

⁵⁸ Section 7(1), Contracts (Privity) Act 1982.

⁵⁹ Section 7(2) (“such sum as the Court thinks just”).

⁶⁰ Coote, “Security of Contract and the New Zealand Contract Statutes” (2000) 16 JCL 37,46.

⁶¹ Todd, “The Contracts (Privity) Act 1982” in *Contract Statutes Review*, NZLC R25, 217, 228.

7. Commentary

This section began with an overview of what the five statutes discussed have in common. Recognition should also be given to their differences. Each was designed to resolve difficulties in the common law in a particular area of contract law, whether that be illegality, mistake, remedies, or otherwise. These areas are not always discrete: in the complicated world of commercial dealings, they can overlap and intermingle. Often, the “legal” nature of a contractual problem is superimposed by the courts on a factual situation long after the formation or performance of the agreement in question. The Contracts and Commercial Law Reform Committee certainly never intended a comprehensive overhaul of the entire law of contract. Rather, it took on the reform of particular areas of contract law in piecemeal fashion.

Yet, while the many and varying circumstances which can give rise to contractual disputes may be complex, the statutes discussed in this section have approached these problems of contract law from a related perspective. While the Acts are all different, the policies behind them are similar. The development of these five contract statutes, all with an emphasis on judicial discretion to reach a “just and fair” result for the parties, was largely a response to three main problems with the common law of contract. These were that the law was often complex and highly technical; it did not always (or perhaps even often) achieve a just result; and certainty – “said to be so important in contract law” – was difficult to attain.⁶² It is clear from the reports of the Contract and Commercial Law Reform Committee that its members often did not envisage major changes to the existing law and wished to restrict the discretion that the statutes would grant. However, it should be equally clear that this wish has not always come true, and that the statutes have often been given expansive interpretations in the courts. This has often led some jurists to comment disparagingly on the statutes.

There have been two main lines of criticism. The first is that the statutes give individual judges too much discretion. Considering the Illegal Contracts Act, the Contractual Mistakes Act and the Contractual Remedies Act as a group, one scholar remarked that:

In all three statutes the prevailing premise is that the remedies of the parties may be determined (at least in certain circumstances) not by clearly defined criteria but by the individual judge’s measure of justice.⁶³

⁶² Burrows, “Contract Statutes: The New Zealand Experience” [1983] Statute LR 76, 77.

⁶³ Stephens, “Illegality and Contractual Mistake” (1981) 9 NZULR 390,397.

To some, certain provisions in these statutes raise images of the ghost of Selden, with the question of what is “just” being such a subjective concept that decisions will be made according to the length of the Chancellor’s (or judge’s) foot.⁶⁴ However, while concerns have been raised that giving effect to the discretion demanded by these Acts is something for which judges have no training or special abilities, it has also been emphasised that much of the common law depends on judicial discretion anyway.⁶⁵

The second key line of criticism hinges less on the role of judges in exercising discretion than on the statutes themselves. One scholar wrote that “[t]he great common law subject, moulded and developed by the judges over several centuries, is gradually being turned into a statutory edifice”.⁶⁶ Another wrote that “[t]he common law is not very well equipped to deal with codes”.⁶⁷ To some, it seems, the common law has a kind of purity that statute law cannot match.

But while some provisions of these contract statutes aimed only to codify existing legal principles, full codification was never intended. It was said that this “simply would not have worked”.⁶⁸ While the Minors’ Contracts Act and the Contractual Mistakes Act contain express provision that they are to be codes,⁶⁹ the other statutes contain no similar provision.⁷⁰ All list exceptions or “savings”: areas of law to which the statutes do not apply. The failure to provide proper definitions of the terms in a number of provisions – section 3 of the Illegal Contracts Act, for example⁷¹ – means that recourse to the common law is often necessary. Debate about the merits and pitfalls of codification continues.⁷²

⁶⁴ Dawson, *supra* note 1, at 57. See also Burrows, *supra* note 52, at 82: “[t]here is something approaching a statutory equity”.

⁶⁵ Burrows, *ibid*, 84, 87.

⁶⁶ McLauchlan, *supra* note 1, at 40.

⁶⁷ Dawson, *supra* note 1, at 44.

⁶⁸ Burrows, *supra* note 52, at 81, 96.

⁶⁹ Section 15, Minors’ Contracts Act 1969, and section 5, Contractual Mistakes Act 1977.

⁷⁰ Note, however, that section 7(1) of the Contractual Remedies Act 1979 provides, in part, that “[e]xcept as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity ...”. McLauchlan, “Contract Law Reform in New Zealand: the Contractual Remedies Act 1979” (1981) 1 OJLS 284, 286 also states that the Act operates as a code.

⁷¹ See Furmston, *supra* note 19 and additional comments.

⁷² See Dugdale, *supra* note 45; McLauchlan, *supra* note 45; and Coote, “The Contractual Mistakes Act as a Code: Some Further Thoughts” (2002) 8 NZBLQ 223, especially 229-231.

Other criticism lies somewhere in between these two lines of discourse. In stark response to a claim by the Contracts and Commercial Law Reform Committee that the statutes were not intended to alter the common law's general theory of contract, one commentator has written that these five statutes have "dramatically altered the law of contractual obligation in New Zealand".⁷³ New Zealand jurists, the writer continues, have been given the "daunting task" of assembling a new theory of contractual obligation "which will not only explain what role should be accorded to contractual autonomy under the statutory regime but which will also explain why it is appropriate for courts to interfere with the parties' own arrangements".⁷⁴

This statement was made in the mid-1980s. Since then, things seem to have settled down somewhat. Lawyers, academics and judges have all become more used to dealing with the statutes, and case law on their provisions has helped to clarify them in a number of respects. However, this does not mean that their operation has been entirely unproblematic. Indeed, concern over many aspects of these statutes among members of the legal community led to a review of them in the early 1990s. But this was not done by the Contracts and Commercial Law Reform Committee. By this time, the part-time committees had been replaced by the (full-time) New Zealand Law Commission. Before discussing this body, however, it is necessary to mention the "other" contract statutes.

8. Frustrated Contracts Act 1944 and Contracts Enforcement Act 1956

The five statutes already considered are not New Zealand's only statutes relating to contract law. The Frustrated Contracts Act 1944 and the Contracts Enforcement Act 1956 also cover general matters of the law of contract. These statutes, however, belong to a different era. Following one account of New Zealand's legal history, the years since 1960 can be seen as part of a "new wave of individuality and reform", with many areas of law undergoing "far-reaching change".⁷⁵ The five statutes examined above are clearly part of this "new wave". From about 1914 to 1960, however, "there was relatively little in the way of law reform", and what there was, was largely unoriginal.⁷⁶

⁷³ Dawson, *supra* note 1, at 57.

⁷⁴ *Ibid.*

⁷⁵ Spiller, P, Finn, J and Boast, R *A New Zealand Legal History* (1995) 78-79.

⁷⁶ *Ibid.*, 78.

The Frustrated Contracts Act 1944 is a striking example of this: it is “virtually identical” to the English Law Reform (Frustrated Contracts) Act 1943.⁷⁷ There have been few reported cases on the Act,⁷⁸ and it has been largely ignored by legal commentators. It has been suggested that, given that the Act does not work satisfactorily in all cases, changes allowing judicial discretion in the granting of relief would be beneficial.⁷⁹ Though the archaic language of the Act remains a problem, reform of this nature would bring the Act very much in line with the statutes already mentioned.

Little needs to be said about the Contracts Enforcement Act 1956, enacted principally in order to reform certain provisions of the Statute of Frauds 1677. In essence, the Act provides that certain contracts must be in, or evidenced by, writing – most prominently, contracts for the sale of land.⁸⁰ A paper by the New Zealand Law Commission has argued that the requirements of the Act are unjust (because the statutory requirements may give a technical defence to an otherwise meritorious claim), inconsistent (because many other contracts need not be evidenced by writing), overly complex, and a distraction from more substantive legal questions. As such, the Law Commission has recommended the repeal of the Act.⁸¹ This has not yet occurred.

9. Conclusion

This part of the article has examined a number of New Zealand statutes which regulate the general law of contract. It has considered the shared background of a number of them, and the policy behind the reforms that the statutes were intended to effect. It has also drawn attention to a number of important provisions and similar themes in the statutes, and the thoughts of both the courts and legal commentators on the operation of the Acts. The next section of this article steps aside from these particular statutes to look at the broader issue of consolidation Acts in general, and their role in the process of law reform.

⁷⁷ Burrows, “Frustration of Contract in *Contract Statutes Review*, NZLC R25, 275, 295.

⁷⁸ See eg *Harding v Coburn* [1976] 2 NZLR 577, *Karelyryfbfplot AO v Udovenko* [2000] 2 NZLR 24, and *van den Brink v Smith* [2001] 1 NZLR 103.

⁷⁹ See Burrows, *supra* n 77 at 295, 302-303: “Such an approach would be in accord with the [other] New Zealand legislation on contract”.

⁸⁰ Section 2(1)(a), Contracts Enforcement Act 1956.

⁸¹ *Repeal of the Contracts Enforcement Act 1956*, NZLC PP30 (1997) especially 5-9, 12. See also Dugdale, “Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956” (1998) 13 JCL 268.

III. CONSOLIDATION ACTS AND LAW REFORM

1. *What is a Consolidation Act?*

A consolidation Act is one which “comprehend[s] in one statute the provisions on a certain subject contained in a number of statutes, those former statutes being repealed”.⁸² In England, there is something of a presumption that consolidation Acts (or consolidating statutes, as they are sometimes called) do not change the law, making only “minor amendments and improvements, if any”.⁸³ However, this presumption is rebuttable, and is at least partly due to the fact that the English Parliament has historically had special procedures for the enactment of consolidation Acts.⁸⁴ In New Zealand, consolidation Acts are passed in the same way as other statutes, and no such presumption can be said to exist. Many so-called consolidation Acts have made substantial amendments to the law: “in New Zealand’s history there has been very little pure consolidation”.⁸⁵

2. *Jurisprudence of Consolidation*

Consolidation can be seen as “part of the process of keeping law up-to-date and reasonably accessible”.⁸⁶ The UK Law Commission has stated that consolidation “makes the law more comprehensible, both to those who apply it and those affected by it”.⁸⁷ There are clearly considerable benefits to this. However, consolidation Acts can also give rise to many problems. There may be inconsistencies between (or even within) statutes, and there can be difficulties in bringing together statutes from different times and different philosophies. In particular, there may be variations in expression and use of language, and inaccuracies in cross-referencing may also arise.⁸⁸

⁸² Odgers, cited in Burrows, “Consolidation Acts” (1983) 2 *Canta LR* 1.

⁸³ Cross, R, Bell, J and Engle, G *Statutory Interpretation* (2nd ed, 1987) 6, 170.

⁸⁴ Driedger, EA *Construction of Statutes* (2nd ed, 1983) 214.

⁸⁵ Burrows, JF *Statute Law in New Zealand* (2nd ed, 1999) 287. Burrows goes on to note at 92-93 that there is a long history of more general consolidation. The Reprint of Statutes Act 1895 set up a commission to examine the consolidation of all of New Zealand’s statute law. While this commission was not in full operation until 1903, by 1908 it had overseen the introduction of the Consolidated Statutes Enactment Bill, which repealed 806 statutes and enacted a schedule of 208 revised Acts to replace them.

⁸⁶ Burrows, *supra* note 82, at 1.

⁸⁷ Cited in Twining, W and Miers, D *How To Do Things With Rules: A Primer of Interpretation* (4th ed, 1999) 257.

⁸⁸ Burrows, *supra* note 82, at 6-7.

Another difficulty is in the extent to which earlier Acts remain pertinent. In *Miller v Lamb*, Stout J remarked that consolidation “would be a farcical proceeding if laymen or lawyers had to try to discover the law by perusing repealed statutes”.⁸⁹ Being forced to look back in this way would certainly seem to negate the gains in accessibility and comprehensibility in the law which consolidation is supposed to create. In *Farrell v Alexander*,⁹⁰ the House of Lords stated that there should be a strong policy against looking at antecedent statutes. But this approach is difficult to reconcile with the purposive approach to statutory interpretation, which involves looking into the mischief that the statute was originally designed to solve. It can also create problems of continuity: the law is hardly more comprehensible if case law interpreting the earlier Act is abandoned. In any case, the tide of authority in New Zealand generally goes against *Miller*, and favours looking into legislative history where appropriate.⁹¹

3. Law Reform

It should be clear by now that consolidation Acts in New Zealand often involve an element of law reform. A brief overview of the role of law reform organisations in New Zealand is thus apposite. The work of the Contracts and Commercial Law Reform Committee has already been mentioned. This was one of a number of part-time committees which, from 1966 to 1986, took on the task of examining options for reform in a particular area of law. From 1966, there were separate committees for contract and commercial law, property law and equity, public and administrative law, and torts and general law. Other committees for criminal law and evidence followed later.

In 1986, these part-time law reform committees were disbanded and the New Zealand Law Commission established in their place. The Law Commission differed from the committees in being staffed primarily by full-time members, and in being able to deal with all matters of law reform rather than only one particular area of law. The Minister responsible for the introduction of the Law Commission suggested that the work of the separate committees “did not add up to anything like the whole body of law”, and that many matters were dealt with “too superficially or far too slowly”.⁹² Far

⁸⁹ (1910) 20 NZLR 873, 879. This decision was made shortly after the consolidation project described supra note 85.

⁹⁰ [1977] AC 59.

⁹¹ See Burrows, supra note 85, at 285-286.

⁹² Palmer, “Systematic development of the law: The function of the Law Commission” [1986] NZLJ 104, 105.

broader law reform powers were hence in order. In the words of its first President, the subject matter of the Law Commission is “the entire field of the law of New Zealand”.⁹³ Since its establishment, the Law Commission has proved itself far more ambitious in law reform than the part-time committees ever were. It has undertaken law reform projects in a vast range of legal areas, from the interpretation of legislation to company law, evidence, and the structure of the courts. As we shall see, however, while some of its recommendations have been passed into law, others have, at times, been left to languish.

4. *Contract Statutes Review*

For our purposes, the most important law reform project the Law Commission undertook was a review of New Zealand’s main contract statutes in the early 1990s.⁹⁴ Both practising lawyers and academics were involved, and the original plan was to look at the five contract statutes discussed above: the Minors’ Contracts Act, the Illegal Contracts Act, the Contractual Mistakes Act, the Contractual Remedies Act, and the Contracts (Privity) Act. All but the first of these, as noted earlier, derived from the work of the Contracts and Commercial Law Reform Committee, and all of them placed considerable emphasis on judicial discretion in both deciding cases and granting remedies. Papers on other topics – such as the Frustrated Contracts Act, the “mistaken payments” sections (94A and 94B) of the Judicature Act 1908, and international contracts – were added later. The relationship between the Contractual Remedies Act and the Sale of Goods Act 1908 was also examined. The Commission commented that:

Overall, the general consensus was that little substantive change to the statutes would be helpful. In large part, this opinion was founded on the view that the statutes had worked well and that judicial interpretation of the statutes had clarified many issues in a way consistent with the general philosophy of the legislation. ... the Commission takes the view that no fundamental changes are called for at this time. There are, however, a number of less fundamental, but nevertheless significant, matters where legislation could usefully be proposed. ... The legislation which will be proposed in this report involves fine-tuning, designed to reduce uncertainties and eliminate minor drafting infelicities and anomalies.⁹⁵

⁹³ Woodhouse, “The new Law Commission” [1986] NZLJ 107. See also section 3, Law Commission Act 1985: “The purpose of this Act is to promote the systematic review, reform and development of the Law of New Zealand”.

⁹⁴ *Contract Statutes Review*, NZLC R25.

⁹⁵ *Ibid*, 4-5.

Material amendments to the Illegal Contracts Act, the Contractual Remedies Act, and the Contracts (Privity) Act were recommended by the Law Commission. In addition, general alterations to the statutes in terms of definitions, provisions concerning international jurisdiction, and Disputes Tribunal jurisdiction were proposed. A draft Contract Statutes Amendment Act was the result.

The heft of the Law Commission's report (it runs to over 350 pages) is a testament to the careful analysis that went into its consideration of New Zealand's statutory contract law regime. However, after the publication of the report in 1993, the proposals went largely unheeded for a number of years. It was not until late 2001 that a statute giving force to the Law Commission's recommendation was introduced into Parliament.

5. Statutes Amendment Bill

The Statutes Amendment Bill (No 2) 2001 was introduced to Parliament in December 2001 as an omnibus bill seeking to amend a large number of different statutes at once.⁹⁶ The Government Administration Select Committee reported back on the Bill in September 2002, and the Bill came into force in December of that year. The Bill touched on many areas of law, including New Zealand's contract statutes. Changes to some of the statutes already discussed were made through the Frustrated Contracts Amendment Act 2002, the Illegal Contracts Amendment Act 2002, the Contractual Mistakes Amendment Act 2002, the Contractual Remedies Amendment Act 2002, and the Contracts (Privity) Amendment Act 2002.

In some respects, these amendment Acts give force to the Law Commission's 1993 proposals. The definition of "court" in each statute is expanded to include reference to arbitral tribunals. Other minor alterations follow from this: in the Contractual Mistakes Act, for example, there is no need for a separate definition of "arbitrators". Recent changes in the jurisdiction of the Disputes Tribunals and District Courts also led to the repeal of certain sections, and new provisions relating to international jurisdiction have been added.

⁹⁶ "A Statutes Amendment Bill is defined in Standing Order 258(1)(e) of the House of Representatives as an omnibus bill because it consists entirely of amendments to Acts. It provides for unrelated and non-controversial amendments to a number of acts that are already in force. These amendments should be unrelated to the implementation of a particular policy objective" (from the introduction to the 2001 Bill). See also Jamieson, "How Many Acts Make a Bill?" (1984) 2 *Canta LR* 230.

Some more specific changes also follow the Law Commission's recommendations. The word "stipulation" has been replaced with the word "term" in section 7 of the Contractual Remedies Act. Section 8(1)(b) of the Contractual Remedies Act has also been changed to allow another exception to the general rules relating to cancellation that are in the Act. Finally, section 7(3) of the Illegal Contracts Act has been altered to allow the courts to consider certain factors not only in determining whether to grant relief, but also in determining the nature and extent of the relief to be granted.

6. Omissions from the Amendment Acts

However, not all of the Law Commission's 1993 proposals were given effect. Clause 6 of the Law Commission's Bill suggested a number of amendments to the Sale of Goods Act 1908. Section 13 was to be repealed, and new sections 39A and 55A were to be added. Other changes, including replacing the word "condition" with the word "term" in a number of places, were also proposed.

These proposals emerged because there are some difficulties harmonising the Sale of Goods Act with the Contractual Remedies Act. Section 15(d) of the Contractual Remedies Act provides that, with a few exceptions, nothing in that Act shall affect the Sale of Goods Act. The Law Commission noted that this would mean three different codes governing the cancellation of contracts:

- (a) the Contractual Remedies Act code for contracts other than sale of goods,
- (b) the Consumer Guarantees code for consumer sales,
- (c) the pre-Contractual Remedies Act for sales of goods other than consumer sales.⁹⁷

This was described as "obviously unsatisfactory",⁹⁸ and it certainly seems rather awkward, especially when it is remembered that section 60(2) of the Sale of Goods Act preserves common law rules relating to the sale of goods.⁹⁹ The inapplicability of most of the Contractual Remedies Act to contracts for the sale of goods creates "an unfortunate disharmony between the general law of contract and the law on one of the most important categories of contract".¹⁰⁰

⁹⁷ Dugdale and Walker, "Harmonisation of the Sale of Goods Act 1908 and the Contractual Remedies Act 1979" in *Contract Statutes Review*, NZLC R25, 111, 112.

⁹⁸ *Ibid.*

⁹⁹ See also *Moodie v Agricultural Ventures Ltd* [1998] 3 NZLR 129.

¹⁰⁰ See Burrows, "Performance and breach" in Burrows, Finn, and Todd, *supra* note 21, at 623, 667. In particular, there are difficulties in the different terminology used in the

7. Conclusion

The Statutes Amendment Bill and its associated amendment Acts, then, make a good number of cosmetic changes and a few material ones. However, some major proposals put forward by the Law Commission, such as the advised amendments to the Sale of Goods Act, were ignored. This means that the contract statutes will still not operate as smoothly as they could. It is of course entirely possible that this issue will be revisited at some stage, particularly since the disharmony continues to attract attention.¹⁰¹ Given the passage of time between the Law Commission's proposals and the emergence of the amendment Acts, however, it is conceivable that this issue will remain simmering for some time.

IV. A CONTRACTS (CONSOLIDATION) ACT

1. Introduction

It should be clear by now that law reform is a tricky business. There are many twists and turns to the process, and it often does not follow a pre-ordained plan. But this does not mean that systematic reform of the law is something to be dismissed. Endeavouring to improve the operation of the law is always an important task, and it is with this in mind that this paper turns towards its crux: the advocacy of a Contracts (Consolidation) Act for New Zealand. Keeping in mind that New Zealanders "tend to exhibit an innocent and misplaced faith in the efficacy of legislation", it is appropriate to keep in mind "[t]he basic question" of "*why is this law necessary?*"¹⁰²

2. What to Include in a Contracts Consolidation Act

The contract statutes discussed in Part 1 of this article all relate to contracts in general. As one scholar has put it, "[i]n English and New Zealand law (unlike some other systems) we start from the position that in principle the

two Acts. The Court in *Moodie* declined to comment on whether there is any difference between "rejection" under the Sale of Goods Act and "cancellation" under the Contractual Remedies Act (at 136). This reluctance highlights the need for further legislative intervention in this area. See Burrows at 667 for a discussion of other terminological difficulties.

¹⁰¹ Ibid.

¹⁰² Palmer, G and Palmer, M *Bridled Power* (3rd ed, 1997) 150.

law of contract is the same for all contracts”.¹⁰³ The words “in principle” are important here, because in practical terms there are many different statutory schemes regulating the formation and operation of contracts. The Sale of Goods Act is one example, applying only to sales of goods in commercial contexts. Similarly, the Land Transfer Act 1952 regulates specific aspects of contracts in relation to land, and the Employment Relations Act 2000 provides rules solely for contracts of employment. These are just a few examples among many. What they very quickly illustrate, however, is that trying to consolidate *all* legislation that encroaches upon the law of contract would be a near-impossible task. As already noted, consolidation should improve the accessibility of the law. Over-consolidation would make this notion a nonsense.

As such, it is essential that the Contracts (Consolidation) Act proposed in this paper remain accessible. The easiest and soundest way to do this is to restrict its scope to legislation on the general principles of contract law. The Frustrated Contracts Act, the Contracts Enforcement Act,¹⁰⁴ the Minors’ Contracts Act, the Illegal Contracts Act, the Contractual Mistakes Act, the Contractual Remedies Act, and the Contracts (Privity) Act all fall into this category. Each of them sets out principles that cover the law of contract generally; none is restricted to a particular area of contract law. They are also all relatively short. They could be collected (or consolidated) together in a way that would make the provisions within them more accessible, easier to understand, easier to amend and keep up to date, and easier to compare and use than they are at present.

3. Consistency

Consolidation also provides a good opportunity to analyse the extent to which the current contract statutes are consistent with each other. It has been stated that:

Effective consolidation should involve reconciling provisions which do not fit together, harmonising the style of provisions from different statutes, and removing anomalies.¹⁰⁵

¹⁰³ Burrows, “Some factors affecting modern contract law” in Burrows, Finn, and Todd, *supra* note 21, at 11, 29.

¹⁰⁴ Of course, the Contracts Enforcement Act could well be excluded, particularly in light of the Law Commission’s recommendation for its repeal. See *supra* note 32 and accompanying text.

¹⁰⁵ Burrows, *supra* note 82, at 1.

Overall, New Zealand's main contract statutes bear a striking degree of similarity. As was pointed out earlier, the Illegal Contracts Act, the Contractual Mistakes Act, the Contractual Remedies Act, and the Contracts (Privity) Act were all designed by the Contracts and Commercial Law Reform Committee. In addition, they all (along with the Minors' Contracts Act) share the "distinctive" features of being short in length and of conferring broad discretionary powers on the courts.¹⁰⁶ There is thus a great degree of commonality in the lineage of the statutes, helping to avoid the problem that different Acts may have different underlying philosophies.¹⁰⁷ Here, the underlying philosophies of the Act are largely harmonious.

The Statutes Amendment Bill also implicitly recognised a high degree of consistency in the mechanics of the statutes. The definitions of "court" in each statute, the non-applicability of the statutes to contracts governed by foreign law, and the removal of provisions on the jurisdiction of the District Courts and Disputes Tribunals all illustrate this consistency. The Law Commission's review did not find any glaring problems of inconsistency between the main statutes. As noted above, the Frustrated Contracts Act – which belongs to a different era to most of the other statutes – could be brought into line with the other statutes by giving the courts broader discretionary powers of relief.¹⁰⁸ A move like this would help consistency. And while the Contracts Enforcement Act remains somewhat anomalous, its provisions could either be repealed in line with Law Commission recommendations, or slotted into a Contracts (Consolidation) Act with relative ease.

¹⁰⁶ Dawson, *supra* note 1, at 42. One possible problem in this area is that the discretionary powers given to the courts by the different statutes are perhaps not entirely congruent. For example, section 6(1)(b)(i) of the Contractual Mistakes Act states that one of the factors for the courts to take into account in determining relief is whether the mistake(s) resulted in "a substantially unequal exchange of values". Section 7(4)(b) of the Contractual Remedies Act states, in part, that the right to cancel a contract exists if the effect of a misrepresentation or breach is: "(i) Substantially to reduce the benefit of the contract to the contracting party; or (ii) Substantially to increase the burden of the cancelling party under the contract". The word "substantially" appears in different places in these two Acts, and there is currently no case law on whether the word should mean the same thing when applying the different provisions. However, while points like this one illustrate that achieving consistency between different statutes and different provisions is difficult, this does not mean that consolidation is an impossible task, and nor does it undermine the considerable benefits of consolidation.

¹⁰⁷ Burrows, *supra* note 82, at 1.

¹⁰⁸ Burrows, *supra* note 77, at 302-303.

4. Accessibility

It was noted earlier that consolidation helps make the law more accessible. It is in the interests of a just and democratic society that laws be as accessible as they can,¹⁰⁹ and, indeed, one of the “principal functions” of the Law Commission is to advise the Minister of Justice on ways in which the law of New Zealand can be made “as understandable and accessible as is possible”.¹¹⁰ A Contracts (Consolidation) Act would certainly improve the accessibility of New Zealand’s main statutory provisions in the field of contract law. Rather than having to look at six or seven different statutes, scattered around many different volumes of legislation, both lawyers and laypeople would only need to go to one source. For some users of legal material, this would be of considerable help. Of course, the case law interpreting the provisions of such an Act would remain scattered. But the accessibility of the law in this area would be improved.¹¹¹

Describing the law would also be easier. Rather than talking of “section 7 of the Illegal Contracts Act, section 7(3) of the Contractual Mistakes Act, and section 9(1) of the Contractual Remedies Act” as all giving discretionary powers of relief to judges,¹¹² commentators discussing the Contracts (Consolidation) Act would have a much more uniform legal tool at their disposal. If the discretionary sections were properly grouped together (keeping in mind the difficulties raised in note 107), then remedial options available in different contractual disputes would be clearer and easier to understand. Ease of accessibility can thus help simplify commentary and description of the law, again improving its usefulness for both lawyers and laypeople.

5. Ease of Amendment and Law Reform

Another general point in favour of consolidation is that it can help make the law easier to amend, and keep up to date. The Law Commission’s proposals for change to the contract statutes illustrate that they cannot be expected to remain relevant all on their own: regular amendments will often be necessary. Consolidation would almost certainly make this amendment

¹⁰⁹ Palmer and Palmer, *supra* note 102, at 163.

¹¹⁰ Section 5(1)(d), Law Commission Act 1985.

¹¹¹ As one commentator has observed (albeit in support of full codification): “It would be an advantage to have a clear and accessible statement of the basic New Zealand Law of Contracts” (Sutton, “Commentary on ‘Codification, Law Reform and Judicial Development’” (1996) 9 JCL 200, 203).

¹¹² See Stephens, *supra* note 53, at 397.

process easier. Instead of five different amendment Acts to change the definition of “court” in five different statutes, a well designed Contracts (Consolidation) Act would only require one amending clause. This point is pertinent to further reform as well, especially since the amendment Acts did not give force to all of the Law Commission’s recommendations. Of course, the amendment Acts arising out of the Statutes Amendment Bill show that the contract statutes can be kept up to date without the kind of consolidation advocated in this article. But this does not take anything away from the fact that amending one Act would be a much simpler task than amending five or more different statutes.

While on the topic of amendment, some specific points concerning law reform deserve to be noted. In particular, the relationship between section 9 of the Contractual Remedies Act and the common law is in need of some clarification. Section 9(2)(b) gives judges the discretion to award “such sum as the Court thinks just”. There has been some debate over whether this provision allows the court to award sums equivalent to the damages that would normally be available at common law.¹¹³ The Contracts and Commercial Law Reform Committee did not, it appears, intend that section 9 replace standard awards of damages, but rather that it work as a device to allow court orders for immediate transfers of funds while damages considerations were pending.¹¹⁴ However, a number of cases indicate that the courts have been unwilling for section 9 to be “read down”: the judiciary has preferred a more expansive interpretation.

*Newmans Tours Ltd v Ranier Investments Ltd*¹¹⁵ is one example. In the High Court, Fisher J interpreted the section 9 quest for a “just” solution as encapsulating common law damages, though the principles underlying the common law were not, he felt, to be ignored. The Court of Appeal in both *Newmans*¹¹⁶ and *Thomson v Rankin*¹¹⁷ took a similarly expansive view. The Court observed in the former that the ambit of section 9 could extend beyond traditional common law damages, and commented in the latter that section 9 could be a valuable instrument in achieving justice without being reined in by common law principles.¹¹⁸

¹¹³ Much of the discussion on this point is taken from Todd, *supra* note 51, at 807 and following.

¹¹⁴ See *supra* note 46, at 22.

¹¹⁵ [1992] 2 NZLR 68.

¹¹⁶ *Coxhead v Newmans Tours Ltd* (1993) 6 TCLR 1.

¹¹⁷ [1993] 1 NZLR 408.

¹¹⁸ *Ibid.*, 410. See Todd, *supra* note 46, at 809.

Decisions like these show that concerns that section 9 would operate as a “super-remedy”¹¹⁹ were not entirely unfounded. As one commentator has noted:

From a relief provision designed to be of modest scope, the courts have fashioned a completely new discretionary remedy for enforcement, occupying the whole ground previously covered only by the common law of damages, but untrammelled by the constraints of the common law.¹²⁰

This particular issue is not *necessarily* one for the legislature to solve – the granting of such wide discretion to the courts in the first place indicates that some abrogation of control over matters in this area was intended by the legislature – but it remains a point of some concern. Careful redrafting of section 9 could make the section more restrictive, though the counterweight to this would naturally be some loss to discretionary justice in individual cases. This article is not the proper forum for a full analysis of the merits of such a change. It should suffice to say that an issue like this highlights that there is scope for a Contracts (Consolidation) Act to consolidate *and* amend aspects of the law of contract.

V. CONCLUSION: THE WAY FORWARD

A whole generation of New Zealand lawyers has now grown up with the New Zealand contract statutes. They have become an important part of the commercial landscape, and, as shown in part one of this article, a rich and substantial jurisprudence has developed around them.

This article has argued that the provisions of these statutes should be collected together into a Contracts (Consolidation) Act. There are considerable benefits in consolidation. The proposed Act would make the law in this area more accessible, more consistent, and easier to amend. It could also provide an impetus for reform in certain areas.

The notion of a Contracts (Consolidation) Act is a simple idea, but one that deserves serious consideration by the Law Commission and the Government. Should they do so, the next generation of lawyers, jurists and judges would be grateful, for reasons both pragmatic and principled.

¹¹⁹ See *supra* note 49 and accompanying text.

¹²⁰ Coote, “The Changing New Zealand Law of Damages in Contract” (1996) JCL 159, 161. See also Coote, *supra* note 50.

A NEW MODEL OF APPLICATION OF INTERNATIONAL LAW IN NATIONAL COURTS: A TRANSJUDICIAL VISION

BY JULIAN HERMIDA*

I. INTRODUCTION

This article explores the interplay between International Law and domestic law with the view to proposing a model for departing from the traditional pattern of application of international law in domestic courts.

For this purpose, the article first discusses the prevailing paradigm of application of international law on the domestic plane. Since much has been written about this topic, my emphasis is on the shortcomings of this model. To illustrate and exemplify its disadvantageous results, I shall analyse the United States judicial decision in *Lisi v Alitalia* as a paradigmatic case and I shall contrast it with an analysis in another jurisdiction.

Secondly, I shall analyse existing proposals to depart from the traditional model of application of international law. In particular, I shall analyse the transjudicial model as well as other ideas propounded by feminist, Critical Legal Studies' advocates and Canadian and United States legal scholars, which have been favourably received by the international legal community. While these proposals share the discontent with the current paradigm, they do not provide a viable solution to overcome its weaknesses. On the contrary, my view is that sometimes these alternatives exacerbate its contradictions and disparities.

Finally, I shall outline the main features of the proposed model for application of international law in domestic jurisdictions. This model calls for ample non-hegemonic participation of the international community in the adjudication process. It borrows its essence from the vision of collective deliberation advocated by transjudicialism theories and draws on the profound discomfort with the International Court of Justice's application of the intervention procedures. Additionally, it echoes Chinkin's call for a rupture with a purely bilateral conception of international dispute resolutions. Succinctly, the proposed model calls for participation of

* DCL (McGill University), Visiting Fellow, Lauterpacht Research Centre for International Law, University of Cambridge. I thank the Lauterpacht Research Centre for International Law, where research for this article took place. In particular, I thank Professor James Crawford, Daniel Bethlehem, Roger O'Keefe, Anne Skinner, Sarah Heathcote and Ruosi Zhang.

interested and potentially affected international parties in the adjudication process of domestic jurisdictions, with a view to providing decisions with a more legitimate and non-hegemonic nature.

This article adopts a socio-legal perspective in analysing both the shortcomings of the traditional method of application of international law and the proposed solution to overcome these shortcomings. It advocates for a radical change in the dominant conception of international law and moves beyond superficial claims as to the ineffectiveness of international law.

II. TRADITIONAL MODEL OF APPLICATION OF INTERNATIONAL LAW IN DOMESTIC COURTS

1. Non-participatory Process and Intrinsic Methodology

The traditional model of application of international law in domestic courts has been dominated by a non-participatory adjudicatory process. This process has been based on a predominantly bilateral conception of dispute resolution and internal methods of interpretation of international sources that are concerned only with an intrinsic examination of the legal texts in light of a systematic order that is considered determinative.¹ Under this conception, the role of the domestic courts is limited to ascertaining in dichotomic terms which normative set (national or international) should be applied to a specific case.² When the court opts to employ an international source it often does so under a domestic and often hegemonic rationale, even if it purports to do otherwise.³ This process has resulted in a widely varied case law and unjustly diverse consequences, even in areas where the law has been amply harmonized.⁴ The example of the selected case discussed below, *Lisi v Alitalia*,⁵ illustrates how the domestic court's principles, rules, methodology and historic characteristics, together with its political view, have shaped a

1 Weber, M *Economy and society: an outline of interpretive sociology* (1978) 657; and Bakan, J *Just Words: Constitutional Rights and Social Wrongs* (1997) 5.

2 Knop, "Here and There: International Law in Domestic Courts" (2000) 32 NYUJ Int'l L. & Pol 501.

3 Zoller, E *Droit des relations exterieures* (1992); Franck, Thomas M *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (1992). Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 Eur J Int'l L 159; and Slaughter, "A Typology of Transjudicial Communication" (1994) 29 U ich Rev 118.

4 Miller, G *Liability in International Air Transport: The Warsaw System in Municipal Courts* (1977) 1.

5 *Lisi v Alitalia-Linee Aeree Italiane, SpA* 370 F 2d 508, 514 (2d Cir 1966).

decision with diametrically different results in other jurisdictions, even under identical or similar facts.⁶

2. *The Adjudication Process in the Domestic Sphere*

My analysis of the traditional method of application of international law in the domestic jurisdiction is grounded upon the premise that there is no rational process of interpretation of legal texts, whether international or national. Hence, the process of adjudication of international legal controversies in domestic courts⁷ is a process of resorting, consciously or unconsciously, to the values, objectives, political perspectives, and ideology of the court that decides a legal controversy.⁸ Because the process is rooted in a bilateral paradigm of dispute resolution, and consequently without any meaningful participation of the international community, there are no counterweights or barriers to the power of the domestic court. Underlying these premises is the idea that an internal judicial review of the international legal norms by resorting only to the canons of construction generally recognised by the international community⁹, such as textual, contextual, objective and purposive interpretation of international norms in a predominantly bilateral and non-participatory adjudicative process, may only lead to results which serve to accommodate national policy to the detriment of obligations assumed at the international level.¹⁰ Thus, the

6 *Ludecke v Can Pac Airlines Ltd* [1979] 98 DLR 3d 52 (Can).

7 Erades, "International Law, European Community Law and Municipal Law of Member States" (1966) 15 ICLQ 120.

8 Milovanovic, D *Sociology of Law* (1994) 40.

9 Article 31 of the Vienna Convention holds that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

10 Zoller, *supra* note 3; Franck, *supra* note 3; Benvenisti, *supra* note 3; and Slaughter, *supra* note 3.

adjudication process in national courts is at best a meaningless task and at worst the mere disguise in technical and legal costumes of the political, economic and social values of the state where the court is located.¹¹

To illustrate these views I shall resort to the analysis of a paradigmatic case of interpretation of an international convention by a United States court. This examination is intended as an exploratory and explicative path to highlight the shortcomings of the traditional model of application of international law in the domestic sphere. Thus, this analysis is not based on a quantitative sample of cases. Rather it seeks to identify, in this paradigmatic case, the typical features which the legal and socio-legal literature has identified as recurring in a myriad of cases.¹²

Lisi v Alitalia concerned an accident involving an Alitalia airplane that crashed in Ireland while en route from Rome to New York. The United States Court of Appeals for the Second Circuit rejected a literal and unambiguous interpretation of article 3 (2) of the Warsaw Convention.¹³

The Warsaw Convention¹⁴ created a uniform system that allocates the major risks arising from international carriage to the passenger and consignor by imposing very low limits of liability.¹⁵ For this purpose, the Convention established a fault liability regime for sustained damage in case of the death, wounding or any other bodily injury of the passenger,¹⁶ for the destruction or loss of or damage to baggage and cargo,¹⁷ and for delay.¹⁸ As a *quid pro quo*

11 Cotterrell, R *The Sociology of Law* (1984) 216.

12 Tomasic, R *The Sociology of Law* (1985) 55; and Todres, "Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and Its Early Case Law" (1998) 30 Colum Human Rights L Rev 159.

13 *Lisi v Alitalia-Linee Aeree Italiane, SpA* 370 F2d 508, 514 (2d Cir 1966).

14 Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat 3000, 137 LNTS 11. The Warsaw Convention System refers to the instruments adopted to amend, supplement or modify the Warsaw Convention.

15 These were not only expressed in terms of monetary caps, but they were also "artfully camouflaged in a thicket of convention articles". In effect, apart from the limitations contained in article 22, the WC limits recovery only to sustained damages. So, punitive and other non-compensatory damages may not be awarded. The lack of compensation for non-bodily injuries also entails a significant limitation of liability, as well as the concept of accident in article 17. See Hermida, "The New Montreal Convention: The International Passenger's Perspective" (2001) 26 Air & Space Law 150.

16 Warsaw Convention, article 17.

17 *Ibid*, article 18.

for the limitation of liability, the Warsaw Convention shifted the burden of proof so that the air carrier is presumed liable unless it can meet the necessary measures standard.¹⁹ However, the Convention also engineered a formalistic regime, which unified the format and the legal significance of relevant documents. The Convention linked these formalities with the airline's liability, as its failure to comply with these formal requirements permits the international passenger to escape the limits of liability.²⁰

Alitalia argued that its liability was limited as clearly proscribed by the provisions of article 22 of the Warsaw Convention and by the language of article 3, which makes it clear that the only ground for denying the limitation of liability is the carrier's failure to deliver a ticket. In analysing the validity of Alitalia's arguments, the Court in *Lisi* relied on two previous decisions of US domestic courts, the *Mertens*²¹ and *Warren*²² cases, thus ignoring the text, object, purpose and context of the Warsaw Convention as well as the practices of other parties to the Convention.²³ In the *Mertens* and *Warren* cases, the United States courts had elaborated a test to determine whether the limits of liability were applicable to international airplane accidents when the airline had not fully complied with the documentation requirements of the Convention. The test revolved around the question of whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures. In other words, the test probed to determine if there had been adequate delivery of the ticket to the passenger.²⁴ However, when the *Lisi* Court proceeded to determine whether the tickets given by Alitalia met this requirement, it actually analysed whether there was adequate notice instead of adequate delivery. It quoted obiter dicta of the *Mertens* and *Warren* cases, where *en passant* the Courts had stated that the statements were printed in virtually unreadable form. The *Lisi* Court went even further by maintaining that, even if a passenger could read the printing on the ticket, it was unlikely that he would understand the meaning of its language. Therefore, the Court held that the tickets given by the airline to the passengers did not adequately give notice of the applicability of the Warsaw Convention and thus, contrary to

18 Ibid, article 19.

19 Ibid, article 20.

20 Hermida, *supra* note 15, at 150.

21 *Mertens v Flying Tiger Line, Inc* (1965, CA2 NY) 341 F2d 851.

22 *Warren v Flying Tiger Line, Inc* (1965, CA9 Cal) 352 F2d 494.

23 Miller, *supra* note 4, at 1.

24 *Warren v Flying Tiger Line, Inc*, *supra* note 22; *Mertens v Flying Tiger Line Inc*, *supra* note 21.

the clear provisions of the Warsaw Convention, Alitalia was not entitled to avail itself of the limitation of liability defences.²⁵

Another court, the Canadian Superior Court (District of Montreal), analysed almost identical facts under the same international treaty, in *Ludecke v Canadian Pacific Air Lines*. The Canadian Court reached a substantially different conclusion. The *Ludecke* court stated that:

the words of [Article] 3(2) are plain and can admit of no misunderstanding. The absence, irregularity or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage.²⁶

Consequently, the Court held that the limitation of liability is forfeited only if no ticket is delivered. The Canadian court emphasised that American courts had ignored the plain meaning of the Convention and “failed to give effect to a precise statement of the law”.²⁷

The *Lisi* Court’s reading of the Convention constitutes a paradigmatic, albeit exacerbated, example of a domestic court analysis of an international treaty. The *Lisi* Court applied the traditional intrinsic canon of interpretation of international treaties, in a non-participative process, which permitted almost any reading of a text under the facade that the text constrains a certain, correct interpretation²⁸. Therefore, the Court arrived at a conclusion which radically deviated from the consensus reached during the negotiation of the treaty and the prevailing interpretation of the Convention by other state parties.²⁹ The decision of the *Lisi* Court is a clear reflection of the United States’ active diplomatic policy at the time to change the Warsaw Convention as a result of pressures of the American Association of Trial Lawyers and other United States interest groups.³⁰ Thus, the *Lisi* Court

25 *Lisi v Alitalia-Linee Aeree Italiane, SpA*, supra note 13.

26 *Ludecke v. Canadian Pacific Airlines Ltd* 98 DLR 3d 52 (1979).

27 *Ibid.*

28 Bakan, supra note 1, at 5.

29 Furthermore, it disregards the text of the Convention, which makes it clear that the only ground for denying the limitation of liability in an international flight is the carrier’s failure to deliver a ticket, not the inadequacy of the ticket as suggested by the Court. The interpretation of the *Lisi* Court also deliberately ignored the main purpose and object of the Convention, which clearly sought to limit the liability of the international airline carrier, as well as its context seen in light of the subsequent practice in the application of the treaty by other parties to the Convention regarding its interpretation.

30 Hermida, supra note 15, at 150.

translated the demands of the official United States' policy position into its judicial decision. In this obvious and unmasked position, the *Lisi* Court blatantly disregarded all interpretations that are more respectful of the consensus arrived at by the international conference and crystallised in the text of the international convention,³¹ in order to impose changes to a convention which United States' diplomacy at the time was unable to achieve.

3. Internal Interpretation of International Norms

An internal interpretation of legal sources³² in non-participatory adjudicative processes, which is the dominant canon of construction of international law (as in the *Lisi* case), is concerned with an intrinsic examination of the legal texts in light of a systematic order that is considered determinative.³³ Internal interpretation has taken several forms, which include textual, contextual and even purposive interpretations. All these methods of interpretation, albeit in a less systematic form, have long been present in customary international law³⁴ and have been codified in the Vienna Convention on the Law of Treaties.³⁵

These methods share the common feature of trying to elucidate the meaning of a provision by looking at the provision itself or other related circumstances.³⁶ For advocates of this internal interpretation method, the legal method is itself a form of constraint, but this ultimately derives from the adjudicator's reading of the text.³⁷ For this interpretation school, on the domestic plane judges must decide cases within the accepted method of the legal profession. This means that judges must cite precedent and statutory provisions, decide cases in accordance with general principles of law, and provide public justifications for their outcome.³⁸

31 Slaughter Burley, "International Law And International Relations Theory: A Dual Agenda", (1993) 87 AJIL 221.

32 Weber, supra note 1, at 657.

33 Ibid.

34 *Restatement (Third) of the Foreign Relations Law of the United States* 325.

35 Sinclair, I *The Vienna Convention on the Law of Treaties* (1984) 115.

36 Villiger, Mark E *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (1997) 327.

37 Weber, supra note 1, at 657.

38 Lazos Vargas, "Democracy and Inclusion: Reconceptualising The Role of The Judge In a Pluralist Polity" 58 Md L Rev 150.

The resort to national courts for the resolution of international disputes has been widely adopted in international treaties, especially in the criminal law realm, as the domestic legal system is capable of supplying the power of coercion that the international legal system usually lacks.³⁹ But, as warned by Knop, this reinforces the hegemonic nature of the traditional model of application of international law.⁴⁰

On the international plane, little else, if anything, is required from the adjudicators for the issuance of a judgment. For example, the Rules of Court that govern the procedure before the International Court of Justice only require the court to make explicit the reasons in point of law.⁴¹ Undoubtedly, this leaves ample leeway to judges to reach decisions without any constraint, provided that the court offers some legal reason of the question over which it ruled, even if this reason is completely arbitrary or it does not have any legal grounds. The decisions of the highest international tribunal are plagued with examples which clearly show that there is nothing in the interpretation method that constraints its members to reach any type of decision. To illustrate this point, suffice to recall the International Court of Justice's decision in the *Nuclear Tests* cases.⁴² Here the Court found that France had committed itself by unilateral declarations that it would refrain from further tests, so that the claims of Australia and New Zealand had become moot and no longer had any object.⁴³ However, there is no legal basis for this decision in the International Court of Justice judgment other than perhaps a vague reference to the principle of good faith. Neither state practice nor general

39 Ratner, "International Law: The Trials of Global Norms", *Foreign Pol'y*, Spring 1998, 65.

40 Knop, *supra* note 2, at 516.

41 Article 95 states: "The judgment, which shall state whether it is given by the Court or by a chamber, shall contain: the date on which it is read; the names of the judges participating in it; the names of the parties; the names of the agents, counsel and advocates of the parties; a summary of the proceedings; the submissions of the parties; a statement of the facts; the reasons in point of law; the operative provisions of the judgment; the decision, if any, in regard to costs; the number and names of the judges constituting the majority; a statement as to the text of the judgment which is authoritative" (International Court of Justice, Rules of Court (1978) as amended on 5 December 2000, article 95).

42 *Nuclear Tests Cases (Australia v France)* [1974] ICJ Rep 253, 267, and (*New Zealand v France*) [1974] ICJ Rep 457, 472.

43 Rubin, "The International Legal Effects of Unilateral Declarations," 71 *Am J Int'l L* (1977); Lellouche, "The Nuclear Tests Cases", 16 *Harv Int'l LJ* 614 (1975); and McWhinney, "International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case", 3 *Syracuse J Int'l L & Com* 9 (1975).

principles reveal a consensus supporting an international obligation to be created by a unilateral declaration.⁴⁴

As the International Court of Justice's decision in *Nuclear Tests* and the United States judgment in *Lisi* clearly demonstrate, there is nothing in the international legal text itself that compels or even suggests that a certain legal provision should be read in a certain way. Nor would the legal method as such prescribe any particular reading.⁴⁵ This, as is clearly shown in the analysed examples, renders the text meaningless. The reasonableness theory with which courts dress their decisions does not establish control of the outcome except in the formal sense.⁴⁶ Even resort to notions of balancing interests or search for equitable situations can hardly determine a specific result.⁴⁷ The use of these notions merely reveals that the grounds for the decision emanate exclusively from the courts' ideological positions.⁴⁸ Therefore, in practice, under the traditional method of application of international law in a domestic court while adjudicating a case with international dimensions, courts do not have any legal constraints to decide the case. This process often results in the court applying, consciously or unconsciously, its own political and legal values and principles.

4. *Intervention in International Cases*

The lack of meaningful participatory mechanisms for the adjudication of international law disputes leaves countries virtually free to apply the intrinsic interpretation methodology, which often translates into hegemonic outcomes. The participation in the judicial procedures of members of an international convention which are not parties to the dispute with the faculties to intervene, and where their positions are to be taken into consideration for the resolution of the dispute, would constrain the courts to produce a judgment more in consonance with the general consensus of the parties to the convention as crystallised in the text. However, the

44 Rubin, *ibid*, and Lellouche, *ibid*, at 2.

45 For example, as discussed above in the *Lisi* case, the Court disregarded the clear language of the Convention and actually read in the adequate notice which was not present in the Convention by interpreting that the passenger must have notice of the limitation of liability.

46 Corten, *L'utilisation du raisonnable para le juge international: Discours juridique, raison et contradictions* (1997) 5.

47 Corten, *ibid*; Frank, *J Courts on trial: myth and reality in American justice* (1949) 1.

48 Moran, "A Radical Theory of Jurisprudence: The "Decisionmaker" as the Source of Law -- The Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine as a Model 1997" 30 *Akron L Rev* 393.

participatory mechanisms which currently exist in national and international processes are very limited and do not afford non-members to a dispute the possibility actually to shape the outcomes envisaged by the treaty.

On the international plane judicial intervention has a very narrow and limited scope, which has been the object of ample criticism.⁴⁹ The Statute of the International Court of Justice⁵⁰ provides two forms of intervention: the so-called discretionary or third party intervention (article 62) and intervention as of right or treaty intervention (article 63).

Article 62 permits a state, which considers that it has an interest of a legal nature that may be affected by the decision in a case, to submit a request to the court to be permitted to intervene.⁵¹ In other words, under this form of intervention, the Statute of the Court makes it possible for a state to intervene in a dispute between other states when it believes that it has an interest of a legal nature. Any third state thus seeking to intervene in the case should normally file its request for permission to do so before the closure of the written proceedings in the principal case.⁵² The International Court of Justice held that “it is normally by reference to the definition of its interest of a legal nature and the object indicated by the State seeking to intervene that the Court should judge whether or not the intervention is admissible.” However, the term interest is not defined in the Statute of the Court or anywhere else. Article 62 does not provide any basis for defining the scope of the interest.⁵³

49 Chinkin, “Third-Party Intervention Before the International Court of Justice”, 80 AJIL 495.

50 Statute of the International Court of Justice, article 63.

51 *Ibid*, article 62.

52 Fiji sought permission to intervene in the Nuclear Tests cases, as did Malta in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Italy in the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Nicaragua in the case concerning the Land, Island and Maritime Frontier Dispute, and Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia with respect to the Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case. The only one of these applications for permission to intervene to have been granted by the Court was the one filed by Nicaragua.

53 The express wording of Article 62 is thus not restrictive. It is phrased subjectively and the only requirement is that the state must consider that its interests might be affected. Chinkin, *supra* note 49, at 495.

Article 63 intervention applies whenever the construction of a convention to which states, other than those concerned in the case, is in question. In that case, the Registrar will notify all such states the right to intervene in the proceedings, but if they use this right the construction given by the judgment will be equally binding upon them.⁵⁴ Article 63 provides for intervention as of right by other parties to a convention where its construction is in issue before the court. The underlying policy behind this intervention procedure is that, since parties to a treaty are bound by it, all parties necessarily have an interest in its construction. Thus, parties to a convention where its construction is in issue should be given an opportunity to express their preferred interpretation to the Court before that body reaches its decision.⁵⁵

These articles clash with the clear provisions of the *res judicata* principle contemplated in article 59 of the statute, which reads that “the decision of the Court has no binding force except between the parties and in respect of that particular case”.⁵⁶ This has led Chinkin to wonder if intervention is ever possible if this article means what it says.⁵⁷

Several states have presented Declarations of Intervention in terms of article 63.⁵⁸ However, applying very narrow parameters for admission of intervention, the International Court of Justice only accepted the intervention in the *Haya de la Torre* case.⁵⁹ In this case, the Court examined the admissibility of the Cuban Government’s intervention. Cuba, invoking article 63, had filed a Declaration of Intervention in which it set forth its views concerning the interpretation of the Havana Convention. Peru contested the Intervention and the Court held that:

54 A declaration of intervention may be made even though the Registrar has not given the notification, but it should normally be filed before the date fixed for the opening of the oral proceedings relating to the principal case.

55 Chinkin, *supra* note 49, at 495.

56 Statute of the International Court of Justice, article 59.

57 *Ibid*, at 2.

58 In Wimbledon, Poland obtained treaty intervention in the case brought by France, Great Britain, Italy and Japan against Germany in a disputed dealing with the Treaty’s Kiel Canal provisions, PCIJ, ser A, No 1, 11 (1923). El Salvador requested intervention in the case concerning Military and Paramilitary Activities in and against Nicaragua, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia requested intervention with respect to the Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case.

59 *Nuclear Tests (Austl v Fr; NZ v Fr)*, Application to Intervene 1974 ICJ Rep 530, 535 (Orders of Dec 20).

[the] Court observes that every intervention is incidental to the proceedings in a case, that, consequently, a declaration filed as an intervention only acquires that character if it actually relates to the subject-matter of the pending proceedings [...]. In these circumstances, the point which it is necessary to ascertain is whether the object of the intervention is the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee: as according to the representative of the Government of Cuba the intervention was based on the fact that it was necessary to interpret a new aspect of the Havana Convention, the Court decided to admit it.⁶⁰

In the *Libya v Malta* case, Italy filed an application to intervene under Article 62 of the Statute. Both parties to the dispute objected to the intervention and the Court held that “if it were to admit the Italian contention, it would thereby be admitting that the procedure of intervention under Article 62 would constitute an exception to the fundamental principles underlying its jurisdiction: primarily the principle of consent, but also the principles of reciprocity and equality of States”. The Court considered that “an exception of this kind could not be admitted unless it were very clearly expressed, which was not the case”. It therefore considered that “appeal to Article 62 should, if it were to justify an intervention in a case such as that of the Italian Application, be backed by a basis of jurisdiction”. Similarly, in *Tunisia v Libya*, Malta was not permitted to intervene because it failed to demonstrate with sufficient clarity the interest of a legal nature that could be affected by the judgment.⁶¹ The language of Article 62 is not restrictive. It is phrased subjectively and the only requirement is that the state must consider that its interests might be affected.⁶² However, the Court interpreted otherwise and restricted the possibility of intervention.

In the *Nuclear Tests* cases, the International Court of Justice laid down a series of restrictive rules to deny the possibility of intervention. It confirmed the incidental nature of intervention by dismissing the request for intervention where the main dispute was no longer litigated.⁶³ The Court held that the subject-matter of the proposed intervention must bear a sufficiently close connection to the proceedings for intervention to be permissible. The Court further held that its competence to consider the

60 *Haya De La Torre Case* Judgment of 13 June 1951, International Court of Justice.

61 Rosenne, *S Intervention in the International Court of Justice* (1993).

62 Chinkin, *supra* note 49, at 495.

63 Request for an Examination of the Situation with Paragraph 63 of the Court's Judgment

of 20 December 1974 in the *Nuclear Tests (New Zealand v France) Case*.

request for intervention may be based on this nexus, not the normally applicable principle of consent, a conclusion that has been strongly resisted by a number of judges.⁶⁴

The most remarkably restrictive case of denial of intervention concerned El Salvador's request in the dispute between Nicaragua and the United States,⁶⁵ where the Court declared El Salvador's effort to intervene inadmissible insofar as it related to the jurisdiction/admissibility phase of the case.⁶⁶ El Salvador wanted to support the United States in its jurisdictional arguments and to contest the admissibility of Nicaragua's application. El Salvador based its grounds for intervention on its membership to the Statute of the Court treaty and other treaties of general scope. However, the Court rejected El Salvador's intervention by holding that its request was premature without any further substantive justification for its decision.⁶⁷

The jurisprudence of the International Court shows that the possibility of meaningful intervention in disputes is seriously restricted to only a handful of situations. This confirms Rosenne's contention that:

the legislative history of these two provisions [...] suggests that little attention was paid to the implications of their inclusion in the Statute, or to the legal significance of the language used in 1922, and altered ... in 1945. Little wonder that the subsequent evolution of the concept or concepts of intervention [...] has been fraught with difficulties and uncertainties which have still not been dissipated.⁶⁸

Chinkin's thesis is that bilateralism is no longer appropriate as the paradigm model for the regulation of activities in the international arena.⁶⁹ As she herself puts it forward, "all members of the international community share an interest in the outcome of all claims".⁷⁰ Chinkin maintains that the actions of any two states have an impact upon the interests of other states and of other participants in international and municipal arenas.⁷¹ Chinkin states:

64 Chinkin, *supra* note 49, at 495.

65 *Military and Paramilitary Activities In and Against Nicaragua (Nicar v US)* 1984 ICJ 215, 216 (Declaration of Intervention, Order of Oct 4).

66 Murphy, "Amplifying the World Court's Jurisdiction through Counter-Claims and Third-Party Intervention", 2000 33 *Geo Wash Int'l L Rev* 5.

67 Chinkin, *C M Third Parties in International Law* (1993) 179.

68 Rosenne, *supra* note 61.

69 Chinkin, *supra* note 67, at 147.

70 *Ibid.*

71 Schwebel, "Third Parties in International Law. Book Review" (1995) 89 *AJIL* 835.

the bilateral formulation by parties of cases for presentation before adjudicative tribunals frequently does not take into account the multifaceted interests characteristically at stake in international disputes. International situations that culminate in claims are rarely bilateral, although it may be in the parties' interests to present them as such. More frequently the actions and reactions of States in their international dealings will impinge on the interests of other participants. [...] Yet when the decision is made to resort to adjudication or arbitration these third party interests are minimised, and the dispute is presented before the tribunal as bilateral.⁷²

On the domestic plane, the situation is not very dissimilar. Even if a vast number of states contain norms permitting judicial intervention, it is also very narrow and does not allow ample participation of non-parties, especially those whose only interest in the dispute is the interpretation of an international norm to which they are parties. For example, in the United States,⁷³ intervention at the federal level takes the form of intervention of right and permissive intervention. The former occurs when an applicant claims, in a timely manner, an interest which is not protected by the parties to the dispute.⁷⁴ There is a tripartite test to satisfy before a non-party may be admitted as an intervention of rights. This test probes (i) whether there is a significantly protectable interest in the claim,⁷⁴ (ii) whether the ability to protect the interest may be impeded or impaired by not allowing the non-party into the case,⁷⁵ and (iii) if those already in the case protect the interest.⁷⁶

Intervention of right by those whose interests may be inadequately represented has depended on whether the applicant is or may be bound by a judgment in the action.⁷⁷ Before a non-party may intervene as of right, the test is whether the applicant will be bound under the doctrine of *res*

72 Chinkin, *supra* note 67, at 148. This emphasis on bilateralism encloses an artificial notion that the practices of states, as well as other actors of the international community, necessarily affect the interests of many others.

73 The US government always has an unconditional right to intervene.

74 59 Am Jur 2d PARTIES § 184.

75 The issue of practical impairment is necessarily one of degree and requires a consideration of the competing interests of the plaintiff and defendant in conducting and concluding their lawsuit without undue complication, and of the public in the speedy and economical resolution of legal controversies (*US v City of Jackson, Miss* 519 F2d 1147 (5th Cir 1975)).

76 USCS Fed Rules Civ Proc R 24.

77 59 Am Jur 2d PARTIES § 184.

*judicata*⁷⁸ or (for other courts) if in a practical and realistic sense he or she will be bound by the judgment in that he or she will not be permitted to dispute or deny an issue which would be determined in the action and may be adverse to him or her even if there will not be *res judicata*.⁷⁹

In permissive intervention, a non-party may be permitted to intervene in an action when a statute confers a conditional right to intervene or when an applicant's claim or defence and the main action have a question of law or fact in common.⁸⁰ In this case, it is up to the discretion of the court to permit non-parties to intervene in the judicial process.⁸¹

Neither of the intervention alternatives has been conceived or permits members of an international treaty which are not parties to the dispute to voice their concerns and argue their positions with regard to the interpretation of the international treaty unless their positions fall within one of the restrictive situations contemplated in the federal rules.⁸²

III. ALTERNATIVE MODELS

In recent years, alternatives to the traditional model of application of international law have been propounded in the international legal literature. Feminist, Critical Legal Studies and other jurisprudential perspectives are concerned with a general understanding of interconnections of human activities as they actually occur beyond the constraints of meaningless legal texts.⁸³ These perspectives have voiced concerns about the deficiencies of

78 *Nuesse v Camp* 385 F 2d 694 (DC Cir 1967); *Ratermann v Ratermann Realty & Inv Co* 341 SW 2d 280 (Mo Ct App 1960).

79 *Kozak v Wells* 278 F 2d 104, 84 ALR 2d 1400 (8th Cir 1960); *Ford Motor Co v Bisanz Bros, Inc* 249 F 2d 22 (8th Cir 1957).

80 USCS Fed Rules Civ Proc R 24 b.

81 In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties (USCS Fed Rules Civ Proc R 24 b).

82 Sonenshein, David A *Federal Rules Of Civil Procedure* (2002).

83 Other models include Bechky's shadow court to hear international treaty cases as a partial solution to the current misinterpretation and mismanagement. The shadow court is a special court at the trial level responsible for all international treaty cases in a certain field. This shadow court would tend to promote uniformity and expediency and due to its high degree of specialisation it would produce judicial decisions which are more attuned with other signatories' interpretations and international law obligations. However, the creation of shadow courts does not offer a solution to the hegemonic problems and does not guarantee by itself any respect for the decisions and arguments

the international model and have put forward proposals to overcome the shortcomings of the prevailing model. In this respect, Critical Legal Studies and Feminist scholars have remarked that judges can consciously or unconsciously dictate outcomes according to their own ideology and experiences, both individual and social.⁸⁴ For instance, Wilson's opinion in *Morgentaler* is a paradigmatic example of how her gender position and understanding of women's relations can be outcome determinative.⁸⁵ In general, judges' ideologies and social contexts tend to favour their dominant analysis and determine their judgments. According to Critical Legal Studies theorists, judges are socially constructed. Although judges interpret the law in good faith, they do so according to their own social experiences, which are positioned according to their political and economic ideology.⁸⁶

Feminist jurisprudence has long insisted on the disclosure and recognition of contextualisation for any legal analysis.⁸⁷ This includes acknowledging all subjective biases, beliefs, expectations and values of the person engaged in legal analysis. Feminist jurisprudence calls for the validation and recognition of personal experience that reflects the individual's contextualised reality in the form of narratives.⁸⁸

The legacy of non-traditional jurisprudence, such as feminism and Critical Legal Studies, shows that the law is essentially the preference of the adjudicator, who, as arises from our discussion of internal legal interpretation, is rather free to decide the fate of any case.⁸⁹ However, the

of other parties to a treaty (Bechky, "Mismanagement and Misinterpretation: US Judicial Implementation of the Warsaw Convention In Air Disaster Litigation" (1995) 60 J Air L & Com 528).

84 Lazos Vargas, *supra* 38, 150.

85 *R Morgentaler v Queen* [1988] 1 SCR 30.

86 Such socially positioned ideology is the "common sense" that each of us uses to order what we perceive (Balkin, "Ideology as Constraint" (1991) 43 Stan L Rev 1134).

87 Charlesworth, H & Chinkin, C *The Boundaries of International Law: A Feminist Analysis* (2000); Charlesworth, "Feminist Methods in International Law" (1999) 93 American Journal of International Law 379; Kennedy, D *International Legal Structures* (1987).

88 Raigrodski, "Breaking Out of "Custody": A Feminist Voice in Constitutional Criminal Procedure"(1999) 36 Am Crim L Rev 1301.

89 Thus, we should seek some conceptual criterion or paradigm by which we can understand the adjudication process, which will be discussed at the end of this article. Allan Hutchinson's non-foundationalist theory does not provide a solution either. It is based on the premise that judges must engage with the legal materials in good faith and that the outcome might be anything, provided that the judges make some genuine

open and full disclosure in the form of narratives does not solve the problem. It merely acknowledges the problem and puts it in the limelight. This acknowledgment does not preclude domestic courts from employing their own values and principles to the detriment of non-hegemonic and harmonic international solutions.

Knop has proposed a model of application of international law based on the persuasiveness rather than on the binding nature of international law, where international law is always applied after a process of translation into the language of domestic courts.⁹⁰ Knop considers that the international norms, regardless of whether they have been domesticated or not, provide a relevant and persuasive source for interpretation of the provisions of national law. Based on the Supreme Court of Canada's non-binding but persuasive application of international law in *Baker*,⁹¹ Knop's model attempts to juxtapose the substantive norms of international law with the court's own idiosyncrasy and understanding of the norms. This juxtaposition is done by freely translating and adapting the international norm to the culture and language of the law of the forum in a way more reminiscent of the role of comparative law than that of international law. For Knop, "the ideal [result of the applied law] is thus neither wholly international nor wholly national, but a hybrid that expressed the relationship between them". She advocates in favour of resorting to domestic interpretation as a form to legitimise international law through a process of "particularization"⁹²

Knop's proposal shows a clear disregard for interpretations of international norms that respect the international consensus that the norms reflect, and advocates for a translation of those norms into the culture and ideology of the court, even if the international norms are denaturalised of their significance. In other words, the problem with this approach is that it tends to reinforce the hegemonic effects of international law by allowing a

effort to support the conclusions by reference to the rules. In other words, "judges must hold a practical and actual belief that the rules do permit such a course of action" (Hutchinson, "The Rule of Law Revisited" in Dyzenhaus, D (ed) *Recrafting the Rule of Law: the Limits of Legal Order* (1999) 212-214. Allan Hutchinson's viewpoint ultimately depends on what the rules might permit, or what the judges perceive in good faith that they permit, which is not very helpful because, as arises from the foregoing, there is nothing in the legal texts and the legal rules that determine any specific outcome or that preclude any specific outcome.

90 Knop, *supra* note 2, at 501.

91 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

92 Knop, *supra* note 2, at 505.

national court to apply its own ideology through Knop's translation process at the expense of the meaning and purpose of the international source.

Slaughter has suggested a model of transjudicial communication where international law is invoked on the domestic plane through a network of decentralised horizontal communication among the courts. She constructs her model upon her observance of the existence of an increasing phenomenon of cross-citation of decisions of foreign courts, reliance of foreign source, and a permanent exchange and dialogue between courts on a wide array of topics⁹³. For Slaughter, this transjudicial communication fosters the acceptance and effectiveness of international obligations and permits a collective deliberation by judges from different national legal traditions in an open and interactive dialogue. For Slaughter, this model of transjudicial communication also fosters the dissemination of ideas from courts in one country to foreign and supranational courts. As in Knop's alternative proposal, the conception of law prevailing in transjudicial communication is based on persuasive rather than on coercive authority.⁹⁴

The weakest aspect of transjudicialism is that it has not developed a notion of persuasion that distinguishes it from political influence and it therefore does not solve the hegemony problem.⁹⁵ To use Slaughter's metaphor, transnational winds blow only in one direction. They originate in highly developed countries with a well functioning legal and judicial system and then appear in developing countries.⁹⁶ However, the transjudicialism vision of collective deliberation, if deprived of its hegemonic elements, is an appealing conception of international law which may help overcome most of the problems which the traditional model presents.

IV. PARTICIPATORY MODEL

As has been analysed above, the non-participatory mechanism of the prevailing models of adjudication, which are based on internal methods of interpretation, does not offer a viable solution for the resolution of international controversies. This mechanism essentially applies the national

93 Slaughter, *supra* note 3. For Slaughter "[t]hey are all forms of transjudicial communication: communication among courts - whether national or supranational - across borders. They vary enormously, however, in form, function, and degree of reciprocal engagement".

94 Patrick Glenn describes persuasive authority as "authority which attracts adherence as opposed to obliging it (Glenn, "Persuasive Authority" (1987) 32 McGill LJ 261).

95 Knop, *supra* note 2, at 505.

96 Slaughter, *supra* note 3, at 118.

interests of the state of the forum to the resolution of the controversy, usually intensifying the hegemonic nature of international law.⁹⁷ The alternative models proposed in the international legal literature have failed to provide adequate solutions to overcome the weaknesses and shortcomings of the traditional method. However, the transjudicial's conception of collective deliberation provides a desirable vision of an acceptable solution for the application of international law in the domestic sphere. Unfortunately, transjudicialism alone is incapable of materialising this vision due to the hegemonic consequences that it brings about, especially because it leaves the transjudicial communication to the spontaneous exchanges among courts. Given the inequalities of the resources, prestige and power of the different courts, the transjudicial communication, in practice, has become a unilateral dialogue where the speaking courts are those belonging to highly developed countries and the listening courts are exclusively those that are found in less developed states.

Since there is no uncontroversial theory to avoid this hegemonic phenomenon, I propose a new model of application of international law. This model is based on the full and open participation of all those interested and affected players of the international community in the adjudication process in municipal courts, coupled with an extrinsic method of interpretation of international sources in light of a multilateral conception of dispute resolution. This model tries to rescue the vision and objectives of transjudicialism without reproducing its hegemonic consequences, and it reflects a profound discontent with the International Court of Justice's narrow conception of judicial intervention.

97 The gist of the proposed model is based upon the teachings of the law reform and participatory theory doctrines. Legal reform is conceived as a multifold dynamic process, which requires a national effort based on a high level of State and private sector participation. Law reform is the instrument for guiding and legitimising the processes of change in society with due account taken of reconciling diverse interests. Participatory theory requires that an act or any other regulation contemplates procedures allowing the industry, those affected by the law and the general public to participate in the elaboration of the regulations (Chinkin, *supra* note 67; Rosenne, *supra* note 61; Nolon, "Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina" (1996) 13 *Pace Envtl L Rev* 726; Shihata, "The Role of Law in Business Development" (1978) 20 *Fordham Int'l LJ* 1578). Under this conception a legal reform must necessarily rest on three basic pillars: (i) adequate rules, (ii) appropriate processes through which those rules are made and enforced and (iii) well functioning public institutions appropriately staffed with trained individuals.

The proposed model aims at attracting a wide participation of the international community in the adjudication process on the domestic plane with the view to influencing decisions in accordance with interpretations that take into account the views of the community of international actors concerned with the interpretation of the treaty to which they are parties. In this way, the likelihood that the court that adjudicates the case can impose its view is considerably reduced.

Under the participatory model, whenever there is a controversy in a domestic court whose resolution depends upon the interpretation of an international convention, the court should give adequate notice to all parties to the convention.⁹⁸ The participation of the parties to the convention should be compulsory for the forum court which should always admit their intervention. Furthermore, there should be clear guidelines for the court to adjudicate a case. These guidelines should include the express obligation for the forum court to take into account and decide in accordance with the prevailing and most persuasive arguments of law as arising from the participation of the intervening states, as well as from the adversarial presentation of arguments made by the parties to the controversy.

By permitting the participation of all of the community of states that form part of the international agreement, this model allows their views and voices to be reflected in all adjudicative decisions. In this way, the transjudicial objective of collective judicial deliberation is materialised without reproducing the hegemonic effects that arise under the current model of non-compulsory participation. This will reduce the mistrust element that derives from the application of international law by a court of another state party to the international convention and will permit a more consistent and non-hegemonic application of international treaties.

This open participation does not completely eradicate the possibility of a court imposing its national policy interests to the detriment of obligations assumed at the international level. However, open participation will openly provide the basis for reducing this possibility to isolated and exceptional cases and for elaborating a consensus in the international community for a democratic and less hegemonic process of settlement of disputes.⁹⁹

98 This could include all other interested subjects of international law that have voiced their intention to participate in these proceedings.

99 Knop's model tries to solve the hegemony problem by acknowledging the inequalities of the sources of international law and by trying to find a method of application of international law which may freely deviate from the sources. At the very least, this model provides the opportunity for the judicial decision to have a persuasive force so

In order to strengthen the legitimate value of decisions and to render outcomes more transparent, less hegemonic and more attuned with the spirit of the consensus reflected in the international treaty, I propose the resolution of the dispute in a participatory process. This process should be interpreted in light of extrinsic methodology and through an open disclosure of all the material conditions affecting the adjudicator, as put forward and suggested by proponents of feminist jurisprudence and some of the advocates of the Critical Legal Studies movement.¹⁰⁰ This open acknowledgment of the political and ideological position of the adjudicator will provide the outcome with a more persuasive force. At the same time, it will permit the communication and collective deliberation to flow more naturally and openly.

V. CONCLUSION

The traditional model of application of international law in domestic courts has been dominated by a non-participatory adjudicatory process based on a predominantly bilateral conception of dispute resolution and internal methods of interpretation of international sources. This process has given domestic courts ample leeway to apply the national interests of the state of the forum in deciding international disputes. This in turn has translated into hegemonic interpretations of international sources, often in direct contradiction of the consensus reached on the international plane.

Based on an artificial but long-standing bilateral conception of international dispute resolution, the existing participatory mechanisms and their application by the courts, at both the international and domestic levels, are very limited and do not afford non-members to a dispute any meaningful possibility to influence the outcome of the adjudicative process.

The alternative models proposed in the international legal literature have failed to provide adequate solutions to overcome the weaknesses and shortcomings of the traditional method. However, the transjudicial conception of collective deliberation provides a desirable vision of an acceptable solution for the application of international law in the domestic sphere. Nonetheless, transjudicialism alone is incapable of materialising this vision due to the hegemonic consequences that it brings about.

that it can be applied to similar factual and legal patterns in other domestic jurisdictions.

¹⁰⁰ Bakan, *supra* note 1, at 5.

The proposed model of application of international law is based on the full and open participation of all those interested and affected players of the international community in the adjudication process in municipal courts, coupled with an extrinsic method of interpretation of international sources and in light of a multinational conception of dispute resolution. This model tries to rescue the vision and objectives of transjudicialism without reproducing its hegemonic consequences.

SALE OF GOODS CONTRACTS AND THE REQUIREMENT OF FITNESS FOR PURPOSE IN THE SALE OF GOODS ACT 1908

BY JOEL MANYAM*

I. INTRODUCTION

In general terms, the law of Contract is a set of rules designed to give legal effect to private bargains. Parties are free to contract on any matter they choose and on any terms they prefer, subject only to any limitations imposed by statute or by common law rules of public policy. The law recognises the paramountcy of this freedom of choice as to promises made in that, once parties have exercised their choice of reaching an agreement, the law may be used to enforce the agreement so reached, subject to the limitations mentioned.

While the law of Contract articulates principles applicable to contracts generally, there are special types of contract for which special rules have been developed. In respect of contracts of sale, the law has evolved whereby recognition is given to special rules that apply, depending on the subject of the sale contract or the types of parties involved. Thus, in respect of contracts for the sale and purchase of land, the Contracts Enforcement Act 1956 and related rules apply. The development of consumer protection legislation such as the Consumer Guarantees Act 1993 is designed to provide special rules in contracts for the sale of goods and services to consumers. The 1993 Act further restricts the notion of freedom of contract in that parties to consumer sales cannot contract out of the Act.¹ There is also the Fair Trading Act 1986, which seeks to impose standards in respect of goods and services which are contractually supplied to consumers.

Contracts for the sale of goods are another specialist form of contract, involving commercial transactions between parties assumed as having relatively equal bargaining strengths. The nature of sale of goods contracts was cogently articulated by the respected Canadian author, Fridman, who opined that:

Sale is a species of contract. Although many of the rules of contract are of general application to sale, particular rules apply to sales of particular types of property. Hence the law of sale of goods must be carefully distinguished from the law dealing

* Senior Lecturer in Law, University of Waikato. I thank Matthew Casey for his helpful comments on an earlier draft of this article.

1 Consumer Guarantees Act 1993, s 43.

with the sale of land, the assignment of leasehold interests, negotiability, and the assignment of choses in action. It is important to do this since, on the one hand, only the contract of sale of goods is subject to the provisions of the Sale of Goods Act, and, on the other hand, rules of the common law or equity, and special statutes applicable to special kinds of contract of sale, assignment, negotiability, and certain other dispositions of owners of goods, may not apply to a contract of sale of goods unless and until they have been specifically stated to do so by some statute or judicial decision.²

Essentially, Fridman validly makes the point that, although sale of goods is a species of contract, there are some particular rules that apply to contracts of sale of goods in contrast to other types of contracts of sale such as contracts for the sale of land. Fridman refers to the Sale of Goods Act as regulating sale of goods contracts. Its equivalent in New Zealand is the Sale of Goods Act 1908 ("SGA 1908").

In this article I shall examine the nature of the SGA 1908 and the way in which it has been interpreted by the courts. In particular, I shall focus on the interpretation of the Act in a recent decision of the Privy Council, *Hamilton v Papakura District Council* ("Hamilton").³ Against the background of the law relating to fitness for purpose, I shall analyse this decision and assess its impact on the law in this area.

II. NATURE OF SGA 1908

The New Zealand Act is a replica of the English Sale of Goods Act 1893 ("SGA 1893").⁴ It follows that an examination of the history of the English Act would shed light on the rationale for the New Zealand Act.

Sir Mackenzie D Chalmers, who was responsible for drafting the SGA 1893,⁵ was of the view that the nature of the 1893 Act was not to

2 Fridman, G H L, *Sale of Goods in Canada* (1995) 9.

3 [2002] 3 NZLR 308, upholding the Court of Appeal in *Hamilton v Papakura District Council* [2000] 1 NZLR 265, which in turn upheld the High Court in *Hamilton v Papakura District Council*, Auckland, CP 391/95, 10 September 1998.

4 New Zealand's Bills of Exchange Act 1908, the Partnership Act 1908 and the Marine Insurance Act 1908 are identical to the legislation of the United Kingdom.

5 Ferguson, "Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes" 4(1) *British Journal of Law and Society* 18. The same was also true of the Bills of Exchange Act 1882. Chalmers said: "Still in drafting the Bills of Exchange Bill, my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad or indifferent in its effects" ("An Experiment in

revolutionise the common law rules, nor to change in any way the rules that had thus far developed. The enactment of the Act was “not to reform the actual terms of the law but to ‘reform’ their shape and organization”.⁶ The Act therefore represented “the effect of decided cases and established principles”.⁷

Although the SGA 1893 was referred to as a Code,⁸ it was not a comprehensive code in that it did not contain all the rules on sale of goods and therefore did not obviate the need to resort to the common law. Lord Diplock, in his dissenting opinion in *Ashington Piggeries v Christopher Hill* (“*Ashington*”), lucidly articulated the nature and scope of the Sale of Goods Act when he opined as follows:

But the exposition contained in the Act is only partial. It does not seek to codify the general law of contract of England or Scotland. It assumes the existence as a basic principle of the English law of contract that, subject to any limitations imposed by statute or by common law rules of public policy, parties to contracts have freedom of choice not only as to what each will mutually promise to do but also as to what each is willing to accept as the consequences of the performance or non-performance of those promises so far as those consequences affect any other party to the contract. The paramountcy of this freedom of choice as to promises made in contracts for the sale of goods is acknowledged by s 55 of the Act [equivalent to s 56 of the SGA 1908]. The provisions of the Act [Sale of Goods Act] are in the main confined to statements of what promises are to be implied on the part of the buyer and the seller in respect of matters on which the contract is silent and to statements of the consequences of performance or non-performance of promises, whether expressed or implied, where the contract does not state what those consequences are to be.⁹

Codification” (1886) 2 LQR 125, 126). See also Chalmers, “Codification of Mercantile Law” (1903) 19 LQR 10, 14.

6 Ferguson, *ibid*, at 21 and 31.

7 Chalmers, *supra* note 5, at 130. This was also described by Diamond as seeking “to reproduce the existing law, to translate case-law into statute-law without radical change” (“Codification of the Law of Contract” 31(4) *Modern Law Review* 361, 372).

8 Diamond, *ibid*, at 369. Lord Diplock in *Ashington Piggeries v Christopher Hill* [1971] 1 All ER 847, 881, observed: “In the form in which the Bill was originally drafted by Sir Mackenzie Chalmers that Act was intended to state the common law rules relating to the sale of goods as they had been developed by judicial decision up to 1889”.

9 *Supra* note 8, at 881-882.

In fact the English Act in section 61(2), a provision identical to section 60(2) in the New Zealand Act,¹⁰ specifically provided a savings provision. Particular rules of the common law of contract would nonetheless continue to have application insofar as they were not inconsistent with the express provision of the Sale of Goods Act. Specific reference is made to the common law rules pertaining to the law of principal and agent, and the effect of fraud, misrepresentation, duress, mistake or other invalidating cause.

The effect of this savings provision, to the extent that it also applies to equitable rules, has been the subject of discussion. In particular, there has been debate as to whether equitable rules have any application under the Sale of Goods legislation. The issue of whether equitable proprietary interests and remedies can be pursued in the context of sale of goods can assume significance in a number of instances, including those where a buyer or seller needs to resort to equitable remedies such as specific performance or an injunction.

The English Court of Appeal decision in *Re Wait*¹¹ has often been relied upon as suggesting a very strict and indeed literal approach to this question, that equitable rules have no application under the Sale of Goods Act. Atkin LJ acknowledged that the Act had been passed at a time when the principles of equity and equitable remedies were recognised and given effect to in all English Courts. Further, the particular remedy of specific performance had been specifically referred to in section 52 of the SGA 1893. Atkin LJ also expressed the view that he considered it futile if the SGA, which was “intended for commercial men to have created an elaborate structure of rules dealing with the rights of law”, also allowed to subsist within it equitable rights which were inconsistent with the Act’s provisions.¹² Atkin LJ’s concluding observations, which have been relied on as excluding equitable rules from having any application under the Act, were as follows:

But the mere sale or agreement to sell or acts in pursuance of such a contract mentioned in the Act will only produce the legal effects which the Act states.¹³

However, it is worth noting that these observations by Atkin LJ were obiter and Atkin LJ expressly stated that he was not deciding the point. Lord

10 S 60(2) SGA 1908 is equivalent to s 57(1), Canadian Sale of Goods Act RSO 1990.

11 [1926] All ER 433.

12 *Ibid*, at 446.

13 *Ibid*.

Brandon in *The Aliakmon*¹⁴ expressed extreme doubt on whether equitable interests in goods could either be created or found to exist within the confines of an ordinary contract of sale. In his view, the SGA 1893 was a complete code in respect of contracts for the sale of goods. However Lord Brandon found it unnecessary to decide the point.

In the earlier decision of *United Scientific Holdings v Burnley District Council*,¹⁵ the House of Lords was of the clear view that there was no reason to distinguish between legal and equitable rules. Lord Diplock expressed the position as follows:

to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is, in my view, conducive to erroneous conclusions as to the ways in which the law of England has developed in the last 100 years.¹⁶

While the question for the purposes of English law does not appear to have been decided, the Privy Council¹⁷ in a decision on appeal from New Zealand's Court of Appeal,¹⁸ appears to have recognised that equitable rights can subsist alongside the SGA 1908. The issue in *Re Goldcorp Exchange Ltd* was whether the respondents, who had purchased bullion for future delivery on terms that they were purchasing "non-allocated metal" which would be stored and insured free of charge by the company, had acquired proprietary rights to the bullion. Lord Mustill, in delivering the advice of the Board, held that the respondents obtained no form of proprietary interest, whether legal or equitable, simply by virtue of the contract of sale as it was not known to what goods the title related. In a specific reference to Atkin LJ's comments in *Re Wait*, the Privy Council noted that they pointed "unequivocally to the conclusion that under a simple contract for the sale of unascertained goods no equitable title can pass merely by virtue of the sale". Lord Mustill further observed that, even if the creation of a separate and sufficient stock would have given the non-allocated purchases some kind of proprietary interest, there was no such separate and sufficient stock in existence. It followed that the Board would have been disposed to making a finding that either a legal or equitable proprietary interest existed if there had been some means of knowing to which, if any, of the non-allocated sales a particular purchase by the company was related.

14 [1986] 2 All ER 145.

15 [1977] 2 All ER 62.

16 *Ibid*, at 68.

17 *Re Goldcorp Exchange Limited (in receivership)* [1994] 2 All ER 806.

18 *Liggett v Kensington* [1993] 1 NZLR 257.

The significance of the savings provisions in section 60(2) of the SGA 1908 is of more than academic interest. The specific reference in section 60(2) to the law of agency, for example, can arise when considering the application of the implied term under section 16(a). If, under the implied term embodied in section 16(a), a buyer is required to make known to the seller the particular purpose for which the goods are required, so as to show reliance on the seller's skill and judgment, the law of agency would appear to have direct application. This could apply, for example, if an employee of the buyer impliedly made known the particular purpose to either the seller or to an agent of the seller.¹⁹

III. INTERPRETATION OF SGA 1908

The Act is not a complete code as the provisions of section 60(2) illustrate. Further, as highlighted by Fridman,²⁰ if sale of goods is a species of contract, it follows that the Act operates in the context of contract law, which in New Zealand is based on an amalgam of the common law and numerous statutes.²¹ This being the context in which the SGA 1908 finds itself operating, the question arises as to how the Act ought to be interpreted and meaningful effect given to its specific provisions.

The approach to the interpretation of a codifying Act was alluded to by Lord Halsbury in *Bank of England v Vagliano Brothers*.²² He opined as follows:

I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it

19 The implied term was in issue in *Hamilton v Papakura District Council* [2002] 3 NZLR 308. However, the impact of the law of agency as contained in the savings provision of s 60(2) was not considered in regard to the implied communication by the agent of the buyer to an agent of the seller. Contrast this with the position in *Hardwick Game Farm v SAPPA* [1969] 2 AC 31, 104 where Lord Guest held that the particular purpose specified in s 16(a) had been made known to SAPPA's representative.

20 *Supra* note 2.

21 These include the Minors' Contracts Act 1969, the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, and the Contracts (Privity) Act 1982.

22 [1891] AC 107.

unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions²³

While the Act contains a number of implied conditions such as in relation to title²⁴ and sales by sample²⁵, those contained in sections 15 and 16 assume central importance in the context of sale of goods law. They are arguably the provisions most heavily relied on, particularly when the issue becomes one of the sale and purchase of defective goods.

The implied conditions embodied in sections 15 and 16 represent an erosion of the common law doctrine of *caveat emptor* (buyer beware).²⁶ The doctrine in essence is that the seller, in supplying goods required by the buyer, takes no responsibility for their quality or essential character. Where the implied conditions in the Act cannot be successfully invoked by a buyer, the doctrine of *caveat emptor* is not displaced and continues to have application.²⁷

The statutory wording of these two provisions is instructive. Section 15 provides that, where there is a contract of sale of goods by description, there is an implied term that the goods will correspond with the description. By contrast, the opening words of section 16 are an enactment of *caveat emptor*²⁸ in that “there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of

23 Ibid, at 144-145.

24 Section 14, SGA 1908.

25 Section 17(2), SGA 1908.

26 Atiyah, P S, *The Sale of Goods* (10 ed, 2001) 137 commented: “In England the implied terms as to quality and fitness in sections 13-15 of the 1893 Act represented an important step in the abandonment of the original common law rule of *caveat emptor*. The common law had itself largely modified the rigours of this rule by 1893, but in several important respects the Act went further than the courts ever did before it was passed”.

27 *Cominco Limited v Westinghouse Can Limited* (1981) 127 DLR (3d) 544, 561.

28 In *Grant v Australian Knitting Mills Limited* [1936] 85, 98, Lord Wright said that the equivalent of s 16 “begins by a general enunciation of the old rule of *caveat emptor* and proceeds to state by way of exception the two implied conditions”.

sale except as follows: ...".²⁹ However, section 16 then provides implied terms that goods must be reasonably fit for the purpose the buyer requires of them and meet a standard of quality. The net effect is that there is a strong sense that *caveat venditor* (seller beware) prevails over *caveat emptor*. There does not appear to be any difference in effect between section 15 and section 16, merely because section 16 contains in its opening words a denial of the existence of any warranty or condition as to quality or fitness for purpose.

Chalmers commented that a codifying bill such as the Sale of Goods Bill in the first instance reproduced the existing law, however defective.³⁰ The question therefore arises whether it can be safely accepted that the enactment of sections 15 and 16 has determined that *caveat venditor* prevails over *caveat emptor*, or whether the courts can continue to decide whether the correct balance has been struck by the implied terms.

There are some dicta suggesting the latter view. In the House of Lords' decision in *Ashington*, Lord Diplock in a dissenting opinion appeared to express the view that, despite the content of the statutory provisions, it was still open to the courts to make policy decisions about where the appropriate balance between *caveat emptor* and *caveat venditor* should lie. Lord Diplock stated:

The choice depends largely on ones personal view as to whether the swing of the pendulum since 1893 from *caveat emptor* to *caveat venditor* has now gone far enough and ought to be arrested, or whether it should be given a further impetus, albeit a minor one, on its current course. For my part I would have been in favour of arresting it; but I recognize that a decision to the contrary is simply one of policy and, as it commends itself to the majority of your Lordships, I accept it with good grace as now forming part of the law of contracts for the sale of goods.³¹

Later, in the House of Lords' decision in *Slater v Finning Limited*, Lord Steyn, in delivering his concurring view that the buyer had not complied

29 In *Hardwick Game Farm v SAPP*, supra note 19, at 92, Lord Morris of Borth-y-Gest commented on the effect of these opening words in s 16(a) by saying: "In general there is no implied warranty or condition as to the quality of goods which are supplied under a contract of sale nor as to their fitness for any particular purpose".

30 Chalmers, supra note 5, at 128. In *Ashington Piggeries v Christopher Hill*, supra note 8, at 881, Lord Diplock stated: "In the form in which the Bill was originally drafted by Sir Mackenzie Chalmers that Act was intended to state the common law rules relating to the sale of goods as they had been developed by judicial decision up to 1889".

31 Supra note 8, at 888.

with the conditions required for invoking the implied conditions in the equivalent of section 16(a), opined:

Outside the field of private sales the shift from caveat emptor to caveat venditor in relation to the implied condition of fitness for purpose has been a notable feature of the development of our commercial law. But to uphold the present claim would be to allow caveat venditor to run riot.³²

It could also be argued that the effect of the New Zealand Court of Appeal and Privy Council majority opinions in *Hamilton*,³³ which found against the buyer in respect of the implied condition in section 16(a), was to reinforce the perception of a shift in the positioning of the dividing line from *caveat venditor* to *caveat emptor*.

However, the more logical and preferred view, as a matter of strict law, seems to be that which is expressed in numerous judicial dicta suggesting that the SGA 1908 has in its implied terms determined where the balance lies. In reference to the effect of the enactment of the SGA on the buyer and sellers' rights, Cozens-Hardy MR, in *Bristol Tramways etc Carriage Co Limited v Fiat Motors Limited*, observed:

but insofar as there is an express statutory enactment, that alone must be looked at and *must govern the rights of the parties*, even though the section may to some extent have altered the prior common law.³⁴

Lord Morris of Both-y-Gest, in *Hardwick Game Farm v SAPPA* ("*Hardwick*"),³⁵ seemed to suggest that directions on sale of goods law are provided in the Act and that the question was simply whether the words of the section could be applied to the facts of any given case:

The Act of 1893 was an Act for codifying the law relating to the sale of goods. If its provisions are clear it should be possible to reach a decision by reference only to the facts that arise in some particular situation. The law as it evolved before 1893 is revealed by a study of a number of notable decisions. The law since 1893 is in terms of the statute. Many of the reported cases since 1893 are seen when analysed to be

32 [1997] AC 473, 488.

33 Supra note 3.

34 [1910] 2 KB 831, 836 (emphasis added). Also note identical comments in *Abbot and Co v Wolsey* [1895] 2 QB 97, 99, *Wimble Sons and Co v Rossenberg & Sons* [1913] 3 KB 743, 762, and *Laurie & Morewood v Dudin & Sons* [1926] 1 KB 223, 234 – 235.

35 Supra note 19, at 92.

no more than decisions on the facts of a case as to whether the words of the section applied. I therefore limit my citations.³⁶

In the same case, Lord Wilberforce was more direct when he commented:

These two subsections ... [ss 14(1) and 14(2) of the UK SGA 1893: corresponding with section 16(a) and (b) in the SGA 1908] state exceptions to the general rule supposed to exist at common law, of caveat emptor a rule of which little now remains ... The words in which these simple situations, and their legal consequences are described are plain, untechnical words; they are contained in an Act which is supposed (and generally thought with success) to codify this branch of our law. It should be possible to apply them directly to the given situation without the use of fact to fact analogies and fact from fact distinctions drawn from reported cases.³⁷

For the purposes of New Zealand law, specifically as regards section 16(a), the position was well articulated by Thomas J in *Bullock and Co Limited v Matthews*.³⁸ Thomas J spoke of the Act as being reflective of policy that had determined the formula for loss distribution between buyers and sellers:

Section 16(a) applies irrespective of fault. It is a loss distribution or allocation provision as between buyers and sellers and reflects the legislature's policy as to who should bear unexpected losses. In general terms, where the purpose for which the goods are to be used is known to the seller and the buyer looks to the seller for the requisite expertise in ensuring that the goods are fit for the purpose for which they are supplied, the loss is to fall on the seller.³⁹

The issue of whether the respective positions of the buyer and seller are as determined by the implied conditions in the Act, rather than by some formula outside the Act, is an important one for those engaged in commerce. Professor Goode observed that the contract of sale was by far the most common type of contract and that "in commercial dealings traders are not

36 Ibid, at 91-92.

37 Ibid, at 123.

38 Unreported, CA 265/98, 18 December 1998. In *Cammell Laird & Co v The Manganese Bronze and Brass Co* [1934] AC 402, 418, Lord Macmillan observed in respect of s 14(1) of the UK Sale of Goods Act 1893 that: "That section contains what is left of the rule of caveat emptor, but the exceptions have made large inroads upon it".

39 Ibid, at 5. In *Matthews v Bullock and Co Limited*, unreported, HC, Wanganui, CP 19/93, 19 December 1997, Gallen J expressed a concurring view: "as was emphasized in the *Ashington* case the purpose of the legislation [SGA 1908] was not to determine fault, but where the loss should fall" (at 40).

interested in goods as such, only in the profit that can be made, or the loss that can be avoided, by re-selling them".⁴⁰ It would thus appear that buyers and sellers, and more particularly their advisors, in sale of goods contracts, need certainty in the application of the SGA 1908.⁴¹

Despite this deep yearning for certainty, there now appears grave doubt in New Zealand as to the correct state of the law of fitness for purpose, contained in section 16(a) of the SGA 1908, as a result of the Privy Council decision in *Hamilton*.⁴² This decision has affected sale of goods law as regards the correct application of section 16(a) and also the law of agency which section 60(2) seeks to preserve in the context of the Act.

IV. *HAMILTON V PAKURA DISTRICT COUNCIL*

In order to grasp the law now applicable pursuant to *Hamilton* and the implications for sale of goods law in New Zealand, the facts which led to the decision need to be traversed.⁴³

Mr and Mrs Hamilton hydroponically cultivated "Evita" cherry tomatoes in glass houses at three properties in Papakura, South Auckland. At two of the properties, the water used was from the town water supply. This supply was in turn sourced from the bulk water supplier Water Care Services Limited (Watercare) which was the second defendant in the proceedings. The tomato crop at these two properties began showing symptoms of damage, including leaf curling and burning, with such symptoms worsening over time. No such symptoms were evident on the crop at the third property which did not use the town water supply.

The Hamiltons issued proceedings against the Council and Watercare, claiming damages in contract, negligence, nuisance and the principle in *Rylands v Fletcher*.⁴⁴ They alleged that the town water supply provided by Papakura District Council ("PDC") was contaminated with herbicide residues at concentrations which proved harmful to the tomato plants. In the

40 Goode, R, *Commercial Law* (2 ed, 1995) 193.

41 In *The Aliakmon*, supra note 14, at 155, Lord Brandon opined: "Yet certainty of the law is of the utmost importance, especially ... in commercial matters".

42 Supra note 3.

43 For a fuller account of the facts, see Lendrum, "Fitness for Purpose, Cherry Tomatoes and the Privy Council" (2003) 31 *Australian Business Law Review* 54; and Brown, "The Swing of the Pendulum from Caveat Venditor to Caveat Emptor" (2000) 116 *LQR* 537.

44 (1868) LR 3 HL 330.

Court of Appeal the emphasis was on the herbicide, triclopyr, which was the active ingredient in a weed spray used for controlling gorse in the water supply catchment.

There being several causes of action, it was understandable that over half of the Court of Appeal judgment was devoted to a discussion of the causation of the plaintiff's loss. Seventeen paragraphs were devoted to the claim in contract specifically in respect of sale of goods and particularly in relation to the law on section 16(a).

The Court of Appeal's application of the law on section 16(a), and its endorsement by the Privy Council, raises concerns about how the provision will be applied in New Zealand in the future. It would appear that what had hitherto been accepted as well-established law on section 16(a) has been significantly changed as a consequence of the decisions in *Hamilton*. It is the nature and extent of this change that must now be examined in order to ascertain its legal validity.

As an important preliminary matter, it needs to be recognised that the provision in section 16(a) assumes relevance because the parties were acknowledged as having entered a contractual relationship⁴⁵ in respect of the supply of water.⁴⁶ The relationship being contractual, it would follow that the seller ought to have been free not to contract if the terms appeared too onerous or, even if it did contract as happened to be the case, it could have expressly disclaimed responsibility⁴⁷ for the quality of the water. A third

45 The Court of Appeal in *Hamilton v PDC*, supra note 3, at 271, noted: "It was accepted that its [the Council's] relationship with individual customers is contractual, though overlaid with statutory obligations".

46 The product, namely water, being assumed to be goods.

47 The majority Privy Council opinion acknowledged that PDC could have "undoubtedly ... said, as it did to the rose grower and to other users in Drury, that it could not give that undertaking [as to the quality of water above the drinking standard]" (supra note 3, at 320). The position of the Council concerning water quality was that it purchased it in bulk from Watercare after it had been taken from the reservoir and passed through the filter station and when there was no practical way in which it could be further treated. This is perhaps what led Williams J to observe that "Papakura District is literally only a conduit for the conveyance of water from the bulk supplier to users and can do nothing to alter the quality of that water once it is within its reticulation system" (supra note 3, at 161 (HC)). In such circumstances the only practical step for the Council should have been either to elect not to supply or expressly to disclaim responsibility for the quality of the water above the drinking standard (supra note 3, at 278 (CA)).

alternative would have been for the seller to have incorporated different terms on which it would contractually agree to supply the goods. Much emphasis appears to have been placed in the Privy Council majority opinion on the fact that the seller had only one product to supply⁴⁸ and was subject to statutory obligations to be a supplier of water.⁴⁹ The implication of this is that the nature of the good supplied, namely one quality standard for all water supplied and the statutory obligation to supply, must necessarily affect the rigour with which the implied condition ought to be interpreted. In such circumstances the buyer loses any protection designed to be provided by the condition, and, perhaps more disturbingly, needs to comply with section 16(a) at a standard far higher than the law had required up until this decision.

Pursuant to *Hamilton*, there appear to be at least two standards governing the application of section 16(a). If this is so, this represents a “knock-out blow”⁵⁰ to the law on section 16(a). First, where a seller can plead special conditions in relation to the circumstances of the supply, a much higher threshold needs to be met by a buyer seeking to invoke section 16(a). Secondly, in the case of a seller who cannot plead such special conditions, the ordinary protection for a buyer under section 16(a) applies, as had been accepted up until the decision in *Hamilton*. This co-existence of two different standards seems untenable. The position must be one standard and one standard alone. This standard is that, where a seller irrespective of any extenuating circumstances regarding supply decides to contract for the supply of a good without disclaiming responsibility for it, such seller must be taken to have fully embraced the onerous terms inherent in the supply, and accept liability where it falls as determined by section 16(a). To accept any lesser standard would be to emasculate seriously the effect of section 16(a), as clearly occurred in *Hamilton*, and cannot be correct as a matter of sound law. Such an important provision should not be left vulnerable to the vagaries of judicial attempts to resurrect *caveat emptor*.

48 Ibid, at 319 (PC).

49 Ibid, at 320, where it is observed: “There can be no assumption of reliance still less an acceptance of responsibility, by a supplier who is under a statutory duty to supply to a multiplicity of customers when conforming to the drinking water standard”.

50 Per Lord Denning MR, *Teheran–Europe Co Limited v ST Belton (Tractors) Ltd* [1968] 2 All ER 886, 890, referring to a passage in Lord Reid’s speech in *Kendall v Lillico* [1969] 2 AC 31, 81.

V. LAW ON FITNESS FOR PURPOSE

In order to invoke the protection afforded by section 16(a), three requirements need to be satisfied.⁵¹ First, a buyer needs either expressly or impliedly to make known to the seller the particular purpose for which the goods are required. Secondly, the purpose needs to be made known by the buyer so as to show that it relied on the seller's skill or judgment regarding the fitness of the goods for that purpose. Thirdly, the goods need to be of a description which it is in the course of the seller's business to supply. If all these three conditions are met, there is an implied condition that the goods are reasonably fit for the buyer's purpose. On the facts in *Hamilton*, there was no contention that the third requirement had in fact been met.⁵² The legal argument relates to the first two requirements.

1. Making Known Particular Purpose

In respect of this requirement, there was contention as to what was required in order implicitly to make known a buyer's purpose and as to how particular a buyer's purpose must be in order to qualify as being "particular" for the purposes of the statutory wording.

If, as the Hamiltons argued, they had never expressly made known their purpose but had done so only impliedly, the question arises as to why their argument before both the Court of Appeal and Privy Council was roundly rejected on the ground that it was not expressly made known? It appears that the Courts' finding was completely at odds with what had allegedly occurred. There is another aspect of law having a direct bearing on the question of implicitly making a buyer's purpose known that may have been ignored, despite the provisions of section 60(2) of the SGA 1908. If this subsection preserves the law of agency as far as sale of goods contracts are concerned, was it not sufficient that an agent of the buyer had implicitly made known the buyer's purpose for the goods? The decisions in *Hamilton* appear to be of the view that, unless the buyer in its own person does not communicate the purpose, the purpose has not been made known. The repercussions of this are disturbing for the commercial environment where many sale of goods contracts involve corporates which cannot act on their own, but rely heavily on their agents to conduct normal commercial

51 Supra note 3, at 317, 325 (PC). See also Lord Reid in *Kendall v Lilloco*, supra note 50, at 79 as to s 14(1) of the UK SGA 1893 which corresponds precisely with s 16(a).

52 Supra note 3, at 325 (PC).

transactions on their behalf.⁵³ In order to appreciate what occurred, it is imperative to reaffirm what the statute states, what the law allows as implicit, and what occurred on the facts. It needs to be considered whether what happened on the facts amounted to the purpose being made implicitly known in accordance with the law as had been thus far established.

In the early New Zealand case of *Taylor v Combined Buyers Ltd*, Salmond J commented on the first aspect of implicitly making the purpose known by saying that “it is not necessary for the buyer expressly to communicate to the seller the fact that he desires the goods”.⁵⁴ *Taylor* was in fact referred to in the High Court decision of Williams J in *Hamilton*.⁵⁵

However, both the Court of Appeal and Privy Council majority opinions in *Hamilton* referred to two very persuasive decisions of the House of Lords in *Hardwick*⁵⁶ and *Ashington*.⁵⁷ In fact it would not be inaccurate to observe that the argument in *Hamilton* before the Court of Appeal directly entailed the application of the principles of these two House of Lords decisions to the facts in *Hamilton*. These decisions need to be examined for they involved the articulation and application of the legal test under the English equivalent of section 16(a).

In *Hardwick*, Hardwick bred pheasants and partridges and had bought feeding stuffs for its stock from Suffolk Agricultural and Poultry Producers Association (“SAPPA”) for many years. SAPPA carried on business as compounders and sellers of feeding stuffs for pheasants and partridges and their chicks. Quantities of SAPPA’s meal supplied to Hardwick were fed to its pheasants resulting in their death. The cause of death was the chemical “aflatoxin” in the Brazilian groundnut meat extractions used in compounding the foodstuffs. SAPPA bought its supplies of the groundnut meat extractions from Lillico and Grimsdale who were third parties to the proceedings. Lillico and Grimsdale in turn bought their supplies from

53 It was for these reasons that Waterfall was a Director of Grimsdale, McLeod an agent of Kendall and Brown a representative or agent of Lillico in *Hardwick Game Farm v SAPPA*, supra note 19, at 125.

54 [1924] NZLR 627, 628. The decision in *Taylor v Combined Buyers Ltd* has been referred to as “a very careful judgment” in Atiyah, supra note 26, at 141.

55 Supra note 3, at 151 (HC).

56 Supra note 19. For a more detailed discussion of *Hardwick Game Farm*, see Davies, “Merchantability and Fitness For Purpose: Implied Conditions of the Sale of Goods Act 1893” (1969) 85 LQR 74.

57 Supra note 8. For a fuller discussion of this decision see Patient, “Ruminating on Mink Food” (1971) 34 Modern Law Review 557.

Kendall and Holland Colombo who were brought in as fourth parties in the action.

The question arose as to whether the equivalent of section 16(a) applied, namely, whether Grimsdale had relied on the skill and judgment of Kendall and whether SAPPa had relied on the skill and judgment of Grimsdale. Lord Reid observed that “[i]t is certainly not necessary in many cases that the buyer should state his purpose expressly”,⁵⁸ thereby confirming the statutory position. However, his more significant observations were in relation to the approach that ought to be taken when considering whether section 16(a) had application. Lord Reid commented as follows:

In order to bring this subsection [section 14(1) of the UK SGA 1893 equivalent to section 16(a) of SGA 1908] into operation it is not necessary to show that the parties consciously applied their minds to the question. It is enough that a reasonable seller in the shoes of Kendall would have realized that he was inviting Grimsdale to rely on his skill and judgment and that is what I think in fact Kendall was doing.⁵⁹

Lord Morris of Borth-y-Gest more comprehensively examined the issue of making known the buyer’s purpose. He examined the issue first as between SAPPa and the third defendants, Grimsdale and Lillico, and secondly in relation to the third and fourth parties respectively. Lord Morris agreed with Havers J’s first instance finding that SAPPa had made it known to Lillico that their purpose in buying the meal was in order to compound it into feeding stuffs for various kinds of poultry and pigs. In respect of the issue between the third and fourth parties, Lord Morris agreed with the finding of Havers J that “the buyers impliedly made known their purpose in buying”.⁶⁰ However, it is worth noting further comments by Lord Morris on making known the particular purpose, when he indicated agreement with the finding of Havers J. This was that the requirement of implicitly making the purpose known can be met if the seller comes to know of the buyer’s purpose from a source independent of the buyer. Lord Morris’ comments to this effect were as follows:

I think it is implicit from these passages that the learned judge was holding not merely that the sellers knew the particular purpose but that the buyers either expressly or impliedly had made known the purpose.⁶¹

58 *Supra* note 19, at 81.

59 *Ibid*, at 84.

60 *Ibid*, at 93.

61 *Ibid*, at 92.

The above comments clearly intimate that the requirement for a buyer to make known its purpose to the seller is one which is broadly interpreted and consistent with Lord Reid's earlier and more general comments. In other words, section 16(a) tends to be given a wide construction and, for it to apply, it is not necessary that the parties consciously applied their minds.⁶² Lord Morris' view suggests that the buyer would have met this requirement if the seller obtains knowledge of the purpose through means employed entirely by the seller or if such is obtained by the seller through independent third parties. A seller could obtain such knowledge of a particular buyer's purpose entirely on his own independent account, if for example there are a number of buyers purchasing the same product from the same seller for identical or similar purposes. In respect of one buyer, the seller may have been specifically told the purpose for which the particular buyer required the goods. It would follow that the seller having been informed of the purpose by one of a number of buyers using the same product for identical or similar uses, each subsequent buyer need not repeat in "parrot-like" fashion their individual particular purposes, identical though all these may be. It would appear that this may have been the context Lord Pearce had in mind when he said that "[t]here is no need for a buyer formally to 'make known' that which is already known".⁶³

In *Ashington*, Lord Guest also commented on the requirement to "make known" being met without the buyer needing to have taken any action to make known its purpose to the seller. He said that "[i]f the seller knows the purpose for which the buyer requires the goods, then no express intimation by the buyer is necessary", and it will be implied.⁶⁴ In other words, in the view of Lord Guest, the requirement to "make known" had been met where the third party knew, quite independently of any action by the buyer, that herring meal was required so as to feed to mink. Lord Guest opined that herring meal which the third party supplied was an international commodity which throughout the world had been used as animal feeding stuff. In the period 1957-1961, when mink in Norway were fed herring meal but no causal link had been established between the disease suffered by mink and the herring meal they were fed, this was sufficient to have placed the third party on notice that herring meal was being used as a food for mink. Lord Guest opined:

62 Ibid, at 79. This was a view also expressed by Lord Wilberforce in *Ashington Piggeries v Christopher Hill*, supra note 8, at 877.

63 Supra note 19, at 115.

64 Supra note 8, at 862.

But the fact that herring meal was being fed to mink must have been known to the third party who was so heavily involved in the sale of that commodity. Mr Volness [one of the witnesses for the third party] admitted that they knew that from 1957 Norwegian mink farmers were feeding herring meal to mink. It is apparent from a correspondence dated in November 1960 and produced by the third party, that herring meal was being pushed in Norway as a suitable food for mink. Mr Volness said there was no reason why herring meal should not be fed to mink.⁶⁵

His Lordship also made reference to the Nordic Handbook on Mink Rearing which stated that herring meal could be used for feeding of mink. Further, there was reference to an article in the Fur Trade Journal of Canada which stated that herring meal could be a nutritionally valuable food for mink.⁶⁶

From these sources of information, quite independent of any buyer input, knowledge of the buyer's purpose was imputed to the seller. It followed that the buyer was not required to appraise the seller of similar use of herring meal in Great Britain. As Lord Guest observed, "[i]f the third party had knowledge that herring meal was being fed to mink in Norway and elsewhere I see no reason why it was necessary for the respondents to prove use in Great Britain".⁶⁷

Viscount Dilhorne in *Ashington* also echoed the view that to "make known" included the case of a seller being put on notice of the buyer's purpose from independent third party sources of information. His instructive comments were that:

If Norwegian herring meal was fed to mink in Norway, and the third party was aware of this, then the third party should have contemplated that its use for food for mink in the United Kingdom was not unlikely.⁶⁸

However, Viscount Dilhorne appeared to go further by saying that the requirement to "make known" would also be met where the third party ought to have known that herring meal was being fed to mink. In this regard he made reference to conferences held between the third party and the Norwegian Fur Farmers Marketing Association and the Institute of Poultry and Fur Bearing Animals, with the object of securing the sale of herring meal as a feed for mink in Norway. Viscount Dilhorne agreed with the finding of the judge at first instance that it was accordingly inconceivable

65 Ibid, at 863.

66 Ibid.

67 Ibid.

68 Ibid, at 870.

that the third party did not become aware that herring meal was fed to mink by Norwegian farmers. The two witnesses for the third party were aware of this and Milmo J at first instance found that the third party, “must have known of this practice”.⁶⁹

So, in essence, Viscount Dilhorne adopted the view that the statutory test of “makes known” by implication can also be met where a seller either, as a matter of fact or as a matter of imputed knowledge, ought to have become aware of the buyer’s purpose. Such actual or imputed knowledge would have been evidenced by the buyer as a direct consequence of circumstances quite unrelated to any attempts by the buyer to “make known” the purpose, but which nonetheless brought home or “made known” to the seller the buyer’s purpose for the goods.

Lord Wilberforce in *Ashington* also agreed with the first instance finding that the buyer’s purpose had been made known to the seller. This was because the third party seller, as a result of experiences in Norway, knew of the practice of feeding herring meal to mink.⁷⁰ Lord Wilberforce expressed full agreement with aspects on which the trial judge had relied and which clearly supported the finding that the seller was aware or ought to have become aware of the buyer’s purpose as a result of information from sources independent of and indeed extraneous to the buyer. He expressed the position as follows:

the findings of fact of the trial judge ... were supported by the impression made on him by the two Norwegian witnesses in the witness box, by some important letters written by the third party in late 1960 on the subject of the herring meal and its potentiality as mink food, and by the general probabilities of the case, the fact that there were numerous mink..... farms in Norway to which herring meal had been fed. In my opinion, we must reinstate the judge’s conclusion, that feeding to mink was a normal user in 1961 and known as such to the third party.⁷¹

69 Ibid.

70 Ibid, at 878.

71 Ibid, at 879. Lord Wright in the earlier House of Lords’ decision in *Cammell Laird & Co v The Manganese Bronze and Brass Co*, supra note 38, at 422 alluded to the prospect of a seller acquiring knowledge of the buyer’s purpose from sources extraneous to the buyer when he commented as follows: “It is not necessary here to have recourse to writings or conversations between the parties outside the contract, or to other circumstances known to the parties involving the inference that at or before the date of the contract the particular purpose for which the buyers wanted the propeller was brought home to the minds of the respondents as contracting parties”.

The views of at least three of the Law Lords in *Ashington*, as highlighted, have been consistent in articulating this quite expansive position of how the requirement for the buyer to “make known” its purpose can be met. This is to be contrasted with the narrowest construction that can be placed on this requirement that a buyer needs to fulfill. Such a restrictive construction on the need for a buyer to “make known” its purpose was articulated by Lord Diplock in his dissenting opinion in *Ashington*, in relation to the second appeal. In the second appeal, the respondents, Christopher Hill, who were compounders of the mink food in question, had argued that as buyers they had impliedly made their purpose known to the third party. It was clear in the second appeal that the respondents had only argued that, while they had not expressly made known their purpose,⁷² they had made this known impliedly. Accordingly, they could claim the protection afforded under the equivalent to section 16(a). Lord Diplock rejected the argument that the purpose had been made known by implication:

The range [of purposes] so made known included use as an ingredient in feeding stuffs for many kinds of domestic animals and poultry. What it did not include was use as an ingredient in feeding stuffs for mink. This seems to me to be conclusive that even if the third party knew that Norwegian herring meal was a commodity which might be used as an ingredient in the diet of mink, use for that purpose can neither be nor form any part of the particular purpose for which the goods were required which was *made known by the buyer to the seller*, so as to give rise to the implied condition under s 14(1)[equivalent to section 16(a) of SGA 1908]. ... Neither expressly nor by implication had the respondents ever made known to the third party that the range of purposes for which they required the herring meal included use as an ingredient in the diet of mink⁷³

Of critical importance, in Lord Diplock’s view, as to why the purpose had not been made known, albeit by implication, was that there was no knowledge that emanated from the buyer which informed the seller of the former’s purpose. Unless the knowledge which the seller gained of the buyer’s purpose was conveyed in some way by the buyer, the buyer could not have made known its purpose by implication. Any knowledge that the seller gained of the buyer’s purpose had to have been gained through the buyer as the conduit for such information. There was no room in Lord Diplock’s view for importing knowledge on the part of the seller of the buyer’s purpose, as a consequence of independent third party information. Lord Diplock expressed his view as follows:

72 Ibid, at 877.

73 Ibid, at 891.

mere knowledge by the seller that the goods may be required for use for feeding to mink is not enough. Unless they know that the goods *are* required for that purpose and the source of their knowledge is the buyer himself, there is no ground for any reasonable inference that the buyer was relying on the skill or judgment of the seller to select herring meal which is fit for feeding to mink.⁷⁴

If, as *Ashington* suggests thus far, there is a continuum of opinion represented on the one hand by an overwhelmingly strong view that making known by implication can be satisfied by independent third party information, and Lord Diplock's view on the other, the question arises as to whether there is an intervening position on the requirement to "make known" the buyer's purpose? It appears that there may be such a position, based on the law of agency and exemplified by the facts in *Ashington Piggeries*.

The issue of the respondent buyer making known its purpose to the seller's agent was assumed, and on occasion specifically alluded to, in the judgments in *Ashington*. However, the implications of the agency relationship were explicitly addressed in the opinion of Lord Wilberforce. The parties to the second appeal, having contracted with each other as buyer and seller, did not transact business directly with each other. The Norwegian seller/supplier of the herring meal had appointed a company called Bowrings to act as their agent in England.⁷⁵ It was the seller's agent that was responsible for and which in fact actively negotiated contracts of sale for the herring meal. Lord Hodson, whose opinion outlined the facts in *Ashington's* case in some detail, encapsulated the agency position as follows. He said that Bowrings were "the exclusive selling agents of the third party in the United Kingdom".⁷⁶

Lord Wilberforce in *Ashington* made reference to the sale which was the subject of the second appeal as one which was negotiated through an agent of the seller, such agent being based in England. However Lord Wilberforce considered it sufficiently significant to raise the issue of whether an agent of the seller was sufficiently informed of the buyer's purpose to the extent that the seller was. In other words, the comment by Lord Wilberforce raises the possibility, in an agency relationship, that an agent may have far less or even no knowledge of the buyer's purpose. If this difference in respective levels of knowledge between principal and agent as to the buyer's purpose existed, any lack of knowledge of the buyer's purpose by the seller's agent would be

74 Ibid.

75 Ibid, at 877.

76 Ibid, at 855.

imputed to the seller as principal. It would appear to follow that, in an agency relationship involving sale of goods and where the principal had no knowledge of the buyer's purpose, the agent of the seller must have knowledge of the buyer's purpose in order that such knowledge may be imputed to the seller as principal. If the seller's agent lacks the necessary knowledge of the buyer's purpose, it would follow that the seller will be taken as not having the required knowledge of the buyer's purpose, unless it can be demonstrated that the seller, on its own account and quite independent of the agency relationship, had knowledge of the buyer's purpose. The comments in Lord Wilberforce's judgment which suggest this are as follows:

The sale was negotiated through an agent in England, CT Bowring & Co Ltd on behalf of Sildmelutvalget, *but no point has been taken as to any limitation on their knowledge as compared with that of their principals ...* and here there is no doubt that the third party, through its selling agents, CT Bowring & Co Ltd, and also directly, knew what the herring meal was required for, ie for inclusion in animal feeding stuffs to be compounded by the appellants.⁷⁷

The requirement that the seller's agent must have the required knowledge of the buyer's purpose, in order for it to be imputed to the seller, is well illustrated by *Mash & Murrell v Joseph I Emanuel*.⁷⁸ Here the plaintiffs, Mash and Murrell Ltd, were dealers in potatoes for human consumption. The plaintiffs were in the business of supplying potatoes to shipping companies for ships' stores and to a lesser extent to canteens. The defendant, Joseph I Emanuel Ltd, was also a dealer in and importer of potatoes. A contract was entered into between the plaintiffs and the defendant's agents, pursuant to which the defendant sold to the plaintiffs 2,000 half-bags of Cyprus spring crop potatoes. The evidence showed that the defendant's agents Messrs Constant Smith & Co knew the nature of the plaintiff's business, as a result of having had dealings with the plaintiffs for many years. It was also clear that Mr Mash of the plaintiffs had made it clear to Mr Smith, the defendant's agent, that he wanted the potatoes for use in his trade in England. It was this series of events which caused the defendant's agent to be fully informed of the buyer's purpose and which, under the law of agency, imputed such knowledge to the defendant seller. This enabled Diplock J to observe quite correctly as follows:

77 Ibid, at 877 (my emphasis).

78 [1961] 1 All ER 485. For further comment on this decision see Hudson, "Time and terms As To Quality In Sale of Goods" (1978) 94 LQR 566, 568-569.

It seems to me that in this case the knowledge of the defendants, through their agents; of the business carried on by the plaintiffs, coupled with the request by Mr Marsh for Cyprus potatoes to be made available for use in England, is sufficient to raise the inference, which I accept, that the plaintiffs did make known to the defendant the particular purpose for which the goods were required, namely for the purpose of use in this country for human consumption after arrival.⁷⁹

It is worth noting that the effect of these judicial opinions, on the application of agency principles in the context of sale of goods, is that a seller's agent needs to be informed of the buyer's purpose. Only if this occurs will it follow that, by implication, the seller had made known to it the buyer's purpose as a consequence of the conduct of the seller's agent. Thus, on this aspect of impliedly making a buyer's purpose known, the law takes an expansive approach to the meaning of "making known". As highlighted by an examination of the authorities thus far, it appears that the seller can be informed of the buyer's purpose by actual knowledge or, where necessary, the law will hold the seller as having been informed of the buyer's purpose through constructive or imputed knowledge.

Pursuant to section 16(a), the buyer needs to make known its particular purpose for the goods. The question in law is how particular must the "particular purpose" be? In *Taylor v Combined Buyers Ltd*, Salmond J commented as follows:

it is settled that the expression "particular purpose" used in this enactment is not limited to a special purpose communicated to the seller, as distinguished from the general purpose to which goods of that class are normally devoted, but includes such general purpose itself.⁸⁰

If Salmond J has interpreted "particular" as including the general purpose, has this been a consistent position as a matter of law up until the decision in *Hamilton*? Lord Wright provided the leading judgment in the House of Lords' decision in *Cammell Laird & Co v The Manganese Bronze and Brass Co*.⁸¹ This considered the application of section 14(1) of the SGA 1893. Lord Wright said that the tendency of court decisions in respect of section 14(1) had been to "give a liberal interpretation to these words". He also expressed the view that "[t]he definition of the particular purpose will vary according to the contract in question".⁸²

79 Ibid, at 490.

80 Supra note 54, at 629.

81 Supra note 38, at 422.

82 Ibid, at 424.

As the *Hamilton* decisions relied on the decisions in *Hardwick* and *Ashington* in order to apply the provisions of section 16(a), the latter decisions need to be examined to ascertain what they established as sufficient to meet the statutory test of “particular” in the phrase “particular purpose”. In *Hardwick*, this issue was mainly addressed in respect of the purchases from the fourth party Kendall by Grimsdale as buyer. In Lord Reid’s view, the fact that Kendall knew that Grimsdale were buying the goods in order to resell to compounders of animal feeding stuffs was a particular purpose. This was because there was no evidence to show that it was not sufficiently particular to enable Kendall to exercise skill and judgment. Lord Reid further observed that it would not have helped Kendall to be told that the goods were ultimately to be fed to any particular kind or age of animal because at the time nobody knew that what was suitable for one kind of animal may not have been suitable for another.⁸³

Lord Morris of Borth-y-Gest in *Hardwick* most clearly articulated what meaning was to be ascribed to the phrase “particular purpose”. In his view the degree of precision or definition required depended entirely on the facts and circumstances of a transaction for the sale of goods.⁸⁴ Lord Morris proceeded to make the following significant comments on the meaning of “particular purpose”:

No need arises to define or limit the word “particular”. ... There is no magic in the word “particular”. A communicated purpose if stated with reasonably sufficient precision, will be a particular purpose. It will be the given purpose. ... The law neither requires the use of any set formula nor the formal reiteration of that which has been made clear.⁸⁵

Applying these principles to the sale of goods contracts between the third parties, namely Grimsdale and Lillico, and the fourth party, Kendall, Lord Morris noted as follows:

If the Grimsdales and Lillico made it known (either expressly or impliedly) that they were buying the groundnuts in order to pass them on by way of re-sales to a number of people who would use the groundnuts in making compound foods for cattle and poultry that, in my view, was a particular purpose. No greater precision or elaboration of purpose was necessary.⁸⁶

83 *Supra* note 19, at 83.

84 *Ibid*, at 93.

85 *Ibid*, at 114.

86 *Ibid*.

Lord Pearce in *Hardwick* rejected the argument that a purpose would fail to be a “particular purpose” if it was expressed too widely and thereby lacked sufficient particularity. He said:

Almost every purpose is capable of some sub-division, some further and better particulars. But a particular purpose means a given purpose, known or communicated. It is not necessarily a narrow or closely particularised purpose. ... A purpose may be put in wide terms or it may be circumscribed or narrowed.⁸⁷

Lord Wilberforce in *Hardwick* noted that “particular” in section 14(1) was not used in contrast to “general” or “so as to require a quantum of particularity”, but was more in the sense of “specified” or “stated”.⁸⁸ Lord Wilberforce, who also delivered an opinion in *Ashington*, reiterated his view in *Hardwick* and arguably provided an even wider interpretation of particular purpose.⁸⁹ Lord Wilberforce stated that, on the facts of the second appeal in *Ashington*, the buyers’ purpose of using the herring meal as an ingredient in their animal food qualified as a particular purpose. In saying that this was a particular purpose, Lord Wilberforce acknowledged that such a purpose was indeed wide, and “wider even than the purpose accepted as particular in *Kendall v Lillico*”.⁹⁰

The legal effect of holding that such a wide purpose was a “particular purpose” was that it covered a large part of the area which would normally have been considered to fall within the purview of s 16(b). However, this was a permissible interpretation of “particular purpose” for the reason provided by Lord Wilberforce in the following passage:

But I do not think, as the law has developed, that this can be regarded as an objection or that in accepting a purpose so defined, as a ‘particular purpose’, the court is crossing any forbidden line. There remains a distinction between a statement (express or implied) of a particular purpose, though a wide one, with the implied condition (or warranty) which this attracts, and a purchase by description with no purpose stated and the different condition (or warranty) which that attracts. Moreover, width of the purpose is compensated, from the seller’s point of view, by the dilution of his responsibility; and to hold him liable under an implied warranty of fitness for the purpose of which he has been made aware, wide enough though

87 *Ibid.*

88 *Ibid.*, at 123.

89 *Supra* note 8, at 877.

90 *Ibid.*, at 878.

this may be, appears as fair as to leave him exposed to the vaguer and less defined standard of merchantability.⁹¹

Lord Wilberforce's views are consistent with Lord Reid's observation in *Hardwick*⁹² that the tendency has been to construe section 16(b) too narrowly and to compensate for that by giving a wide construction to section 16(a). It is also consistent with the approach examined in respect of the requirement by the buyer impliedly to make known its purpose. It would be inconsistent to adopt the approach that section 16(a) is to be construed very widely but then take a very restrictive approach to interpreting the particular ingredients contained in its provisions.

2. Buyer's Reliance on Seller's Skill or Judgment

The statutory requirement is that the buyer's purpose needs to be made known so as to show reliance on the seller's skill or judgment. It is not unreasonable that a buyer should rely on the seller's "knowledge and trade wisdom", to use a phrase quoted in *Australian Knitting Mills Ltd v Grant*⁹³ by Evatt J from *Ward v Great Atlantic & Pacific Tea Co*⁹⁴ In the earlier Privy Council decision in *Grant v Australian Knitting Mills Ltd* Lord Wright in respect of the material phrase, "so as to show that the buyer relies on the seller's skill and judgment", observed as follows:

It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances.⁹⁵

The House of Lords, prior to its decisions in *Hardwick* and *Ashington*, had examined this material phrase. In *Manchester Liners Ltd v Rea Ltd*,⁹⁶ Lord Sumner indicated that the words "so as to show" were satisfied if the reliance was a matter of reasonable inference to the seller and to the court. The matter was clearly expressed by Lord Wright in *Cammell Laird & Co v The Manganese Bronze and Brass Co* when he said:

Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to

91 Ibid.

92 Supra note 19, at 79.

93 [1933] 50 CLR 387, 446.

94 (1918) 231 Mass 90, 93, 94.

95 [1936] AC 85, 99.

96 [1922] 2 AC 74, 90.

have contracted on that footing. The reliance is to be the basis of a contractual obligation.⁹⁷

The question of reliance was also the subject of comment in *Hardwick*, with Lord Reid saying that the test for reliance was an objective one. It seems that Lord Reid required for reliance that the seller knew of the reliance by the buyer and that a reasonable person in the shoes of the seller would have realised this. Lord Reid stated that:

It is enough that a reasonable seller in the shoes of Kendall would have realised that he was inviting Grimsdale to rely on his skill and judgment and that is what I think that in fact Kendall were doing.⁹⁸

This view appeared to have been reinforced by Lord Pearce's views in *Hardwick*,⁹⁹ that the whole trend of authority had inclined towards an assumption of reliance whenever the seller knew the particular purpose. It appears therefore that the key ingredient, in order to activate protection under section 16(a), is expressly or impliedly to make known, to the seller, the buyer's purpose. If this can be established by the buyer then there is almost a presumption that the seller, having known of the purpose, necessarily knew or ought to have known that it was being relied on by the buyer. The argument had been raised in *Hardwick*¹⁰⁰ that the width of the purpose should prevent any inference that there was reliance. Lord Pearce rejected the argument.

Ashington, which was heavily relied on in *Hamilton*¹⁰¹ as articulating a correct statement of the law on section 16(a), confirmed the approach that reliance was a matter of reasonable inference in all the circumstances of a given case.¹⁰² For the purposes of New Zealand law on the question of

97 *Supra* note 38, at 423.

98 *Supra* note 19, at 84.

99 *Ibid*, at 115.

100 *Ibid*, at 116.

101 *Supra* note 3.

102 *Supra* note 8, at 862 where Lord Guest expressed the position as follows: "The question in the present case therefore resolves itself into this: whether in all the circumstances it is proper to draw the inference that there was reliance by the buyer on the seller's skill or judgment. ... If the proper inference from all the evidence is that the third party knew that herring meal was used as food for mink then, in my view, it is sufficient to show the reliance required by the section. If the particular purpose is shown, then it is an easy step to draw the inference of reliance".

reliance, the principles were clearly distilled by Moller J in *Milne Construction Ltd v Expandite Ltd*:

My understanding of the law in this area is that it is not necessary for the purchaser to prove that he expressly made known to the seller that he was relying on the seller's skill or judgment. In some cases reliance of this kind can be established by the mere fact that the particular purpose has been made known to the seller. But this is by no means a general rule. The question is "whether in the whole circumstances the inference can properly be drawn that a reasonable man in the shoes of the seller would realise that he was being relied upon."¹⁰³

Lord Wilberforce in *Ashington* also pointed out that reliance need not be total or exclusive. In a case where there is only partial reliance on the seller, it will be a question of fact to be determined by the evidence as to the extent to which a buyer partially relied on the skill or judgment of the seller and how far he relied on his own.¹⁰⁴

Assuming that the buyer is able to establish that the ingredients of section 16(a) have been met, the seller's liability is quite onerous. Salmond J in *Taylor v Combined Buyers Ltd* observed:

the liability of the seller is not limited to defects which might have been avoided by due use of his skill and judgment, but is an absolute liability for all defects which in fact make the goods unfit for the buyer's purpose, even though such defects were latent and undiscoverable.¹⁰⁵

Lord Diplock in *Ashington* also appeared to indicate that the extent of the seller's liability included latent defects when he commented:

It does not matter that the seller does not possess the necessary skill or judgment nor does it matter that in the then state of knowledge no one could by exercise of skill or judgment detect the particular characteristic of the goods which rendered them unfit for that purpose. This may seem harsh on the seller but its harshness is mitigated by

103 [1984] 2 NZLR 163, 182. This test was adopted and applied by Gallen J in *Matthews v Bullock and Co Ltd*, supra note 39.

104 *Taylor v Combined Buyers Ltd*, supra note 54, at 632, per Salmond J.

105 *Ibid*, at 629. In *Hardwick Game Farm*, supra note 19, at 116, Lord Pearce agreed that the seller's liability extended to latent defects when he commented: "Goods are not fit if they have hidden limitations requiring special precautions unknown to the buyer or seller. The groundnut meal delivered was plainly not fit for the purpose of reselling in small lots to compounders of food for cattle and poultry. It was highly toxic".

the requirement that the goods must be of a description which it is in the course of the seller's business to supply.¹⁰⁶

VI. ANALYSIS OF *HAMILTON* DECISION

It now becomes necessary to examine whether the law on fitness for purpose was correctly applied in *Hamilton*, as this decision has been described as being "New Zealand's leading decision on fitness for purpose".¹⁰⁷ The decision will be considered in relation to three ingredients in section 16(a), namely, the need for a buyer to make known its purpose, the meaning of particular purpose, and the question of reliance on the seller's skill and judgment. It was the failure of the buyer to meet this last requirement that led the Privy Council ultimately to find against the buyer.

1. Buyer's Requirement To "Make Known" Its Purpose

It is a central tenet of this analysis that the decisions in *Hamilton* fundamentally altered the law in New Zealand on what is required of a buyer to make known its purpose. Specifically, the question becomes whether, for the purposes of New Zealand law, a buyer can only make known its purpose expressly. A corollary to this is whether the statutory alternative enabling a buyer to make its purpose known explicitly is now redundant in New Zealand.

The Court of Appeal in *Hamilton* observed that Williams J in the High Court decision¹⁰⁸ decided against the Hamiltons on the ground that it had not been established on the evidence that they had either expressly or by implication made known their particular purpose to the Papakura District Council ("PDC"). Gault J, in delivering judgment for the Court of Appeal, commented on whether the requirement for a buyer to make known its purpose had been met. This was because PDC had knowledge that a number of customers that were drawing on the town water supply were involved with glasshouse horticultural activities, and that PDC knew that the presence of herbicides in the water could cause damage to crops. Gault J's response to this state of knowledge by PDC was that this was not sufficient in order to satisfy the statutory requirement for a buyer implicitly or expressly to make known its purpose. The Court of appeal expressed the view that "[p]lainly the words of the statute require more".¹⁰⁹

106 *Supra* note 8, at 885.

107 Lendrum, *supra* note 43, at 58.

108 *Supra* note 3 (HC).

109 *Supra* note 3 (CA).

It would appear from the Court of Appeal judgment,¹¹⁰ and implicitly from the Privy Council's majority advice,¹¹¹ that mere knowledge of the buyer's purpose is not sufficient to amount to a communication of the buyer's purpose to the seller. This is despite the Court of Appeal's specific identification in *Hamilton* of the correct legal test that a buyer needs to meet, in order to convey its purpose to the seller. The Court noted "the importance of the statutory requirement that the particular purpose be made known by the buyer to the seller".¹¹²

The statutory requirement is to make the purpose known. The Court of Appeal, in responding to the plaintiff's argument, appeared to acknowledge that the buyer had argued that it had impliedly done this in that the seller had knowledge of it. The Court of Appeal rejected the argument that impliedly making known a buyer's purpose was sufficient to meet the statutory test. This was because there was still a requirement for the buyer to expressly or directly communicate its purpose to the seller.¹¹³

The discussion of the legal test for implicitly making known a buyer's purpose, as discussed above, makes it clear that the object of the requirement is to ensure that the seller is in some way informed of the buyer's purpose. Although the wording of the provision articulates the requirement as the buyer needing to make known its purpose impliedly, the decisions that have considered the requirement have given it a very wide meaning. The requirement is certainly not narrowly or literally interpreted so as to restrict its meaning only to those actions on the part of the buyer that make its purpose known to the seller. In other words, there is no requirement in law that, for the seller to be informed albeit impliedly of the buyer's purpose, any means employed by the seller to be so informed must ultimately be found to have, as their source, the buyer. The rationale for this narrow argument is that, even though the seller can be informed of the buyer's purpose implicitly by any means whatsoever, such means must ultimately have the buyer as their source. This is because, by statute, the buyer bears the onus of making its purpose known. This is not how restrictively the buyer's responsibility for impliedly making known its purpose has been interpreted. The requirement is not that the buyer implicitly communicate its purpose but that the buyer "impliedly make

110 *Ibid*, at 276.

111 *Ibid*, at 318, where the majority accepted the Court of Appeal finding that the seller had mere knowledge of the buyer's purpose.

112 *Ibid*, at 276.

113 *Ibid*.

known” its purpose. The law is clear that this covers any other means whatsoever by which the seller either knew or ought to have known of the buyer’s purpose.

This legal requirement is also consistent with commercial reality, as was forcefully argued before the Privy Council but rejected by the majority. The buyers through their counsel argued that the threshold for meeting the legal test of “implicitly making known” a buyer’s purpose cannot be raised so high as to be made unrealistic in the commercial marketplace. Specifically, it was argued that it could not be the case that, to avail themselves of the protection afforded by section 16(a), the Hamiltons were obliged individually and specifically to communicate their particular purpose of using water for glasshouse horticulture to the seller.¹¹⁴ Counsel for the buyers in support of the argument provided the analogy of sales by means of vending machines which were to unknown buyers. Simply because such buyers were unknown did not relieve the seller of meeting its obligations under section 16(a) to supply products or goods that were fit for the buyer’s purpose. The Privy Council merely acknowledged that “[t]here is considerable force in [such a] submission”,¹¹⁵ but rejected it for the same reasons as the Court of Appeal had in that all it alluded to was general knowledge on the part of the seller of the buyer’s purpose. Mere knowledge was not sufficient and the buyer had to state specifically to the seller that it needed the water for glasshouse horticulture.

In adopting such an interpretation, a significant divergence in judicial opinion has emerged on the requirement for implicitly making known a buyer’s purpose. The law as had been developed and applied until *Hamilton* drew a clear distinction between the requirements in section 16(a) for a buyer “impliedly to make known” its purpose and the requirement for a “particular purpose”. There was no suggestion that, to meet the first requirement of “implicitly making known”, there was also a requirement that it also had to be “particularly” made known. The requirement of “particularity” only related to “purpose” and not to the first ingredient of “implicitly making known”. The issue of “implicitly making known” was taken to mean making known in a specific or general sense, and the law recognised that such could be made known by any person, not only the buyer. It was a logical interpretation based on the statutory wording requiring a buyer implicitly to make known its particular purpose, rather than a requirement prescribing a buyer implicitly yet particularly to make known its particular purpose.

114 *Ibid.*, at 318.

115 *Ibid.*

Even if the Privy Council was dismissive of any suggestion that “implicitly make known” included any actions of an unspecific nature by the buyers or anyone else, were there any such actions on the facts which nonetheless qualified as “implicitly making known”? It would appear that there were a number of such actions which would have so qualified and which would have placed the seller in a position of having knowledge of the buyer’s purpose. First, there were other growers of horticultural crops such as Messrs Edgar, Haydon, McCarthy, Tod and one other grower neighbouring the buyers.¹¹⁶ It was clear that Haydon’s property also drew on the town water supply.¹¹⁷ McCarthy had been a grower of standard tomatoes on the Bunnythorpe Road Property from 1978 until February 1995 when he leased the property to the buyers.¹¹⁸ However, Edgar, Tod and McCarthy drew on the town water supply primarily for horticultural use. This in itself would have served to put the seller on notice that there were other horticultural users such as the Hamiltons who were drawing on the town water supply for the particular use of horticultural crop farming. This may have served as the basis for statements by Hamilton, and accepted in the High Court decision, that the seller was aware of the buyer’s use of the water for horticultural purposes and that the seller “actively promoted horticultural development in the area”.¹¹⁹

Of further interest of how well informed and knowledgeable the seller was of the buyer’s purpose was the seller’s knowledge of McCarthy’s horticultural activities on the Bunnythorpe Road property for 18 years prior to it being leased to the buyers. McCarthy gave evidence that the PDC as seller was aware that his Bunnythorpe Road property had been used to grow tomatoes for at least 18 years when PDC required a prior owner to erect a new packing shed. Later in 1981, McCarthy applied to PDC for a permit to build a new glasshouse for tomato growing. McCarthy, in giving his evidence, expressed the view that the Council would have knowledge that his glasshouses were being employed for horticultural use because of water consumption that had occurred through a separate meter. McCarthy also asserted that PDC knew that his glasshouses were being used for commercial horticultural production. This was because of his need to have a dangerous goods licence for a large diesel tank used for heating the three glasshouses, and the fact that the tank was inspected every year by an officer

116 *Supra* note 3, at 19 (HC).

117 *Ibid*, at 41.

118 *Ibid*, at 30.

119 *Ibid*, at 11.

of the Council.¹²⁰ Although McCarthy admitted in cross-examination that he had personally never raised with the seller issues of water quality for the type of growing operation he conducted, the fact that such was the knowledge the Council had or was appraised of concerning his growing activities was an important aspect for the buyer's case of having met the terms of section 16(a). It meant that, in terms of the test for knowledge by the seller as propounded by *Ashington*, knowledge of such activities conducted by a third party would be imputed to the seller as knowledge of the buyer's purpose. Such imputation of knowledge on the seller's part would be even more compelling in a case such as the *Hamiltons*. In *Hamilton*, the buyers had engaged in horticultural activities identical to those of McCarthy's as third party, and the seller over many years had reason to have full knowledge of the third party's activities.

It could also have been argued that, if section 60(2) of the SGA 1908 preserved the rules of agency insofar as they had application in the context of sale of goods, the buyer's agent had indeed made known its purpose to the seller's agent. As the agents of the buyer and seller respectively had so acted, it could be said that, on the principles of agency law, each agent having acted under due authority from their respective principals, it followed that the buyer had indeed made known its purpose to the seller. The individual whose actions could arguably be construed as making known the buyer's purpose was a Mr van Essen whose role was referred to in the High Court judgment,¹²¹ the Court of Appeal judgment,¹²² and the minority opinion in the Privy Council.¹²³ The evidence accepted by the High Court was that, since 1991, van Essen, in his role as a greenhouse vegetable crop adviser, had advised the *Hamiltons* on tomato growing. Such advice also included matters involving nutritional management. In his capacity as advisor and in respect of the formulation of feed recipes for the plants, van Essen had "said that he had spoken to the Papakura District water engineer four or five times over a three-year period as to nutrient and element levels in the town water supply".¹²⁴ While the Court of Appeal and Privy Council minority judgments make reference to van Essen, this was only in the context of whether there was reliance by the buyer on the seller. The Court of Appeal went a step further by suggesting that such contact, although acknowledged as having occurred, did not result in the buyer's agent communicating any needs of the buyer. It is understandable for the Court of

120 *Ibid*, at 31.

121 *Ibid*, at 32.

122 *Supra* note 3, at 277.

123 *Ibid*, at 329.

124 *Ibid*, at 32.

Appeal to have taken the view that the role played by the agent did not amount to any communication of the buyer's needs. This is because the Court had consistently taken the view that any communication by the buyer had to be express in order to qualify under section 16(a).

Just as Lord Wilberforce in *Ashington*¹²⁵ had commented on the agency question in respect of the seller where no issue had been taken as to any limitation on the knowledge of the seller's agent who acted on the seller's behalf, so also no issue was raised in *Hamilton*. In fact the issue of the capacity of an agent to act on behalf of its principal went further in *Hamilton* than had been the case in *Ashington*. In *Ashington* the issue of agency, as described by Lord Hodson and as examined for its implications by Lord Wilberforce, only extended to one agency relationship, namely, that of the seller and its agent. In *Hamilton* the agency issue went further in that the communication was between the seller's agent, namely, the water engineer and the buyer's agent, van Essen. At no stage in the High Court, Court of Appeal and Privy Council judgments was the capacity of the respective agents questioned insofar as their ability to act on behalf of their principals was concerned. It must therefore be accepted that both agents had the necessary capacities to act on behalf of their principals respectively. It follows that the communication, being as it was about nutrient and element levels in the town water supply, must have made known to the seller the purpose for which the buyer required the goods. Even if, as the High Court found, the buyer's agent was never told that the water might be unsuitable for horticultural use, nor had the buyer's agent even asked the seller of the herbicide levels in the water, this would appear to be immaterial. If, as a result of the communications, the purpose was made known, namely, use of water for greenhouse vegetable crop growing, the legal test for "making known implicitly" would have been met.

In summary, then, the communications by the respective agents of the buyer and seller could well have been relied on by the buyer as evidence of having made known its purpose to the seller.

Thus far the discussion has emphasised the test of a buyer making known its purpose as a result of mainly third party actions as well as actions by the buyer indirectly through its duly authorised agent. However, there were also actions by the buyer itself that would have conveyed knowledge of its purpose to the seller. As Williams J noted in the High Court judgment,¹²⁶ in 1994 the Hamiltons received an award for excellence in food science at the

125 *Supra* note 8, at 877.

126 *Supra* note 3, at 13.

Printpak-UEB Food Awards for cherry tomatoes and were congratulated by the mayor of Papakura. Thus, the first citizen of the town that supplied water to the plaintiffs, and through the mayor the Council itself, knew in a general sense that the Hamiltons were numbered among the other horticulturalists, and also specifically knew of their horticultural activities and that these included the growing of cherry tomatoes. The Hamiltons were also directly responsible for bringing to the knowledge of the Council their purpose for the water, through the very large volume of water that they drew from the town water supply for their horticultural purposes. As the minority Privy Council opinion observed:

[B]y asking for a large-scale supply of water for their horticultural business, the Hamiltons did impliedly make known to Papakura that they required the water for growing crops in the greenhouses. Indeed we find it hard to imagine that Papakura could have supposed that the volume of water in question was required for anything else.¹²⁷

These means by which the seller obtained knowledge of the buyer's purpose were in addition to the matters referred to in the Court of Appeal judgment.¹²⁸ The common element in all these means was summarised by the Court of Appeal as follows:

Together this material establishes that the Council knew at the relevant time that its town water supply was used for protected crop growing including the use of soil-less techniques, knew growers preferred that water to bore water because of its quality and knew that the catchment area was vulnerable to contamination from (inter alia) pesticides.¹²⁹

The Court of Appeal's view that the buyer would not have made its purpose known implicitly if it did not expressly communicate its purpose to the seller is disturbing. This is contrary to established authority and increases the burden on the buyer quite considerably so as to render the protection afforded by section 16(a) utterly meaningless. This could not possibly have been the effect of *caveat venditor* as enshrined within the provisions of section 16(a)

127 Ibid, at 326.

128 Ibid, at 277.

129 Ibid.

2. Buyer's Particular Purpose

Lord Morris of Borth-y-Gest in *Hardwick* observed that there is no magic in the word "particular".¹³⁰ If a buyer explains its purpose or impliedly makes it known, that will qualify as a "particular" purpose. Lord Wilberforce in *Ashington* was clear that broadly defining a "particular purpose" was an acceptable approach, and in fact applied such a broad approach to "particular" in his application of section 16(a) to the facts in the second appeal.¹³¹

A commentator¹³² has suggested that the requirement of "particular purpose" would have been met on the facts in *Hamilton* if the Hamiltons had made known their particular purpose as growing "Evita" cherry tomatoes hydroponically. With respect, this has not been the degree of specificity of "particular purpose" required as a matter of law. In particular, the highly persuasive decisions that were considered in *Hamilton*, namely, *Ashington* and *Hardwick*, had accepted that a widely stated purpose would qualify as "particular". In respect of this requirement, the Court of Appeal appears to have considerably narrowed the requirement of "particular". The effect of this is that a very narrow or literal meaning is attributed to the phrase and in turn this makes it far more difficult for a buyer to come within its purview.

3. Buyer's Reliance on Seller's Skill or Judgment

The Privy Council majority judgment dismissed the appeal by the Hamiltons on the singular ground that their actions failed to demonstrate that they had shown reliance as required by section 16(a). This was despite the law in decisions such as *Hardwick* and *Ashington* which had held that, once the buyer had made known its particular purpose, there was a presumption or inference of reliance. The majority judgment in *Hamilton* raised the threshold of this requirement higher so that, on the facts, the buyer was found not to have met this requirement and so failed to obtain the protection of section 16(a). In the majority opinion, the buyer was required to make its purpose known "so as to show" reliance, and also had to show that the seller knew of its reliance. The effect of this additional requirement on the buyer is in effect to remove or negate any presumption or inference of reliance by the buyer. No longer can the buyer as a matter of law presume it has acted "so as to show" reliance merely by impliedly making known its particular

130 *Supra* note 19, at 93.

131 *Supra* note 8, at 877-878.

132 Lendrum, *supra* note 43, at 57.

purpose. It must go further and notify the seller expressly that it is in fact relying on the seller, before it can claim to have shown reliance.

The rationale given by the Privy Council majority for this significant new imposition on the buyer was because of the unique position of the seller. Its position was unique because of the particular good involved in that the seller was in the business of selling one and the same product, namely, water from one single source of supply to all its purchasers which numbered more than 38,000 people. Coupled with this was the fact that the only standard that the seller was required to meet in respect of the good was the drinking standard. These specific circumstances served as mitigating factors for the seller. It followed that, since the buyer had not specifically shown that the seller knew of its reliance, the buyer failed in its bid to claim the implied condition under section 16(a). The buyer failed even though it was clear on the facts that it had acted well beyond the legal requirement of making its purpose known “so as to show” reliance. This was because it had not merely made known its particular purpose to the seller. It had actually acted “so as to show” reliance on the seller by using the town water supply instead of bore water.

The second aspect which indicated that it had acted “so as to show” reliance on the seller was the large volume of water that it had drawn from the town water supply. The third aspect was that, unlike the New Zealand Milk Corporation, other large businesses such as pharmaceutical, photo-processing, hospital and brewery concerns, and specialist water users like the kidney dialysis patients, the buyer had not installed its own filtration plant to ensure that the water met its particular needs. These measures by the buyer were not considered by the majority as showing reliance, as there was no evidence that the sellers knew of the particular steps that had been taken by the buyer.

If the seller was in such a unique position as described by the majority, because of the type of product it was supplying and the statutory obligations it was under for that supply, the fact remains that the relationship with the buyer was contractual.¹³³ Since hydroponic tomato-growing, horticulture in general and the use of herbicide¹³⁴ were prevalent in the area, it would have been a prudent measure for the seller not to supply the product or

133 Note that the statutory obligation was to supply to regular domestic consumers. The supply to the buyers was termed “extra-ordinary supply”, and was not obligatory, hence the contractual nature of the relationship.

134 Williams J, *supra* note 3, at 148 spoke of “the prevalence of hydroponic tomato-growing and the use of herbicide”.

alternatively, if it chose to supply, to disclaim responsibility for the suitability of the water. The seller in fact specifically disclaimed responsibility for the water quality to a rose grower in Drury in 1996. It followed that it could have done the same with respect to the buyers and others in their position. It appears that, because the seller did not so act, and gave no warning of the risk of pesticides of which it was aware, the buyer was saddled with the costly consequences of the seller's decision to supply the water.

VII. CONCLUSION

The overriding principle pervading the implied conditions in the SGA 1908, particularly section 16(a), is that of *caveat venditor* or seller beware. As stated by Thomas J in the Court of Appeal in *B Bullock and Co Ltd v Matthews*¹³⁵ and reaffirmed by the minority Privy Council opinion in *Hamilton*:

The essential function of the implied term in the contract of sale between Papakura and the Hamiltons is to distribute or allocate loss between them. If the Hamiltons impliedly made known to Papakura that they needed the water for covered crop cultivation so as to show that they were relying on its expertise to supply water suitable for that purpose, then the law says that the parties contracted on the basis that the water supplied would indeed be reasonably fit for that purpose.¹³⁶

However, the effect of the Privy Council decision in *Hamilton* is not to apply the law but to erode dramatically the effect of the protection afforded to a buyer by the implied provision in section 16(a). The decision will have a very significant impact on sale of goods law in New Zealand.

A prudent course for subsequent Courts would be to distinguish the decision on its facts. The very restrictive interpretation of section 16(a) in *Hamilton* may perhaps be explained by the special facts, namely, a local authority supplying water to a minimum health standard and subject to statutory obligations. Any wider application of the *Hamilton* decision to sale of goods law in regard to the application of section 16(a) generally would mean an unwarranted interpretation of section 16(a) which was designed to protect the buyer and hold the seller accountable.

135 *Supra* note 38, at 12.

136 *Supra* note 3, at 331.

LESSONS IN ADJUDICATION

BY PETER SPILLER*

I. INTRODUCTION

This article is based on a survey of some 900 District Court judgments on appeal from the Disputes Tribunal. The period covered in the survey is from mid-1999 to mid-2003. An objective of this article is to publish the valuable lessons in adjudication contained in these judgments which, being unreported, would otherwise remain inaccessible. These judgments provide guidance for those involved in the Disputes Tribunal process and in other adjudicatory processes as well.

Appeal lies from the Disputes Tribunal to the District Court in terms of the Disputes Tribunals Act. This Act allows for appeal on the basis of procedural unfairness which prejudicially affects the outcome of the hearing.¹ The number of appeals lodged against orders of the Tribunal, in proportion to the number of claims heard, is small, and the great majority of appeals are unsuccessful.² This article examines the minority of appeals that have been successful, and focuses on the recurrent reasons for successful appeals. The article explores the lessons to be learnt in terms of running a fair hearing and the process of decision-making.

II. RUNNING A FAIR HEARING

To offend and judge are distinct offices, and of opposed natures.³

The above words of Shakespeare provide a pointer to an essential attribute of good judging: the need to run a fair hearing. No judge can avoid

* Professor of Law, University of Waikato. This article is an edited version of a paper presented at the 2003 Conference of Disputes Tribunals' Referees in Napier.

¹ Disputes Tribunals Act 1988, s 50(1).

² The 1986 Review of the Small Claims Tribunals recorded that 4% of decisions were appealed against and that in 13% of these the Tribunal's decision was altered (P Oxley, *Small Claims Tribunal Evaluation. Volume 1: Discussion Paper* (Policy and Research Division, Department of Justice, Wellington, 1986) 85). Department of Justice/Courts statistics for the period 1992-96 revealed that appeals averaged at around 4% of Tribunal decisions.

³ *Merchant of Venice* II.IX.60-61, a Shakespearean play about mercy and justice.

displeasing one or another of the parties in the course of a judicial career.⁴ Yet every judge should avoid causing hurt and resentment through conducting bad processes which breach the requirements of natural justice. As Chilwell J once remarked, there is “all the world of difference between a disappointed litigant and a disturbed litigant”, the latter being a person who has suffered an unfair process.⁵

In the District Court, a recurrent reason for successful appeal has been that the Referee who presided at the Tribunal hearing has processed matters too quickly and not given an adjournment where appropriate. Sometimes Referees have proceeded in this way with the best of motives. One of the objectives of the Tribunal is to provide a forum that provides speedy justice.⁶ Thus, Referees have rightly had regard to the inconvenience to the parties of further hearings, and in recent years Departmental pressure has been brought to bear on Referees not to adjourn matters unnecessarily.⁷ The conflicting demands on Referees have been reflected in cases taken on appeal. On one occasion, the appeal Judge remarked on the “rush to do justice” which resulted in an unfair process.⁸

District Court judgments have signalled that running a fair hearing requires that parties have adequate notice of the claim made, have sufficient opportunity of responding to evidence and argument, have adequate opportunity of producing material witnesses for cross-examination, are fairly dealt with in situations calling for interpreters or telephone conferences, and have enough time to present their case in full.

1. Adequate Notice of Claim

The District Court has affirmed that it is procedurally unfair to deal with a claim or an issue about which the opposing party has received no or inadequate warning.⁹

⁴ *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24, 45, per McKay J (“at least one party is likely to be dissatisfied”).

⁵ *Connell v Auckland City Council* [1977] 1 NZLR 630, 634.

⁶ Oxley, *supra* note 2, at 92.

⁷ The Departmental “Disputes Tribunal Performance Indicator” is that 80 percent of claims will be disposed of within 90 days of the date of filing (*Departmental Forecast Report For the Year Ending 30 June 2003* (presented to the House of Representatives pursuant to s 34A of the Public Finance Act 1989) 38).

⁸ *Pierce Landscape Co Ltd v Clark and Clark*, unreported, DC Auckland, DT 367/01 & 757/01, 19/7/01, per Joyce DCJ.

⁹ *Auto Court Ltd v Douglas*, unreported, DC Dunedin, DT 57/00, 5/7/00.

Where an order was based on a counterclaim made by the respondent three days before the hearing, the appeal was allowed for the following reasons:

The appellant had little or no effective time within which to investigate the counterclaim; no real opportunity to prepare in terms allowing them fairly to confront the assertion made.¹⁰

Where a claim for compensation was brought against a company, in the course of the hearing the claim was directed against the director personally pursuant to a guarantee. The Referee's order against the director was overturned because:

The Referee has stepped outside the terms of the application in dealing with this pursuant to the guarantee, which was not part of the case when it commenced but became part during the hearing. The appellant was not forewarned of this, was not in a position to argue this and the Referee should not have proceeded on that basis. That amounts to a procedural unfairness.¹¹

2. Adequate Opportunity of Responding to Opposing Evidence

The District Court has stressed that natural justice requires that all parties be given proper opportunity to read, reflect upon and respond to submissions, particularly where they are lengthy and/or raise difficulties. The Court has observed that a further hearing might be necessary where further evidence and/or enquiries need to be made.¹²

At a hearing, a very detailed and comprehensive lawyer's letter was presented in support of the respondent's case. The applicant had no notice that the legal submission would be presented, he was not given proper opportunity to respond to the submissions, and he was not given the opportunity of an adjournment. The Referee's decision was based on the lawyer's letter. On appeal, the Judge observed:

When a lawyer's letter is presented without prior warning a Referee should be assiduously careful to ensure that there is a proper balance and fairness between the parties. That should normally mean that a Referee should specifically provide the

¹⁰ *Pierce Landscape Co Ltd v Clark and Clark*, unreported, DC Auckland, DT 367/01 & 757/01, 19/7/01, per Joyce DCJ.

¹¹ *Hofman v Hodder*, unreported, DC Christchurch, DT 1445/99, 14/3/00, per Hattaway DCJ.

¹² *Martin v L'Estrange-Corbett*, unreported, DC North Shore, DT 1925/99, 6/9/00.

opportunity to the other party to ask for an adjournment to provide similar legal submissions if desired. At least there should be a short adjournment sufficiently long to give the party time to absorb the lawyer's letter so that the party could properly respond to the letter.¹³

In another hearing, there was inconclusive evidence as to the costs of machining the recycled timber in question. The Referee decided to allow quotes for these costs to be submitted subsequent to the hearing. In relation to one of these quotes the Referee telephoned the business that had supplied the quote in order to clarify it. The Referee made the decision without a further hearing. On appeal, the Judge stated:

The information which was subsequently provided was not straightforward and the Referee herself sought to clarify it. Rather than endeavouring to contact the companies providing the quotes to see whether she could clarify the matter, the Referee should have called for a resumed hearing. The issue of unfairness can mean simply failing to conduct a hearing where all of the parties are given an opportunity of being heard or questioning the other parties, or calling witnesses and producing documents.¹⁴

3. *Hearing Material Witnesses*

The District Court has affirmed that a party must not be deprived of the opportunity to have witnesses heard on important matters, and that adjournment is necessary where a material witness cannot be present.¹⁵ This procedure is required to avoid reliance on hearsay evidence, to provide for cross-examination of witnesses, and to allow the Referee to make the safest possible decision.¹⁶

A Referee declined to adjourn the proceedings so that witness evidence could be given, on the basis that the parties had had long enough to prepare their cases. The party applying for the adjournment did so because it had thought that it would succeed on its interpretation of the contract, and had not thought that it would be necessary to rely on the evidence of the witness

¹³ *Boddy v Meredith*, unreported, DC Palmerston North, DT 468/00, 17/5/01, per Becroft DCJ.

¹⁴ *McGhie v Farmhouse Group Ltd*, unreported, DC Hastings, DT 119/02, 31/10/02, per Perkins DCJ.

¹⁵ *Downsix Systems Ltd v Hagley Building Products Ltd*, unreported, DC Christchurch, DT 1031 & 1879/01, 13/11/01, per Holderness DCJ.

¹⁶ *Fastcat Ferries Ltd v Dew Trustee Co Ltd*, unreported, DC Blenheim, NP 454/00, 20/12/00.

which (it claimed) would offer conclusive evidence on the matter. The Judge commented perceptively:

It must be remembered that in this case the Referee was dealing with lay people and he almost always does. It is not infrequently the case that parties before Courts misjudge their own cases and do not have at immediate hand evidence which might be critical to the Court's determination. In those circumstances the Court almost always entertains adjourning the proceedings so that crucial evidence may be presented, and the Court must turn its mind to the question of whether or not to refuse to do so would be unfair. The Referee failed to turn his mind to a critical issue, namely, whether there was evidence which would support a view contrary to the conclusion that he reached in the absence of that evidence.¹⁷

In another case, the outcome of the hearing was dependent on what was said during a key telephone conversation. Only one party to the telephone conversation was present at the hearing, and the other party's version of the conversation was presented on her behalf by her husband. The Referee preferred the evidence of the witness who was present, without indicating the need for the other person's direct evidence. The Judge allowed the appeal, commenting:

Where there is a dispute between two witnesses as to what was said in a telephone conversation, it is difficult to see how such a dispute can be resolved by a Tribunal without hearing from both parties. If only one party is there giving oral evidence, it is predictable that that party's evidence will be preferred to pure hearsay evidence, unless there are some independent circumstances which might corroborate the account of one or the other. If there are no independent circumstances, it is really essential to hear both parties. The Referee would have seen how crucial the conversation was and so she should have positively given the party the opportunity to call his wife as a witness and at the same time advised the party that he would be at a serious disadvantage if he did not avail himself of that opportunity.¹⁸

4. Interpreters

New Zealand's increasingly multicultural society has presented the Disputes Tribunal with new challenges. The District Court has pointed out the need for extra time or adjournment for an interpreter to be present, where parties or witnesses are not familiar with the English language. This is because the

¹⁷ *Joyce Group Ltd v Tregenza Ltd*, unreported, DC Timaru, DT 94/02, 23/10/02, per Erber DCJ.

¹⁸ *Sole v Gavin Chan Decorators Ltd*, unreported, DC Wellington, DT 60/01, 2/11/01, per Tuohy DCJ.

hearing room is a foreign environment for most of the population, and because in legal proceedings precision of language is important in terms of comprehension and argument.¹⁹

In one dispute, a Referee reluctantly proceeded with a hearing without an interpreter where the respondent could not adequately understand English. The Referee did not adjourn for an interpreter because the respondent's 13-year-old son interpreted for his family, and because all the parties at the hearing were adamant that they did not wish to have an adjournment. The Judge allowed the appeal for the following reason:

A Court-appointed interpreter should have been present so that there could have been no suggestion that either party did not receive a fair hearing. An adjournment should have been granted and then fewer hearings would have been required in order for this matter to be determined.²⁰

In another case, the Referee was faced with an application for an adjournment by a Samoan interpreter, on the ground that he had other commitments. The Referee declined this on the basis that the party in question (who had difficulty with the English language) had had plenty of time to get assistance before the hearing. The party then left the proceedings and a decision was given against him in his absence. The Judge noted the following:

There is unfairness where a party, faced with a foreign procedure, one that he was not familiar with and to be conducted in a language with which he is not familiar, is unable to use an interpreter or to get an adjournment to arrange a suitable person. To proceed in the absence of a participant when an application for an adjournment has been declined when it should have been granted is an unfairness.²¹

5. Telephone Conferences

The potential inconvenience to a party who lives some distance from the residence of the applicant is minimised by the availability of a telephone conference at the local District Court.²² However, the absence of the respondent in person presents particular challenges to the Referee in

¹⁹ *Brauner v Brand*, unreported, DC Wellington, DT 380/00, 4/9/00.

²⁰ *Guang Zhou Xu v Littlejohn*, unreported, DC Manukau, DT 884/00, 6/3/01, per McAuslan DCJ.

²¹ *Leota v Jones*, unreported, DC Christchurch, DT 412/02, 11/6/02, per Doherty DCJ.

²² Disputes Tribunals Act 1988, s 60(2)(ga): "the giving of evidence from a distance (for example by video link or telephone conference)".

ensuring a fair hearing. The District Court has stated that where the party on the telephone is being prejudiced, by the nature of the hearing or by faulty equipment, the Referee should abandon the hearing and start afresh.²³

In one dispute the initial hearing concluded with an agreement that the matter would be adjourned to address a specific issue, and that the party who lived away from the Tribunal could attend by way of a telephone conference. At the adjourned telephone hearing, the discussion developed into consideration of a much greater issue than had been envisaged. The Referee gave a decision at the end of the hearing on all the matters discussed. The Judge allowed the appeal of the telephone party and noted:

Given the initial limited scope of the telephone conference, when the nature of the telephone conference changed the Referee should have made clear that the Tribunal was going to proceed to make determinations on the broader issues, and that the telephone party had the choice of abandoning the telephone conference and coming to the Tribunal in person. The telephone party did not give any informed consent to the scope of the telephone conference changing, and were clearly prejudiced by the fact that they did not have a representative present in person to put all evidence before the Tribunal and to cross-examine the [other party].²⁴

6. Adequate Time for Hearing

The District Court has affirmed that it is essential that sufficient time be given to parties to present all their evidence and allow opportunity for cross-examination, and that adjournment is necessary where the dispute is not resolved in the time allotted.²⁵

A Referee decided to give her decision without calling two witnesses who could have given material evidence, because the hearing had overrun by 40 minutes and the following hearing was a teleconference. In allowing the appeal the Judge observed:

It is important that all witnesses are heard adequately and that the normal issues are put to those witnesses. Constraints of time should not preclude parties from calling material witnesses.²⁶

²³ *Peter Munro Commercials Ltd v Todd*, unreported, DC Dunedin, DT 103/00, 15/11/00.

²⁴ *Media Connections Ltd v Eventpro Ltd*, unreported, DC Wellington, DT 324/00, 4/12/01, per Becroft DCJ.

²⁵ *McWhirter v Thanh*, unreported, DC Auckland, DT 1870/01, 31/1/02.

²⁶ *Lemmon v Smal*, unreported, DC Auckland, DT 1441/00, 31/1/01, per Cadenhead DCJ.

In another case, the appellant contended that, because of certain delays at the commencement of the hearing, he was unable properly to present his case and that he had to “fast forward” through his video. The Judge granted the appeal and affirmed that “the appellant needed adequate time to present his evidence without the necessity to truncate the presentation of his case”.²⁷

III. THE DISCIPLINE OF DECISION-MAKING

Are you acquainted with the difference that holds this present question in the court?²⁸

Decision-making requires discipline of mind and will. It is helpful for the decision-maker, in maintaining tight discipline over the decision-making process, to check repeatedly if there is full “acquaintance” with the difference at issue. The above question needs to be asked by the decision-maker of himself or herself, and needs to be asked of the parties to the litigation.

In the District Court, appeals have been repeatedly allowed because Referees have not adopted a disciplined approach to decision-making. To be fair to Referees, theirs is a complex role. First, they are required to assess, before they proceed to determine a dispute, whether it is appropriate to assist the parties to negotiate an agreed settlement.²⁹ This requirement means that Referees are regularly involved in a mediation-type process. Secondly, where the Referee proceeds to determine the dispute (as occurs in the majority of cases), he or she is required to decide the dispute according to the substantial merits of the case having regard to the law.³⁰ This requirement allows Referees (most of whom are not legally trained) considerable discretion in balancing the overall equities of the matter with legal considerations. Thirdly, the Referees’ functions operate in a hybrid context designed to afford informality and therefore accessibility as well as being subject to natural justice processes.³¹ It is not surprising that, in this context, Referees have sometimes betrayed irregular decision-making

²⁷ *Campbell v Williams*, unreported, DC Whangarei, DT 358 & 359/99, 9/3/00, per Tompkins DCJ.

²⁸ *Merchant of Venice*, IV.1. 167-168.

²⁹ Disputes Tribunals Act 1988, s 18(1).

³⁰ Disputes Tribunals Act 1988, s 18(6).

³¹ See Spiller, P *The Disputes Tribunals of New Zealand* (2nd ed, 2003) 7-10. For example, Referees may have regard to any relevant evidence, even if this is not admissible in a court of law, but evidence must be shown to both parties for the opportunity to comment on it (Disputes Tribunals Act 1988, s 40(3)-(4)).

processes. On one occasion a District Court Judge commented that “[a] natural anxiety to see the whole matter resolved has produced as its by-product a process that was unfair”.³²

District Court judgments have highlighted that there are a number of consequences of adopting a disciplined approach to decision-making. Before the decision-maker proceeds to a decision, he or she needs to check that the disputants are clear as to the issues that will be decided and that they have had the opportunity of being heard on all factors relevant to deciding those issues. The decision-maker must meticulously decide on each aspect of multi-faceted claims, must produce proper evidential support for the decision, and must provide a logical and principled basis for the decision. Finally, the decision-maker must reflect an “acquaintance” with the dispute through adequate written reasons in support of the decision and (if need be) the process adopted.

1. *Foreshadowing, at Hearing, Basis of Decision*

The District Court has repeatedly allowed appeals where Referees have given reserved decisions based on reasons which have not been canvassed at the hearing. This process has been seen to be a breach of natural justice, leaving the evidence, logic and thought-processes of the Referee untested, and the decision as a surprise to the parties.³³

Reaching decisions, after a hearing, which rely on reasons to which one or other party has not been able to respond may be called the “Erebus phenomenon”. In the “Erebus Inquiry”, Mahon J made findings of “a pre-determined plan of deception” and “an orchestrated litany of lies”, without having foreshadowed these findings at the Inquiry. In so doing, Mahon J was held by the Court of Appeal and the Privy Council to have acted contrary to natural justice. The Privy Council stated that a person making a finding must “listen fairly to any relevant evidence conflicting with a finding, and any rational argument against the finding, that a person, whose interests may be adversely affected by it, ... would have so wished [to place before the decision-maker] if he had been aware of the risk of the finding being made”.³⁴

³² *Pierce Landscape Co Ltd v Clark and Clark*, unreported, DC Auckland, DT 367/01 & 757/01, 19/7/01, per Joyce DCJ.

³³ *Clark v Young*, unreported, DC Alexandra, DT 127/99, 16/2/00.

³⁴ *Erebus Royal Commission; Air NZ Ltd v Mahon* [1983] NZLR 662, 671. See also *Erebus Royal Commission; Air NZ Ltd v Mahon (No 2)* [1981] 1 NZLR 618.

In one Tribunal case in point, the question canvassed at the hearing was whether engine work had been done satisfactorily. In a reserved decision, the Referee held that the work had been unsatisfactory, but then made an order which substantially reduced the amount claimed on account of the delay in bringing the claim. The possible impact of delay on the decision was not raised by the Referee as a factor during the hearing. The Judge allowed the appeal and remarked:

It is procedurally unfair for a Referee to decide an important part of a claim adversely to a party unless the basis of that decision has been clearly raised at the hearing. Where they are material to the outcome, issues must be raised and appropriately dealt with before they are decided.³⁵

In another case, a Referee made an order which had regard almost exclusively to the effect of the weather on the work done. Before the appellant received the decision, he was unaware that the weather would be an issue of importance to the Referee. The appeal Judge declared:

It is better to err on the side of caution rather than leave a party with a genuine sense of grievance at not being able to put before the Disputes Tribunal all relevant matters. There are grounds upon which it can properly be said that the appellant was denied an opportunity to put before the Referee all matters relevant to the effect of the weather on the property.³⁶

2. *Consideration of Each Aspect of Claim*

The District Court has emphasised the need for Referees, where they are faced with claims comprising different parts, to decide explicitly on each part and to give reasons for each decision, rather than adopt an overall arbitrary assessment.³⁷

An applicant presented a claim which was made up of two parts. The first part was for payment for services to assist in the setting up of a shop, and the second was for the use of a stereo player for a period of some months. The Referee held that there was insufficient evidence to establish an intention by the parties that there would be a legal relationship for the first claim.

³⁵ *Ward v Graham Page Engine Reconditioning*, unreported, DC Dunedin, DT 387/00, 18/1/01, per MacAskill DCJ.

³⁶ *Bjerring v Lennsen*, unreported, DC Hamilton, DT 384/99, 9/2/00, per Willy DCJ.

³⁷ *Ward v Graham Page Engine Reconditioning*, unreported, DC Dunedin, DT 387/00, 18/1/01.

However, the Referee made no reference to the second part. The Judge allowed the appeal from the decision and said:

It is not objectively correct to say that the second issue was dealt with under part of the original decision. On an objective reading by a third party of the original decision, the [second] issue was not dealt with at all.³⁸

In another claim the applicant sought the refund of the purchase price of a piano plus the delivery fee. The Referee made an order for the payment of part of the purchase price, but did not refer to the claim for the delivery fee. The Judge commented:

The Referee failed to have regard to the part of the claim seeking recovery of the delivery fee. The Referee needed to explain why the claim for delivery was apparently disallowed.³⁹

3. *Evidential Support for Decision*

The District Court has referred to the fundamental requirement for Referees to have regard to, and back their decisions with, relevant evidence.⁴⁰ Where Referees have failed to provide evidence in support of the basis of their decision, there has been held to be prejudice and procedural unfairness.⁴¹

In one case the respondent had declined to complete a contract with the appellant for the purchase of property for \$16000. The appellant later resold the property for \$12000 and claimed \$4000 in the Tribunal. In a reserved decision the Referee dismissed the claim on the basis that the appellant had failed to prove that the difference in price was solely attributable to the cancellation of the contract. In the decision the Referee suggested that the respondent may originally have been prepared to pay more than the market value or that the appellant had later been under pressure to sell and that this had prompted him to sell at a lower price. The Judge allowed the appeal and remarked:

The comments of the Referee indicated an acceptance of a hypothetical position which was not supported by any evidence referred to by the Referee. The Referee

³⁸ *McCausland v Magazine Action Gifts Ltd*, unreported, DC Wellington, DT 287/01, 23/7/01, per Tuohy DCJ.

³⁹ *Sheffield v Bennett*, unreported, DC Auckland, DT 2589/00, 23/8/01, per Boshier DCJ.

⁴⁰ *Furneaux v Korunic* unreported, DC Christchurch, DT 2145/99, 8/8/00.

⁴¹ *Swinson Wall Coverings Ltd v Pitches*, DC Auckland, DT 2996/00, 23/8/01, per Boshier DCJ.

was introducing matters of opinion into what was largely a factual situation, rather than dealing with the claim on the evidence which was produced.⁴²

In another case the respondent, a tax agent, brought a claim against his former client for accountancy fees. The Referee, after hearing the parties, awarded part of the claim. In his decision, the Referee wrote that the facts of the matter were in dispute and there was no conclusive evidence to support either party's view. Nevertheless, the Referee held that, on the merits and justice of the matter, he was awarding the applicant 60% of his account. On appeal, the Judge observed as follows:

The proper way to approach adjudication was to heed the evidence; to measure its weight and merit on both sides; and to decide whether or not, in the end, the applicant had on the probabilities tipped the scales his way - so that he would either recover his account (the total amount of it) or would get nothing.⁴³

4. *Logical and Principled Basis for Decision*

The District Court has affirmed that, where a Referee's approach is illogical or without a sustainable basis, the issue of fairness in the process can arise and an appeal can be allowed.⁴⁴

In a dispute the appellant claimed the unpaid balance of an account for work done. The respondents complained of problems in the work done, and so they counterclaimed the difference between the cost of rectifying defects in the work and the amount of the appellant's claim. The Referee dismissed the appellant's claim for the unpaid balance *and* ordered the appellant to pay the respondents most of the cost of rectifying the work. The Judge, in allowing the appeal, commented:

There has been a real mix up concerning the relationship between claim and counterclaim. The respondents have been given something of a double benefit. They have been relieved of the cost of the driveway work and given the benefit of the remedial work. That leaves them with a decided windfall.⁴⁵

⁴² *Arieli v Martin*, unreported, DC Auckland, DT 390/00, 5/10/00, per Toomey DCJ.

⁴³ *Yu v Weston and Associates*, unreported, DC Auckland, DT 31/01, 19/7/01, per Joyce DCJ.

⁴⁴ *Delany Transport Ltd v Goodwin*, unreported, DC Nelson, DT 282/02 and 302/02, 22/5/03.

⁴⁵ *Pierce Landscape Co Ltd v Clark and Clark*, unreported, DC Auckland, DT 367/01 & 757/01, 19/7/01, per Joyce DCJ.

In another dispute the respondent bought a property from a third party which he immediately on-sold to a client of the appellant solicitor. The appellant did not act for the respondent. The appellant's client initially gave express instructions to the appellant that the purchase price was not to be placed upon deposit, but this instruction was later varied. As a result of the default of the third party, settlement of the transaction was prevented on due date. The result was that the appellant held the purchase money for considerably longer than had been envisaged. In the reserved decision, the Referee referred to the Solicitors Trust Accounting Handbook, which provides that a solicitor has a duty to ensure that trust moneys earn interest with the benefit of the client concerned unless the client instructs otherwise. The Referee construed the reference to "client" as including the respondent, and awarded a claim for interest against the appellant. The Judge made the following pointed remarks:

The respondent never was the appellant's client. To the contrary, the appellant had the opposing duty to protect the interests of his purchaser client to the exclusion of the interests of the respondent. There is therefore no factual or legal basis upon which this decision can stand. What a Referee cannot do is completely ignore the facts, misconstrue the reportedly legal provisions upon which she seeks to rely and produce a decision contrary to the interests of the appellant on that basis.⁴⁶

5. Summary of Written Reasons

The Referee is required to give reasons for the final decision reached in the proceedings, but these reasons may be given orally or in writing.⁴⁷ The District Court has said that the failure to give written reasons can raise a question whether the Tribunal has addressed the dispute and decided the issues between the parties.⁴⁸

At the conclusion of a hearing the Referee ordered a party to pay money to the other. The Referee gave reasons orally at the hearing, but did not record the reasons for her decision in the written order. The appeal Judge remarked on the difficulties which this process produced at the appeal hearing in determining what had happened at the hearing. The Judge noted the

⁴⁶ *Paul Cheng & Co v Beer*, unreported, DC Wellington, DT 888/00, 5/4/01, per Willy DCJ.

⁴⁷ Section 21(1)-(2). However any party to the proceedings may, within 28 days after the hearing, require written reasons (s 21(4)).

⁴⁸ *Anderson v Hawken*, unreported, DC New Plymouth, DT 162/01, 23/10/01.

importance of written reasons particularly in view of the fact that “there is not usually any record of the proceedings before the Referee”.⁴⁹

6. *Need to Write Appropriate Appeal Reports*

The Disputes Tribunals Act requires that, after a notice of an appeal has been lodged, the Referee who heard the proceedings must provide a report on the manner in which the proceedings were conducted, and the reasons therefor.⁵⁰ The District Court has said that it expects Referees to comment on the grounds of appeal, and that this certainly helps the appeal Court to decide what transpired at the hearing.⁵¹

In an appeal, the appellants alleged that the Referee had not allowed for the hearing of the appellants’ own evidence, although the Referee had heard the witnesses of the appellants. The Referee’s appeal report stated simply that the evidence of the appellants had been heard first, but the report did not draw a distinction between the appellants’ own evidence and the evidence of their witnesses. The Judge allowed the appeal and commented:

It is fundamental that, unless parties wish to give no evidence, they be afforded the opportunity to present their own evidence. The Referee’s report provides no latitude for any comfortable acceptance that these fundamentals were observed.⁵²

IV. CONCLUSION

A Daniel come to judgment: yea a Daniel! O wise young judge how I do honour thee!⁵³

In the trial scene in *A Merchant of Venice*, Portia was hailed as a Daniel (“Judge of God”) by one side and then by the other. Two key sources of her wisdom were her ability to facilitate a fair hearing and her disciplined grasp of the dispute at hand. The honour due to one who displays such qualities is equally appropriate in the very different environment of Disputes Tribunal hearings in New Zealand.

⁴⁹ *L & J Silage Ltd v O’Leary*, unreported, DC Timaru, DT 21/01, 22/4/02, per Ryan DCJ.

⁵⁰ Section 51(1).

⁵¹ *Foodstuffs (AK) Ltd v Auckland Towing Co Ltd*, unreported, DC Auckland, DT 1372/01, 12/11/01.

⁵² *Richards v Moore*, unreported, DC Palmerston North, DT 266/01, 1/11/01, per Lovegrove DCJ.

⁵³ *Merchant of Venice* IV.1.220-221.

What lessons have emerged from the District Court judgments considered above? In terms of running a fair hearing, the message from the District Court Judges is that safety of process has priority over speed. This is evident in the Judges' emphasis on parties being able to prepare, produce material witnesses, respond, argue, question and cross-examine adequately, and on Referees exercising care to ensure that there is balance and that neither side is seriously disadvantaged. In any judicial forum there will be judgment calls as to whether the interests of justice require further time or adjournment, bearing in mind the need to guard against unwarranted delays and abuse of process. But the clear lesson from the District Court judgments is that an elongated natural justice process is preferable to speedy injustice. The irony is that, by not adjourning hearings where appropriate, Referees have ended up prolonging proceedings by giving grounds for successful appeals and consequent rehearings of disputes.⁵⁴

In terms of decision-making, the message from the District Court Judges is that rigorous attention to procedural and substantial justice has priority over flexibility and informality of approach. It is acknowledged that Referees are required to balance out a range of factors, relating to the possibility of agreed settlements, the need to be responsive to substantial merits and justice having regard to the law, and the need to make the Tribunal process as accessible as possible to lay disputants. But the District Court Judges have emphasised that these imperatives must not provide an avenue for arbitrary or whimsical justice. Judges have stressed the need for a measured, meticulous and thorough approach, in ensuring that all relevant issues are addressed, decided on a proper and sustainable basis, and adequately analysed in writing. This disciplined approach to decision-making, along with running a fair hearing, are essential to justice being done and being manifestly seen to be done.⁵⁵

⁵⁴ *Guang Zhou Xu v Littlejohn*, unreported, DC Manukau, DT 884/00, 6/3/01, per McAuslan DCJ.

⁵⁵ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259.

PRE-WI PARATA: EARLY NATIVE TITLE CASES IN NEW ZEALAND

BY JOHN WILLIAM TATE*

The question of native title was a contentious issue within the New Zealand judicial system from 1847 to 1912. Following the New Zealand Supreme Court's decision in *Wi Parata v Bishop of Wellington*¹ in 1877, both the Supreme Court and the New Zealand Court of Appeal held tenaciously to the precedent on native title which they believed this case had established.²

* School of Policy, University of Newcastle, Australia. I would like to thank Neil Foster from the School of Law, University of Newcastle, and Elise Histed, Pamela O'Connor and Sharon Rodrick from the Faculty of Law, Monash University, Australia, for their valuable assistance in helping to decipher the more arcane aspects of "seisin in fee" as it relates to the Crown. I would also like to thank the following library personnel for their assistance in the research process associated with this paper: Ann Stokes, Ruth Talbot-Stokes, Leone Clough, and Melda Shay, Auchmuty Library, University of Newcastle; Margaret Greville, University of Canterbury, Christchurch.

¹ (1878) 3 NZ Jur (NS) SC 72.

² See *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 488, per Richmond J; *The Solicitor-General v The Bishop of Wellington and Others* (1901) 19 NZLR 665, at 685-86, per Williams J.; *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR (CA) 655 at 667, per Stout CJ; and *ibid*, at 671-72, per Williams J. Yet although the *Wi Parata* precedent was upheld by the main line of New Zealand judicial authority until the early years of the twentieth century, there were some minor exceptions. In *Mangakahia v The New Zealand Timber Company* (1881) 2 NZLR (SC) 345 at 350, Gillies J went so far as to base native title rights on the Treaty of Waitangi: "Theoretically the fee of all lands in the colony is in the Crown, subject nevertheless to the 'full, exclusive and undisturbed possession of their lands', guaranteed to the natives by the Treaty of Waitangi which is no such 'simple nullity', as it is termed in *Wi Parata v Bishop of Wellington*..." Gillies J's suggestion that the Treaty is a legal guarantee of native rights is a position not only at odds with Prendergast in *Wi Parata*, but also with most subsequent New Zealand judicial authority which has argued that the Treaty (and the rights it embodies) has no force in law independent of the Treaty's embodiment in statute (See "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 732, per Stout CJ; *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA), at 354-55, per Chapman J; *Te Heuheu Tukino v Aotea District Māori Land Board* [1941], NZLR, 590, at 596-97). Nevertheless, almost 20 years later, Edwards J affirmed Gillies J's conclusion. (*Mueller v The Taupiri Coal-Mines (Limited)* (1900) 20 NZLR 89 (CA), at 122). Indeed, Edwards J goes further and argues that the rights embodied in the Treaty of Waitangi, referring to the "full, exclusive, and undisturbed possession" of land, had

This precedent was that native title matters involving the Crown fell entirely within the jurisdiction of the Crown's prerogative powers, and so were outside the jurisdiction of the municipal Courts.³ This meant that native title claims were not enforceable against the Crown within these Courts, nor could these Courts refer such matters to the Native Land Court against the wishes of the Crown. Rather, the Crown was to be the "sole arbiter of its own justice" on native title matters.⁴ The New Zealand judiciary clung to this precedent, even in the face of an open breach with the Privy Council over this issue.⁵ It was not until the decision of the New

actually received legislative recognition in the Native Lands Act, 1862 and the Native Rights Act, 1865 (ibid). The clear implication of this claim is therefore that these native title rights, because of their legislative basis, are binding on the Crown. Consequently, it is somewhat contradictory for Edwards J, later in the same paragraph, to also affirm the precedent of *Wi Parata* - that native title is subject to the prerogative power of the Crown and so is not binding upon it. Nevertheless he does so as follows: "No doubt transactions with the Natives for the cession of their title to the Crown are to be regarded as acts of State, and are therefore not examinable by any Court; and any act of the Crown which declares, or, perhaps, merely assumes, that the Native title has been extinguished is conclusive and binding upon all Courts and for all purposes." (ibid, at 123). Nevertheless, these departures from the *Wi Parata* precedent are minor ones, because the main line of New Zealand judicial authority, and certainly the one that reached the Privy Council in *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371 and *Wallis v Solicitor General for New Zealand* [1903] AC 173, fully affirmed *Wi Parata* as the authoritative precedent on native title in New Zealand.

³ See *Wi Parata v Bishop of Wellington*, supra note 1, at 78-79.

⁴ Ibid, at 78.

⁵ The ostensible reason for the Court of Appeal's breach with the Privy Council in 1903 was the injudicious language which the Court of Appeal believed the Privy Council had used in *Wallis v Solicitor General for New Zealand*, supra note 2, to describe *obiter dicta* which the Court of Appeal had offered in a previous judgment which the Privy Council was overturning on appeal in this case (see "*Wallis and Others v Solicitor General, Protest of Bench and Bar*", supra note 2, at 730, per Stout CJ; at 747, 755-56 per Williams J; at 757, per Edwards J). However it is evident that, despite these protestations, the real issue of contention animating the Protest was the extent to which the Privy Council's judgment in *Wallis v Solicitor-General* (along with its previous judgment in *Nireaha Tamaki v Baker*) broke from the precedent of *Wi Parata* on native title issues. All of the judges in the Protest, despite their protestations above, criticized the Privy Council's judgment in *Wallis v Solicitor-General* in these substantive terms (see ibid, at 732-34, 742-43, per Stout CJ; at 747-48, 749-50, 754-55, per Williams J; at 757, per Edwards J). Indeed, all went as far as to accuse the Privy Council of ignorance of New Zealand law on these and other matters. (ibid, at 732, 737, 743, 745, 746, per Stout CJ; at 756, per Williams J; at 758-59, per Edwards J).

Zealand Court of Appeal in *Tamihana Korokai v The Solicitor-General*⁶ that the New Zealand judiciary revealed it was willing to openly break with the *Wi Parata* precedent.⁷

Yet the irony of this almost unqualified commitment to *Wi Parata* on the part of the New Zealand judiciary is that the case itself was preceded by two judgments which delivered fundamentally different opinions on native title. The judgment of the New Zealand Supreme Court some thirty years earlier in *The Queen v Symonds*, and of the Court of Appeal in *In re 'The Landon and Whitaker Claims Act 1871'*, were the earliest New Zealand decisions delivered on native title.⁸ Far from insisting that native title matters involving the Crown fell exclusively within the Crown's prerogative powers, both cases defended the justiciability of native title within municipal courts, by insisting that it fell within the parameters of common law.⁹

Yet what is doubly ironic is that although both cases clearly provided a contrary precedent to the later judgment of *Wi Parata v Bishop of Wellington*, nevertheless in the wake of the *Wi Parata* precedent, these earlier cases were read by the New Zealand judiciary and Crown law officers as consistent with *Wi Parata*. In other words, there was a clear reluctance on the part of most of the New Zealand judiciary and the Crown to retrospectively read the legal history of native title in New Zealand as anything other than a clear endorsement of the *Wi Parata* judgment. This paper attempts to provide some explanation for this paradoxical state of affairs. On what basis could otherwise highly qualified legal authorities misread these clearly contrasting precedents in such a manner as to perceive them as consistent with each other? Was this misreading deliberate? Or did it point to the existence of a "colonial consciousness" which shaped the way

⁶ *Tamihana Korokai v The Solicitor-General*, supra note 2.

⁷ Hence in *Tamihana Korokai*, the Court of Appeal finally followed the Privy Council in acknowledging the statutory enforceability of native title claims against the Crown (see *ibid.*, at 344-45, per Stout CJ). However Paul McHugh points to the face-saving manner in which they did so (see McHugh, "Aboriginal Title in New Zealand Courts" (1984) 2 *Canterbury Law Review* 251; *The Māori Magna Carta. New Zealand Law and the Treaty of Waitangi* (1991) 121).

⁸ *The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, and *In re 'The Landon and Whitaker Claims Act 1871'*, 2 *NZ CA* (1872).

⁹ See *The Queen v Symonds*, supra note 8, at 388, 390, per Chapman J; and at 393-94, per Martin CJ; *In re 'The Landon and Whitaker Claims Act 1871'*, supra note 8, at 49-50, per Arney CJ.

in which issues of land settlement were understood within settler societies? All these possibilities will be considered in what follows.

I. CONTRASTING PRECEDENTS

1. *The Queen v Symonds and In re 'The Landon and Whitaker Claims Act 1871'*

At first glance, it would seem that when it comes to native title, there could hardly be more divergence between the precedent of *The Queen v Symonds and In re 'The Landon and Whitaker Claims Act 1871'*, on the one hand, and that of *Wi Parata* on the other. Chapman J in *The Queen v Symonds* gave a ringing endorsement of the common law status of native title as follows:

The intercourse of civilized nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our colonial Courts, and the Courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has called the "vice of judicial legislation". They are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.¹⁰

In this statement, Chapman J referred to "principles of law", "settled principles of our law", and the "common law of England" as the foundation for indigenous rights in the colony. To the extent that Chapman J saw the foundation of indigenous rights as lying in English common law, he saw these rights as justiciable in the municipal courts. This would presumably include the indigenous right most at issue in the present case - native title -

¹⁰ *The Queen v Symonds*, *ibid*, at 388, per Chapman J.

since this was the sole basis upon which indigenous inhabitants could claim customary rights to the occupation of traditional land under common law.¹¹

Similarly, some twenty-five years later, in *In re 'The Landon and Whitaker Claims Act 1871'*, during the course of a discussion concerning the distinction between “Crown lands” and “Native lands”, the Court of Appeal also affirmed the common law status of native title, and therefore its justiciability within the Courts. As Arney CJ stated, in delivering the judgment of the Court of Appeal:

No doubt there is a sense in which “Native lands” are not “Crown lands”. The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand is vested and resides in the Crown, until it be parted with by grant from the Crown. In this large sense, all lands over which the Native title has not been extinguished are Crown lands.¹²

With these words, the Court of Appeal was simply recognising the common law principles that native title is a “burden” on the radical title of the Crown, but does not displace that radical title, and that all other titles to land derive exclusively from the Crown.¹³

¹¹ That Chapman J included native title among the indigenous rights to which he refers as part of the “settled principles of our law” and the “common law of England” is evident elsewhere in his judgment (see *infra*, note 82).

¹² *In re 'The Landon and Whitaker Claims Act 1871'*, *supra* note 8, at 49-50. Paul McHugh points out that the full bench of the Court of Appeal, which decided this case, included Justice Chapman, who had previously delivered one half of the Supreme Court’s decision in *The Queen v Symonds* (“Aboriginal Title”, *supra* note 7, at 245).

¹³ These principles are fundamental to native title in English common law. As Brennan J stated in the *Mabo* case: “Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown’s radical title when the Crown acquires sovereignty over that territory.” (*Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 51). So under English common law, native title precedes the Crown’s acquisition of radical title and is a “burden” on it until extinguished by the Crown. All other land titles are not a “burden” on the radical title of the Crown because (unlike native title) they derive directly from the Crown’s radical title (see *ibid*, at 47-48, per Brennan J).

2. *Wi Parata v Bishop of Wellington*

Prendergast CJ's *Wi Parata* judgment, on the other hand, came to very different conclusions on native title. In fact, despite the iconic status which this judgment attained for later New Zealand authorities, the judgment itself was highly contradictory on the question of native title. At one level, Prendergast CJ seemed to deny the legal existence of native title altogether, asserting what amounts to a claim of terra nullius. At another level, he recognized the existence of native title, but insisted that when such matters involve the Crown, native title falls within the Crown's prerogative powers and so outside the jurisdiction of the Courts. We will deal with each of these aspects of the *Wi Parata* judgment in turn.

As mentioned above, at one level, Prendergast CJ appeared to deny the existence of native title altogether, articulating what amounts to an extraordinary claim of terra nullius – usually associated with the larger land mass across the Tasman. For instance, in the context of his judgment, Prendergast CJ referred to the Native Rights Act, 1865, and criticised its reference to the “Ancient Custom and Usage of the Māori People”, “... as if some such body of customary law did in reality exist”.¹⁴ In denying the existence of this customary law, Prendergast CJ effectively denied the existence of native title in New Zealand, because it is precisely such “ancient custom and usage” that native title is premised upon, as a form of customary ownership which pre-dates the Crown's acquisition of sovereignty.¹⁵ Indeed, Prendergast CJ entirely rejected the existence of any such pre-existing customary law, stating that “... a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary suppositions, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts”.¹⁶

¹⁴ *Wi Parata v Bishop of Wellington*, supra note 1, at 79.

¹⁵ “Ancient custom and usage” defines both the identity and content of native title. Native title is “[a] right or interest over land or waters that may be owned, according to traditional laws and customs.... The content and nature of the rights that may be enjoyed by the owners of native title is determined by the traditional laws and customs observed by those owners.” (Nygh, Peter E and Butt, Peter (eds) *Butterworths Australian Legal Dictionary* (1997) 775).

¹⁶ *Wi Parata v Bishop of Wellington*, supra note 1, at 79.

Indeed, even when faced with Crown statutes which clearly implied such customary ownership, in so far as they made reference to “the rightful and necessary occupation and use” of land by the “aboriginal inhabitants”, as in the Land Claims Ordinance of 1841, Prendergast CJ blankly denied that they implied Crown recognition of native title. As he stated: “These measures were avowedly framed upon the assumption that there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land”.¹⁷

Prendergast CJ also insisted that the absence of such “territorial rights” or “definite ideas of property in land” among Māori was due not to any oversight on the part of the Crown. Rather, it was simply due to their non-existence in fact. He stated: “Had any body of law or custom, capable of being understood and administered by the Courts of a civilised country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines”.¹⁸ It was therefore this purported absence of a “body of law or custom” relating to property within Māori society which, Prendergast CJ believed, rendered English law incapable of recognising any native title rights to which Māori tribes might be able to lay claim.

The Chief Justice’s claims in the passages above are nothing less than extraordinary. To insist that Māori had no settled customary law or property in land capable of being recognised by the Crown is effectively to claim that, upon its occupation by the Crown, New Zealand was terra nullius.¹⁹

¹⁷ Ibid, at 77.

¹⁸ Ibid, at 77-78.

¹⁹ Both Paul McHugh and Frederika Hackshaw have pointed to these elements of Prendergast CJ’s judgment in *Wi Parata* which deny the existence of native title altogether. They have attempted to explain them in terms of the influence on Prendergast of various legal schools of thought, influential in the later part of the nineteenth century (McHugh, *Māori Magna Carta*, supra note 7, at 113-14, 116; Hackshaw, “Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi”, in Kawharu I H (ed) *Waitangi. Māori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 99-101,111). However neither McHugh nor Hackshaw points to the inherent contradiction within *Wi Parata* between this aspect of Prendergast CJ’s judgment and his subsequent recognition of native title in his discussion of the Crown’s prerogative powers over that title. As we shall see in the text below, McHugh actually sees these two elements in Prendergast CJ’s judgment as complementary rather than contradictory. I discuss what I believe to be the problems with McHugh’s position in the section “Prendergast’s Contradiction” below.

Yet Prendergast CJ then contradicted this position above, in so far as he clearly made reference to native title elsewhere in his judgment. As we see in the passage below, Prendergast CJ affirmed the existence of native title but insisted that it falls entirely within the prerogative powers of the Crown, and so outside the jurisdiction of the Courts. As he put it:

Upon such a settlement as has been made by our nation upon these islands, the sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishing the native title, assumes on the other the correlative duty, as supreme protector of aborigines, of securing them against any infringement of their right of occupancy.... The obligation thus coupled with the right of pre-emption, although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation. It is one, therefore, with the discharge of which no other power in the State can pretend to interfere. The exercise of the right and the discharge of the correlative duty, constitute an extraordinary branch of the prerogative, wherein the sovereign represents the entire body-politic, and not, as in the case of ordinary prerogative, merely the Supreme Executive power.... Quoad this matter, the Māori tribes are, ex necessitate rei, exactly on the footing of foreigners secured by treaty stipulations, to which the entire British nation is pledged in the person of its sovereign representative. Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State, and therefore are not examinable by any Court... Especially it cannot be questioned, but must be assumed, that the sovereign power has properly discharged its obligations to respect, and cause to be respected, all native proprietary rights.²⁰

Prendergast CJ therefore clearly recognised the existence of native title, but firmly placed its protection and extinguishment within the prerogative powers of the Crown, claiming that such matters are “in the nature of a treaty obligation” on the part of the Crown towards Māori tribes.²¹ Prendergast CJ made this claim despite the fact that, elsewhere in his judgment, he held that Māori lacked the sovereign capacity to engage in treaty negotiations, with the result that, in his view, the Treaty of Waitangi,

²⁰ *Wi Parata v Bishop of Wellington*, supra note 1, at 78-79.

²¹ Issues involving sovereign acts of state, such as treaty negotiations between the Crown and indigenous inhabitants, or methods by which the Crown acquires sovereignty in new territories, have generally been held by the Courts to be within the prerogative powers of the Crown and so outside the jurisdiction of the Courts (see *Te Heuheukino v Aotea District Māori Land Board*, supra note 2, at 596-97; *Mabo v Queensland*, supra note 13, at 31-32, per Brennan J).

to the extent that it purported to be an instrument of cession, was a “simple nullity”.²²

It is on these grounds – that native title matters involving the Crown are an affair of state and so fall within the prerogative powers of the Crown – that Prendergast CJ insisted the Crown must be the “sole arbiter of its own justice” on this issue.²³ As he stated in his concluding sentence in the passage above, it is on this basis that the Courts cannot question, but can only assume, that the Crown has acted properly in native title matters. The result, Prendergast CJ believed, is that native title claims involving the Crown are judicially unenforceable, because for the Courts to enforce such claims would be to intrude on the Crown’s prerogative.²⁴

²² As Prendergast CJ infamously put it, so far as the Treaty purports to be an instrument of cession by which sovereignty was transferred between Māori tribes and the British, “... it must be regarded as a simple nullity.” (*Wi Parata v Bishop of Wellington*, supra note 1, at 78). Prendergast CJ’s reason for arriving at this conclusion was as follows: “No body politic existed capable of making cession of sovereignty, nor could the thing itself exist” (ibid). Consequently, as with his *terra nullius* claims, where Māori tribes were deemed incapable of claiming property in their land due to what Prendergast CJ perceived to be an absence of customary law, Prendergast CJ refused to concede that Māori tribes possessed sovereignty over their land, or possessed the level of political organization and sophistication necessary to formally treat with the Crown for the cession of that sovereignty. Indeed it is this aspect of Prendergast CJ’s judgment, not his contradictory views on native title, for which the *Wi Parata* case is most notorious.

²³ *Wi Parata v Bishop of Wellington*, supra note 1, at 78. Paul McHugh has criticized Prendergast CJ’s conclusion that the Crown’s dealings with Māori over native title were “acts of state”, on the following grounds: “By 1877 the Māori’s status as British subjects had been long fixed – how then could an ‘act of state’ be made by the Crown against its own subjects?” (McHugh, “Aboriginal Title”, supra note 7, at 247). McHugh points out that a long line of judicial authority had established “... that as between the sovereign and a subject there can be no act of state on British territory....” (ibid, note 55, at 247). See also McHugh, *The Māori Magna Carta*, supra note 7, at 114.

²⁴ Hence elsewhere in his judgment, Prendergast CJ referred to the Crown’s prerogative right of “conclusively determining when the native title has been duly extinguished” (*Wi Parata v Bishop of Wellington*, supra note 1, at 80). He argued that the exercise of such a prerogative (for instance, in the issue of a Crown grant) “...must still be conclusive in all Courts against any native person asserting that the land therein comprised was never duly ceded.” (ibid).

3. Prendergast CJ's Contradiction

However for our purposes, the central point in the passages above is that Prendergast CJ recognized the existence of native title, to the extent that he recognized the Crown's prerogative over it.²⁵ This recognition is entirely at

²⁵ There are some judicial authorities who interpret the *Wi Parata* judgment as insisting that the municipal Courts cannot recognize any native title claims *whatsoever* (see "*Wallis and Others v Solicitor General, Protest of Bench and Bar*", supra note 2, at 732, per Stout CJ; at 754-55, per Williams J). Certainly this is how Paul McHugh interprets the *Wi Parata* precedent, stating: "... Prendergast handed his judges feudal blinkers which saw the sole title to land in the colony as nothing other than Crown-derived...."

(McHugh, *Māori Magna Carta*, supra note 7, at 115. See also *ibid* at 113). And there are times when Prendergast CJ seemed to give some credence to this view, such as when he stated that "...it has been equally clear that the Court could not take cognizance of mere native rights to land." (*Wi Parata v Bishop of Wellington*, supra note 1, at 79). However I think such an interpretation of the *Wi Parata* precedent is too wide. Setting aside those instances in the *Wi Parata* judgment where Prendergast CJ adopted a fully blown *terra nullius* position (which as we have seen, was inconsistent with other aspects of his judgment) his references to the municipal Courts being excluded in their jurisdiction over native title generally referred to those instances where the Crown is directly involved, and thereby likely to exercise its prerogative. Hence in discussing the jurisdiction of the Native Land Court, under the Native Rights Act 1865, Prendergast CJ did not exclude *all* native title matters being referred to that statutory body by the municipal Courts. Rather, he only excluded those matters which directly involve the Crown - since "[t]he Crown, not being named in the statute, is clearly not bound by it" (*ibid*, at 80). Indeed, he even conceived of a situation where the municipal Courts *would* have jurisdiction over native title, this being cases where such jurisdiction was actively supported by the Crown. As he put it: "In this country the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished. For the reason we have given, this implied fact is one not to be questioned in any Court of Justice, *unless indeed the Crown should itself desire to question it, and should call upon the Court to lend its aid in correcting some admitted mistake.*" (*ibid*, at 78, my emphasis). And in addition to such instances where the Court's jurisdiction was supported by the Crown, Richmond J also suggested that the municipal Courts would have jurisdiction over native title if the Crown was not involved in the claim, allowing the matter to be judicially referred to the Native Land Court: "The Native Rights Act, 1865, declares this Court shall take cognizance of Māori custom, but the Legislature requires us to send any question of Māori title to the Native Lands Court. It is as much as to say, it is a jurisdiction we are incapable of exercising.... *If you can imagine such a thing as the rights of natives inter se, questions of that kind must go to the Native Lands Court....*

odds with those parts of his judgment where he denied the existence of native title altogether, and which amounted to assertions of terra nullius. We therefore see a fundamental inconsistency in his judgment.

Some scholars have not seen any inconsistency at all. For instance, Paul McHugh has argued that although Prendergast CJ denied any legal status to native title in *Wi Parata*, nevertheless his reference to the Crown's prerogative over the matter is a recognition that "... whatever rights the Māori held to their traditional lands subsisted by Crown sufferance, by moral rather than legal necessity".²⁶ In other words, McHugh reconciles the two contrary poles of Prendergast CJ's *Wi Parata* judgment by claiming that one is a reference to the absence of any legal status for native title, and the other a reference to its moral status, at least from the perspective of the Crown.

However McHugh's attempted reconciliation fails to resolve the issue. It is very clear from the language which Prendergast CJ used above that his denial of native title is a denial of its existence in fact, as well as in law. Prendergast CJ asserted above that such title literally does not exist.²⁷ So contrary to McHugh, it is difficult to see what "moral necessities" Prendergast CJ could possibly believe arose for the Crown from a form of customary title which, Prendergast CJ claimed, was non-existent. If, as Prendergast CJ said, "a phrase in a statute cannot call what is non-existent into being", on what grounds could he believe that a purported moral obligation of the Crown would do so? Consequently, for McHugh to imply

[However] [i]t is quite plain that we have no power to refer to the Native Lands Court the question whether the native title has been effectually extinguished by her Majesty, and it would be a monstrous thing if we could be required to do it." (ibid, at 75, per Richmond J, my emphasis). Consequently, I would suggest that far from excluding native title from the jurisdiction of the municipal Courts in total, the Supreme Court in *Wi Parata*, at those points where it recognised the existence of native title, only excluded it from the jurisdiction of the municipal Courts in those cases where the Crown had indicated it was willing to exercise its prerogative rights in such a way as to exclude that jurisdiction. Prendergast CJ claimed that the existence of a Crown grant was, in itself, sufficient indication of such an intention (see ibid, at 78 and 80. See also supra note 24 and infra note 94).

²⁶ McHugh, *Māori Magna Carta*, supra note 7, at 114.

²⁷ The most pointed evidence that Prendergast CJ intended his denial of native title to be a denial in fact as well as in law, is that when he was confronted with clear references to native title in law, his response was to deny the existence of such title in fact. This is the meaning behind his statement that "... a phrase in a statute cannot call what is non-existent into being." (*Wi Parata v Bishop of Wellington*, supra note 1, at 79).

that Prendergast CJ's denial of native title at a legal level was consistent with his recognition of its status for the Crown at a moral level, is mistaken, since it fails to recognize that Prendergast CJ's rejection of native title was a rejection of its existence in fact as well as in law. Once this double rejection is acknowledged, then it is evident that in referring in *Wi Parata* to both an absence of native title and also to the Crown's prerogative over that title, Prendergast CJ was, even within the terms of his own judgment, simply contradicting himself.

Yet why did he contradict himself? Why did Prendergast CJ advance two clearly incompatible propositions concerning native title in the same judgment? I think the answer to this is that each of these propositions served a different purpose in realizing Prendergast CJ's overall aim. This aim was nothing less than to protect the Crown from native title claims. It was clear from his use of language in his judgment that Prendergast CJ was gravely concerned that land which the Crown had already issued to settlers, in the form of Crown grant, might be challenged by native title. This is evident in the following passage where he refers to such a possibility as an "alarming consequence":

But it may be thought that the Native Rights Act, 1865, has made a difference on this subject, and by giving cognizance to the Supreme Court, in a very peculiar way, of Māori rights to land, has enabled persons of the native race to call in question any Crown title in this Court. This would be indeed a most alarming consequence; but if it be the law, we are bound so to hold.²⁸

Such native title challenge to Crown grants was clearly something that Prendergast CJ wished to avoid. Yet he was confronted with two prior New Zealand native title judgments that clearly upheld the status of native title at common law, and hence its justiciability in the Courts. He could not challenge these judgments in law, because one of them, the *Lundon and Whitaker Claims* judgment, was actually delivered by a superior Court (the Court of Appeal). He therefore had to challenge these judgments on the basis of fact, by denying the very existence of the native title they referred to. This was the purpose behind Prendergast CJ's terra nullius claims.

Yet these terra nullius claims could only carry Prendergast CJ's defence of the Crown so far. Although it might be possible, on this terra nullius basis, to claim that "a phrase in a statute cannot call what is non-existent into being", nevertheless Prendergast CJ was clearly confronted by a statute – The Native Rights Act 1865 – which appeared to hold that the Native Land

²⁸ Ibid, at 79.

Court, and not the Crown, was the ultimate authority on native title matters in New Zealand. As Prendergast CJ stated:

[A]ll questions of native title are by the 5th section relegated to a new and peculiar jurisdiction, the Native Lands Court, supposed to be specially qualified for dealing with this subject. To that tribunal the Supreme Court is bound to remit all such questions, and the verdict or judgment of the Native Lands Court is conclusive. If, therefore, the contention of the plaintiff in the present case be correct, the Native Lands Court, guided only by 'the Ancient Custom and Usage of the Māori people, so far as the same can be ascertained', is constituted the sole and unappealable judge of the validity of every title in the country.²⁹

So whereas native title might provide a threat to Crown grants at common law, the Native Land Court clearly provided such a threat at the level of statute. However while Prendergast CJ's *terra nullius* claims might have been sufficient to deal with the former, they were clearly not sufficient to deal with the latter, as the statutory existence of the Native Land Court, and its exclusive focus on native title, provided credence for the existence of such title, Prendergast CJ's *terra nullius* assertions notwithstanding.

It is in terms of his need to respond to what he perceived as the threat to Crown title posed by the Native Land Court that Prendergast CJ's claims concerning Crown prerogative acquire meaning. If Prendergast CJ could claim that all native title matters involving the Crown were subject to the Crown's prerogative, this would exclude the jurisdiction of the municipal Courts, and so undermine their capacity to refer native title matters to the Native Land Court under the Native Rights Act 1865. Further, if he could claim that this Act itself was not intended to intrude on the Crown's prerogative, the jurisdiction of the Native Land Court would be limited as well. And indeed, this is what Prendergast CJ did do. As he states in the passage below, he interpreted the Native Rights Act 1865 as non-binding on the Crown, thereby reserving to the Crown its prerogative powers over native title. Indeed, he effectively admits in this passage that he adopted this interpretation of the Act because any other interpretation would have undermined precisely those powers (in other words, a clearly circular piece of reasoning). As Prendergast CJ stated:

The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished.³⁰

²⁹ *Ibid*, at 80.

³⁰ *Ibid*, at 80.

Therefore, by having to confront the Native Rights Act 1865 in his *Wi Parata* judgment, Prendergast CJ was forced to recognize the legal existence of native title and thereby forced to carve out whatever exceptions he could make for the Crown by asserting its prerogative powers over it. But in so doing, his claims for a Crown prerogative over native title clearly conflicted with his terra nullius claim that native title did not exist. We therefore see that the contradiction in *Wi Parata* between two incompatible propositions on native title arose from the fact that each of these propositions was meant to serve a different purpose in Prendergast CJ's overriding aim of protecting the Crown from native title claims.

The fact that, with one exception considered below, subsequent New Zealand judicial authority did not follow Prendergast CJ in his terra nullius position shows that this position was not consistent with the other proposition concerning Crown prerogative which emerged from his judgment. It was this later proposition concerning Crown prerogative which subsequent judges tended to follow.

The contrast between *Wi Parata* and the earlier native title cases in New Zealand is therefore clear. From Prendergast CJ's perspective, native title claims, to the extent that they involved the Crown, fell entirely within the Crown's prerogative powers, and so were excluded from the jurisdiction of the Courts. The result was that Māori tribes had no recourse to the Courts in order to enforce native title claims against the Crown. The latter alone became the sole determinant of justice on this issue. Nothing could be more at odds with the earlier judgments of the New Zealand Supreme Court and Court of Appeal in *The Queen v Symonds* and *In re 'The Lundo and Whitaker Claims Act 1871'*, both of which recognized the status of native title in common law, and so its justiciability within the Courts.

II. SUBSEQUENT (MIS)READINGS

Contrary to the New Zealand judgments on native title that would follow his, Prendergast CJ recognized in *Wi Parata* that *The Queen v Symonds* embodied a precedent contrary to his own. Hence although he tried (somewhat problematically) to enlist the support of *The Queen v Symonds* for his views on the Treaty of Waitangi and the "law of nations", he nevertheless recognized that Chapman J's citation of American cases in

support of the idea that the Courts could take cognizance of native title claims was clearly contrary to his own view.³¹

Yet subsequent readings by the New Zealand Bench in the wake of *Wi Parata* interpreted these early native title judgments as consistent with *Wi Parata* itself. In *Hohepa Wi Neera v The Bishop of Wellington*, Stout CJ (in a judgment which was concurred with by Edwards and Conolly JJ) cited *The Queen v Symonds* in support of the view that the Courts could only recognize titles to land deriving from the Crown, thereby excluding native title from the jurisdiction of the Courts.³² He stated:

The earliest decision of the Supreme Court on the subject is, I believe, that of *McIntosh v Symonds* [sic] [N.Z. Gazette (1847), p. 63]. In the very able and learned judgment of the late Mr Justice Chapman, approved of by the Chief Justice Sir William Martin, it was held that the Supreme Court could not recognise any title not founded on the Queen's patent as the source of private title. This decision was followed in several cases, the most important of which was *Wi Parata v Bishop of Wellington*.³³

Consequently, Stout CJ clearly identified both cases as forming a common precedent.³⁴ In the formal Protest of the New Zealand Court of Appeal against the judgment of the Privy Council in *Wallis v Solicitor-General*, Stout CJ continued to identify *The Queen v Symonds* and *Wi Parata* as providing this common precedent as follows:

³¹ See *ibid*, at 80. Prendergast CJ also claims, I think correctly, that Chapman J was mistaken in his understanding of the precedent to which he believed these US authorities gave rise. See *infra* note 82.

³² A finding that the Courts can only recognize titles deriving from the Crown necessarily excludes native title from Court jurisdiction because native title is the one form of legal land title that does not derive from the Crown (see *Mangakahia v The New Zealand Timber Co*, *supra* note 2, at 350-51, per Gillies J; *Mabo v Queensland*, *supra* note 13, at 64, per Brennan J). Rather, because native title derives from traditional laws and customs which precede the Crown, it pre-exists the Crown as a form of title. Native title is therefore a "burden" on the Crown's radical title once the Crown acquires sovereignty, rather than deriving from that radical title as all other land titles in colonial territory do (*Mabo v Queensland*, *ibid*, at 51, per Brennan J). It is because he sees native title as a form of title which *precedes* the Crown, that Justice Brennan in the *Mabo* judgment can refer to native title as "surviving" the Crown's acquisition of sovereignty (*ibid*, at 69).

³³ *Hohepa Wi Neera v The Bishop of Wellington*, *supra* note 2, at 665-666, per Stout CJ.

³⁴ On the Crown as the source of all private title, as referred to in Stout CJ's passage above, see *infra* notes 49 to 51.

The root of title being in the Crown, the Court could not recognize Native title. This has been ever held to be the law in New Zealand; see *Reg v Symonds*, decided by their Honours Sir William Martin, C.J., and Mr Justice Chapman in 1847; *Wi Parata v Bishop of Wellington*, decided by their Honours Sir J. Prendergast and Mr Justice Richmond in 1877, and other cases.³⁵

And in 1912, Stout CJ again identified both cases as providing this common precedent when he stated:

The decision of *Wi Parata v The Bishop of Wellington*... only emphasized the decision in *Reg. v Symonds* that... Native customary title was a kind of tenure that the Court could not deal with.³⁶

Needless to say, as Chief Justice of the Court of Appeal, Stout CJ's opinions on native title precedent carried some weight. Yet other Court of Appeal judges, such as Williams J, referred in 1903 to an "unbroken current of authority" in New Zealand on native title matters.³⁷ While Edwards J, also of the Court of Appeal, referred in 1903 to "the laws relating to Native lands in this colony" which have "prevailed from its foundation".³⁸ So clearly with the hindsight of 1903, it appeared to these judges that there was no discontinuity between *Wi Parata* and the earlier native title cases.³⁹

So given the evidence above, it seems that by reading the precedent of *The Queen v Symonds* as identical with that of *Wi Parata* (and by effectively ignoring *In re The Landon and Whitaker Claims Act 1871*) New Zealand judges, in the wake of *Wi Parata*, were able to look back to what they believed was a consistent and continuing line of authority, from the inception of common law in New Zealand, unanimous in its conclusion that

³⁵ "*Wallis and Others v Solicitor General, Protest of Bench and Bar*", supra note 2, at 732, per Stout CJ.

³⁶ *Tamihana Korokai v Solicitor-General*, supra note 2, at 344, per Stout CJ.

³⁷ "*Wallis and Others v Solicitor General, Protest of Bench and Bar*", supra note 2, at 750, per Williams J.

³⁸ *Ibid*, at 757, per Edwards J.

³⁹ Needless to say, such a conclusion by Edwards J was somewhat at odds with his position in *Mueller v The Taupiri Coal-Mines (Limited)*, discussed supra note 2, where he held that the native land rights in the Treaty of Waitangi had received legislative recognition (a position very much at odds with *Wi Parata*). Yet as we saw, he also attempted, at the risk of severe contradiction, to uphold the *Wi Parata* precedent in the same judgment.

native title cases, to the extent that they involved the Crown, were excluded from the jurisdiction of the municipal Courts.⁴⁰

What we see here in this assertion of an “unbroken current of authority” is the *Wi Parata* precedent being read retroactively to impose its authority over earlier as well as later judicial decisions. Hence Williams J implied that all New Zealand judicial authority points in the direction of *Wi Parata*, when he insisted that:

It has always been held that any transactions between the Crown and the Natives relating to their title by occupancy were a matter for the Executive Government, and one into which the Court had no jurisdiction to inquire. ... We considered, as every authority justified us in considering, that the root of all title was in the Crown. What the right of any prior Native occupiers might be, or whether they had any rights, was a matter entirely for the conscience of the Crown. In any case they had no rights cognizable in this Court. Nor could this Court examine in any way what their rights were.⁴¹

Yet as we shall see below, all of these readings of *The Queen v Symonds* were misreadings, premised on isolating specific passages in Chapman J’s judgment and interpreting them independently of their broader context within the judgment as a whole. One indication of this is the very different reading *The Queen v Symonds* received in the Privy Council, allowing that body to come to very different conclusions concerning the precedent on native title established in that case. Hence in *Nireaha Tamaki v Baker*, Lord Davey, delivering the opinion of the Privy Council, stated:

In an earlier case of *The Queen v Symonds*, it was held that a grantee from the Crown had a superior right to a purchaser from the Natives without authority or confirmation from the Crown which seems to follow from the right of pre-emption vested in the Crown. In the course of his judgment, however, Chapman, J., made some observations very pertinent to the present case. He says: ‘Whatever may be the opinion of jurists as to the strength or weakness of the Native title,... it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers’. And while affirming ‘the Queen’s exclusive right to extinguish it’

⁴⁰ For evidence that such “unanimity” was largely appearance rather than fact, see the reference to Gillies J’s judgment in the *Mangakahia* case, supra note 2.

⁴¹ “*Wallis and Others v Solicitor General, Protest of Bench and Bar*”, supra note 2, at 754-55, per Williams J.

secured by the right of pre-emption reserved to the Crown he holds that it cannot be extinguished otherwise than in strict compliance with the provisions of the statutes.⁴²

Consequently, Lord Davey affirmed precisely those elements of Chapman J's judgment which endorsed native title rights against the Crown, and which subsequent New Zealand judicial authorities had ignored in their haste to assimilate *The Queen v Symonds* to *Wi Parata*. In providing this endorsement however, Lord Davey did not go so far as to affirm Chapman J's claim that native title fell within the jurisdiction of common law. Rather, he insisted that the Crown was now bound by statute on this matter.⁴³ Nevertheless the above passage from the Privy Council judgment shows that it was possible for judges to engage in a transparent reading of *The Queen v Symonds*, rather than assimilating it to a subsequent (and contrary) precedent.

The irony of the New Zealand judiciary's response to *The Queen v Symonds* is not that this judgment was conveniently forgotten (as it might have been, given that it upheld a contrary precedent to *Wi Parata*) but rather that it was misread in such a way that it was assimilated to this contrary precedent, thereby establishing an apparently "unbroken current of authority" on native title.⁴⁴ A good example of this assimilation process in relation to the other early native title case, *In re 'The Lundon and Whitaker Claims Act 1871'*, is the following statement from the Solicitor-General during his presentation of the Crown's evidence in *Tamihana Korokai v The Solicitor-General*. He stated:

The principle of *Wi Parata v Bishop of Wellington*... has been reaffirmed in the following cases: *Hohepa Wi Neera v Bishop of Wellington*; *Teira te Paea v Roera Tareha*; *Mueller v Taupiri Coal-Mines (Limited)*. The only dictum to the contrary is

⁴² *Nireaha Tamaki v Baker*, supra note 2, at 384.

⁴³ See *Ibid*, at 382.

⁴⁴ In this respect I would disagree with David Williams' claim that *The Queen v Symonds* "...suffered a long period of total eclipse and only now in these latter days [has] waxed once again." (Williams, "*The Queen v Symonds Reconsidered*" (1989) 19 *Victoria University of Wellington Law Review* 385). Such a statement assumes that the precedent of *The Queen v Symonds* was effectively ignored or forgotten by subsequent judicial authorities. On the contrary, as we have seen, this judgment was copiously cited, but in a selective manner which allowed the judgment to be interpreted as authority for what it was not. In this respect I would say that *The Queen v Symonds* suffered not so much a "total eclipse" as a long period of selective (mis)interpretation.

in *Lundon and Whitaker Claims*, but it could not have been meant to conflict with the judgment in *Wi Parata v Bishop of Wellington*.⁴⁵

Here we have the somewhat comic instance of a case decided five years prior to *Wi Parata* which, although it gave rise to dictum contrary to *Wi Parata*, is nevertheless interpreted in terms that it “could not have been meant to conflict” with it. Short of clairvoyance on the part of the judges in *Lundon and Whitaker Claims*, it is not apparent how they could have “meant” any such thing. Yet nothing more clearly indicates the overwhelming desire on the part of the Crown (and also, as we have seen, the Courts) to assimilate all native title judgments to *Wi Parata*, even the earlier ones.

Yet the fatuous nature of the Solicitor-General’s statement is understandable when we realise there were few other ways for the Crown (or the Courts) to overcome the uncomfortable fact that there were two cases prior to *Wi Parata* which clearly conflicted with its judgment on native title. At least the Solicitor-General was forthright enough to admit that *In re ‘The Lundon and Whitaker Claims Act 1871’* did conflict with *Wi Parata*. As we have seen above, senior elements of the New Zealand Bench were not so forthcoming in their interpretation of *The Queen v Symonds*, viewing it as entirely consistent with the later *Wi Parata* precedent.⁴⁶

III. POSSIBLE EXPLANATIONS

What possible explanation could there be for such an obvious (and consistent) misreading of the early native title cases of *The Queen v*

⁴⁵ *Tamihana Korokai v The Solicitor-General*, supra note 2, at 332, per Solicitor-General.

⁴⁶ This capacity to see the two precedents as consistent is even more astounding when one considers the broad context of the two cases. *Wi Parata* was a case where the Supreme Court refused to bind the Crown on native title matters, on the grounds that this would be a gross intrusion on the Crown’s prerogative powers. It held, therefore, that such matters were outside its jurisdiction. In the case of *The Queen v Symonds* however, far from the Court excluding native title matters involving the Crown from its own jurisdiction, the entire case was an exercise of such jurisdiction. The issue in *The Queen v Symonds* was whether the Crown could waive its exclusive right of pre-emption over native title. Far from accepting the Crown’s declaration on the matter at face value, as the Court would be obliged to do if they considered native title matters a question of Crown prerogative, both judges in this case adjudicated on the issue at hand. By this example alone they clearly affirmed their belief that matters of native title fell within the jurisdiction of the municipal Courts, even when they involved the Crown.

Symonds and *In re 'The Landon and Whitaker Claims Act 1871'*, relative to the later precedent of *Wi Parata*? I think it is possible to highlight two.

Firstly, there are clear elements of Chapman J's judgment in *The Queen v Symonds* which, if read selectively and to the exclusion of other elements in his judgment, could give rise to perceptions that would support the subsequent misreading indulged in by the New Zealand Bench. As we shall see, it is only when Chapman J's judgment is read in a broader (largely unarticulated) framework presupposed by his judgment, that any resolution is achieved between its apparently conflicting elements.

However unlike *The Queen v Symonds*, *In re 'The Landon and Whitaker Claims Act 1871'* does not have conflicting elements, relating to native title, that can be read in isolation. So while contrary elements within Chapman J's judgment may explain some subsequent misreadings of *The Queen v Symonds*, it does not explain how *In re 'The Landon and Whitaker Claims Act 1871'* could have been effectively overlooked by the New Zealand Bench in their subsequent reading of all New Zealand judicial authority as consistent with *Wi Parata*. As such, a second explanation for this is needed, and I think one can be found if we interpret these attempts to assimilate all judicial authorities to *Wi Parata* (and the misreadings of earlier judgments which this entails) as exhibiting a distinct "colonial consciousness" on the part of senior elements of the New Zealand Bench.

I define a "colonial consciousness" as an outlook informed by the material interests of a settler society. Foremost among these interests is a necessary concern for the process of land settlement, since it is this process which, more than anything else, defines a "settler" society. These material concerns were exacerbated in New Zealand society because of the open military conflict that had erupted between Māori tribes and the Crown over precisely this issue in the middle decades of the nineteenth century.

Needless to say, it would be highly unusual if the members of the New Zealand Bench were immune from these interests and concerns to the point where they never intruded on their legal outlook or judgment in native title cases. I argue below that such concerns did indeed intrude on their judgment, and it is these concerns which help explain the decisions they arrived at concerning native title during these years. In particular, this "colonial consciousness" explains the Court of Appeal's tenacious commitment to the precedent of *Wi Parata*, its willingness to misread previous native title cases as consistent with this precedent, and its willingness to defend *Wi Parata* even to the point of an open breach with the

Privy Council.⁴⁷ The postulation of a “colonial consciousness” explains all of this because it highlights the material interests which a judgment such as *Wi Parata* satisfied, and therefore reveals the incentives which existed to maintain this precedent in the face of all opposition.

So there are two explanations as to why senior elements of the New Zealand Bench were willing and able to misread *The Queen v Symonds* and overlook *In re ‘The Landon and Whitaker Claims Act 1871’* in such a way that they could assimilate these early New Zealand native title judgments to *Wi Parata*. These were 1. contrary elements in *The Queen v Symonds* and 2. the existence of a “colonial consciousness” among senior elements of the New Zealand Bench which affected their adjudication on native title issues. The following will consider each of these in turn.

1. Contrary Elements in The Queen v Symonds

The first major judicial decision to deal with native title in New Zealand was *The Queen v Symonds*. This judgment was foundational in the sense that later New Zealand judgments on native title generally referred to this case, along with *Wi Parata*, as authoritative precedent. As we have seen above, in the wake of *Wi Parata*, the New Zealand Court of Appeal referred to *The Queen v Symonds* as one of the authorities for holding that municipal Courts had no jurisdiction over native title matters involving the Crown. They did so on the basis of isolated passages within *The Queen v Symonds* where Chapman J had stated that municipal Courts could only recognise land titles deriving from the Crown.⁴⁸

Yet as we shall see, the use of these passages as the basis for such a conclusion is premised on a selective reading of *The Queen v Symonds*. There are some statements by Chapman J which, read in isolation, could give reason for claiming that he held that the municipal Courts could not recognise any title to land other than those deriving from the Crown - thereby excluding native title. However as we shall see below, if such statements are read in the broader context of Chapman J’s judgment as a whole, and are supplemented by the judgment of Martin CJ in the same case, it is evident that the Supreme Court’s decision in *The Queen v Symonds* did hold that the municipal Courts could recognize native title, thereby affirming that native title matters fell within their jurisdiction. By

⁴⁷ Despite the more ostensible pretexts for the Court of Appeal’s Protest against the Privy Council in 1903, the real factors animating the Protest was the desire to defend the *Wi Parata* precedent against recent Privy Council departures (see supra note 5).

⁴⁸ See the section “Subsequent (Mis)Readings” above.

implication therefore, the judgment rejected the presumption that native title was purely a matter of Crown prerogative and so outside the jurisdiction of the Courts.

Nevertheless it is impossible to deny that Chapman J's judgment does suffer from a bifurcation between his insistence at some points that the municipal Courts can only recognise land titles deriving from the Crown, and his apparent affirmation elsewhere in the judgment of the jurisdiction of the Courts over native title. The selective reading of *The Queen v Symonds* by subsequent judicial authorities is made possible by these contrary aspects of the original judgment. The following discussion attempts to outline these contrary aspects of Chapman J (and Martin CJ's) judgments, and provide some explanation for them. It will be argued that these contrary aspects can be reconciled so long as the judgment is read in the context of a broader explanatory framework which, it is claimed, was largely unarticulated by either judge in the case, but which must be presumed in order to make sense of these conflicting elements within their judgments as a whole.

(a) An Initial Denial of Native Title?

The appeal to *The Queen v Symonds* as precedent for claiming that the municipal Courts had no jurisdiction over native title is somewhat ironic given that Chapman J began his judgment with the passage quoted above, at the beginning of the section entitled "Contrasting Precedents", which appears to be a clear statement that all matters involving indigenous inhabitants and the Crown are matters of common law, and therefore fall well within the jurisdiction of the municipal Courts. As argued above, this clearly includes native title.

Yet immediately following this claim, Chapman J went on to make a series of statements concerning the Crown's relationship to land in the colony which seemed to deny the legal status of native title, and therefore its recognition by the Courts. And it is these passages that subsequent New Zealand judicial authorities focused on in order to read *The Queen v Symonds* as consistent with *Wi Parata*. These passages seem to deny the legal status of native title because, within them, Chapman J insisted that all title to land in the colony must derive from the Crown alone, in the form of a grant authorised by Letters Patent, and he insisted that the Courts cannot recognise any title to land which does not conform to this procedure.

Chapman J asserts these claims in stages. Firstly, he invoked the conventional doctrine of the Crown having ultimate (radical) title over all land in the colony:

It is a fundamental maxim of our laws, springing no doubt from the feudal origin and nature of our tenures, that the King was the original proprietor of all the lands in the kingdom, and consequently the only legal source of private title.... In the language of the year-book – M. 24, Edw. III – ‘all was in him, and came from him at the beginning’. This principle has been imported, with the mass of the common law, into all the colonies settled by Great Britain; it pervades and animates the whole of our jurisprudence in relation to the tenure of land....⁴⁹

This claim is not, in itself, controversial. It had certainly long been the case in English common law that all land is held in the form of tenure from the Crown.⁵⁰ This notion, deriving from the feudal doctrine that all land was originally distributed by the King to his vassals, entails the assumption that the Crown is the source of all title to land, and therefore holds the ultimate (radical) title to this land.⁵¹ But this notion becomes somewhat controversial when it is imported to new colonies where there are pre-existing landholders, who have hitherto held land outside the Crown’s authority. In what position do these prior landholders now stand in relation to a Crown insisting on the feudal notion that all title to land in the colony now derives exclusively from it? Sir William Blackstone held that the answer to this question depended on whether the land in question is perceived by the

⁴⁹ *The Queen v Symonds*, supra note 8, at 388, per Chapman J.

⁵⁰ Under the English system of common law, land is held as an “estate” from the Crown, rather than possessed outright, because the doctrine of “tenure” within common law means that one does not own land but rather possesses an “estate” in it, derived from the Crown: “Ownership of an estate in land is to be distinguished from ownership of the land itself, which in theory resides solely in the Crown.” (Nygh and Butt, supra note 15, 1060). Effectively therefore, all landholders hold “estates” in land derived from the Crown, and so are theoretically “tenants” of the Crown (see Chambers, Robert, *An Introduction to Property Law in Australia* (2001) 89).

⁵¹ As Blackstone stated: “[I]t became a fundamental maxim, and necessary principle (though in reality a mere fiction) of our English tenures, ‘that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services’. For, this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise.” (Blackstone, *Commentaries on the Laws of England*. Vol. II (1799) ch. 4, 51; see *Mabo v Queensland*, supra note 13, at 46-47, per Brennan J). The contemporary outcome of this doctrine is that the Crown is considered to have ultimate or radical title over all land, and others merely “hold” their land as a form of tenure from the Crown.

Crown as “cultivated” or “desart”, and therefore to be acquired by conquest/cession or by discovery and occupation.⁵² Contrary to the view of Prendergast CJ in *Wi Parata*, New Zealand is clearly a colony that was acquired by cession, through the instrument of the Treaty of Waitangi.⁵³ In

⁵² Concerning newly discovered territory, Blackstone made a fundamental distinction between “desart and uncultivated” land, where a right of discovery and occupancy (“settlement”) is sufficient to validate the Crown’s claim to possession, and land “already cultivated”, where conquest or cession are the only valid means of the Crown acquiring possession. As Blackstone states: “Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart [*sic*] and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient [*sic*] laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.” (Blackstone, *Commentaries on the Laws of England*, Vol. 1, *supra* note 51, at 104-105). Blackstone’s reference to “desart and uncultivated” lands clearly refers to a situation of *terra nullius*, where the Crown acquires not only sovereignty but full beneficial title to all territory upon discovery, occupation and settlement, and where the laws of the Crown apply in full (see *Mabo v Queensland*, *supra* note 13, at 32, 48, per Brennan J; at 77, per Deane and Gaudron JJ; at 180, per Toohey J). But in using the phrase “desart and uncultivated”, was Blackstone ascribing *terra nullius* only to lands which were literally uninhabited? The fact that he uses the phrase “uninhabited country” later in the same passage to refer to these “desart and uncultivated lands” is evidence that this was his intention (see King, Robert J, “Terra Australis: Terra Nullius aut Terra Aboriginum?”, (1986) 72, 2, *Journal of the Royal Australian Historical Society*, 79-80; Reynolds, Henry, *The Law of the Land* (2ed 1992) 33-34). However, regardless of Blackstone’s own intentions, the legal consequences that he associated with his conception of “desart and uncultivated” land came in time to be applied by English judicial authorities to some inhabited lands as well, such as Australia, thereby expanding the doctrine of *terra nullius* (and all its legal consequences) to include the indigenous inhabitants of these colonial territories (see *Cooper v Stuart* Vol. XIV, J.C. (1889), 286 at 291).

⁵³ However for a contrary view, see McHugh, “Aboriginal Title”, *supra* note 7, at 239, who claims that New Zealand was perceived by colonial authorities at the time as a

such a context, the pre-existing land titles of the indigenous inhabitants were deemed by Blackstone to be recognised by the new sovereign until expressly extinguished by him.⁵⁴

Yet Chapman J then went on to make statements which seem, at face value, to deny that the municipal Courts can recognise pre-existing land titles held by the indigenous inhabitants. Such a denial is based on his claim above that, according to the feudal principles imported from Britain, the Crown is the exclusive source of all title. As Chapman J stated:

As a necessary corollary from the doctrine, 'that the Queen is the exclusive source of private title', the colonial Courts have invariably held (subject of course to the rules of prescription in the older colonies) that they cannot give effect to any title not derived from the Crown (or from the representative of the Crown, duly authorized to make grants), verified by letters patent. This mode of verification is nothing more than a full adoption and affirmation by the colonial Courts of the rule of English law; 'that (as well for the protection of the Crown, as for the security of the subjects, and on account of the high consideration entertained by the law towards Her Majesty) no freehold, interest, franchise, or liberty can be transferred by the Crown, but by matter of record'... that is to say, by letters patent under the great seal in England, or (what is equivalent thereto in the Colony) under the public colonial seal. In the instruments delegating a portion of the royal authority to the Governors of colonies, this state of the law is without any exception, that I am aware of, universally and necessarily recognized and acted upon. In some cases the authority and powers of the Governor are set out in his Commissions... but in this Colony the Governor derives his authority partly from his Commission, and partly from the Royal Charter of the Colony – Parl. Paper, May 11, 1841, p. 31 – referred to in and made part of such Commission. In this Charter, we find the invariable and ancient practice followed: the Governor, for the time being, being authorized to make and execute in Her Majesty's name, and on her behalf, under the public seal of the Colony, grants of waste lands, &c. In no other way can any estate or interest in land, whether immediate or prospective, be made to take effect; and this Court is precluded from taking notice of any estate, interest, or claim, of whatsoever nature, which is not conformable with this provision of the Charter; which in itself is only an expression of the well-ascertained and settled law of the land.⁵⁵

This statement by Chapman J seems to imply a definite ruling that native title, being a form of title that does not derive from the Crown under the

"settled" colony – that is, one in which the Crown's sovereignty and title derived from discovery and settlement alone.

⁵⁴ See the passage from Blackstone, *supra* note 52.

⁵⁵ *The Queen v Symonds*, *supra* note 8, at 388-89, per Chapman J.

authority of the letters patent, cannot be recognised by the Courts as a source of title to land. It is therefore clearly contrary to Chapman J's earlier claim above that the principles governing the intercourse between "civilised nations" and the "aboriginal Natives", not least the question of land ownership, are settled principles of law cognisable by the courts.⁵⁶

(b) Chapman J's Recognition of Native Title

Yet at a further point in the same judgment, Chapman J seemed to revert to the spirit of his opening remarks, insisting on the full judicial recognition of native title as follows:

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.⁵⁷

⁵⁶ Ibid, at 388, per Chapman J.

⁵⁷ Ibid at 390, per Chapman J. Despite this apparent assertion of native title by Chapman J, David Williams has argued that Chapman J's reference to the Australian Waste Lands Act 1842 (see *ibid* at 392-93), as an additional basis for rejecting McIntosh's claim in the *Symonds* case, undermines any "affirmation of Māori rights and the Treaty of Waitangi" associated with that case (see Williams, *supra* note 44, at 395). However Williams' reasoning is not self-evident here. Firstly, in interpreting s. 5 of the *Australian Waste Lands Act* as extending the "formalities prescribed by the Act" to land subject to native title, Chapman J clearly distinguishes such land from waste land itself. The native title is an example of the "less estate or interest" which Chapman J referred to, whereas "waste land" is land "the [Crown] title to which was complete" (*The Queen v Symonds*, *supra* note 8, at 392-93, per Chapman J). So in extending the Act to land subject to native title, Chapman J was not saying that this native title is now in some way extinguished, because the land in question is now "waste land" of the Crown. He was simply extending the requirements of the Act to land subject to "any less estate or interest" (*ibid*, at 393). Further, in claiming that McIntosh's land only becomes waste lands of the Crown *after* the native title has been extinguished by McIntosh's purchase (see *ibid* at 393), Chapman J was once again distinguishing land subject to native title from waste lands of the Crown. Consequently, Chapman J's

Presumably it is because Chapman J perceived both native title and the Crown's exclusive right of pre-emption as established principles in common law that he can maintain that the Treaty of Waitangi does not assert "any thing new and unsettled" by reaffirming these principles in its clauses.⁵⁸ In any case, their status at common law certainly places them within the jurisdiction of the municipal Courts.

Consequently, we see a clear contradiction in Chapman J's judgment between an endorsement of the common law status of native title in the early and later stages of his argument, and yet in the middle an apparent denial of native title in his insistence that the Crown alone is the sole source of all land title in the colony, with the result that the Courts only have jurisdiction to recognise titles deriving from the Crown.

(c) An Explanation of Chapman J's Contradiction

So was Chapman J's assertion of these contrary principles a clear case of contradiction in his judgment? The answer, I think, lies in what I call the "dual relationship" between the Crown and its subjects which I believe Chapman J implicitly assumes in his judgment. On some issues, the Māori tribes clearly stood in a different legal relationship to the Crown relative to the Crown's non-indigenous subjects, with the result that some Crown laws affected them differently. For instance, the Crown's exclusive right of pre-emption over Māori land was intended to limit only the non-indigenous subjects of the Crown in their land dealings with Māori. In regard to Māori, it left them free to deal with each other under traditional Māori custom, just

extension of the *Australian Waste Lands Act* to the facts of the case was in no way inconsistent with his broader defence of native title at common law elsewhere in his judgment.

⁵⁸ Similarly, in referring to the Crown's exclusive right of pre-emption over Māori lands, which is upheld in the Treaty of Waitangi, Martin CJ stated that the principle itself does not derive its authority from the Treaty, but rather was already accepted legal practice, and so already bound the Crown and its subjects, independent of any treaty negotiated with the Māori tribes: "This right of the Crown, as between the Crown and its British subjects, is not derived from the Treaty of Waitangi; nor could that Treaty alter it. Whether the assent of the natives went to the full length of the principle, or (as is contended [by the claimant in the present case]) to a part only, yet the principle itself was already established and in force between the Queen and Her British subjects." (ibid, supra note 8, at 395, per Martin CJ, my addition).

as before.⁵⁹ Clearly therefore, there were some laws under which Māori and Pakeha stood in a dual relationship with the Crown, with different rights accorded to each.

Consequently, the apparent contradiction which emerges in Chapman J's judgment - between his obvious recognition of native title on the one hand, and on the other, his insistence that the Crown is the sole source of all title (thereby apparently excluding native title from the recognition of the Courts) – can only be resolved by interpreting these apparently contrary positions in terms of this “dual” relationship, where indigenous and non-indigenous subjects stand in a different legal relationship to the Crown. For instance, as will be discussed in the next section, when Chapman J referred to the Crown as the sole source of title and limited the Courts' jurisdiction to the recognition of titles deriving from the Crown, he was referring to the law as it applied to the Crown's non-indigenous subjects. When he referred to native title, and the capacity of the Courts to recognise its status in law, he was referring to the law as it applied to the Crown's Māori subjects. In other words, this “dual” relationship allows apparently contradictory statements on native title to be made, because each statement applied to a different subject population, who stood in a different legal relationship to the Crown on this issue.

The apparently contradictory nature of the statements in Chapman J's judgment are therefore resolved once we recognize that each statement was meant to apply to a different audience. Yet Chapman J never made this dual relationship explicit in his argument. As we shall see below, we are left to infer its existence from his apparently contradictory remarks concerning the Crown and native title, as the only way of making sense of them and resolving their differences.

(d) Chapman J's “Dual Relationship”

Why did Chapman J implicitly resort to a “dual relationship” as the broader, unarticulated context within which he presented his views in this case? The answer lies in the facts of the case itself.⁶⁰ This case considered the claim of

⁵⁹ As Chapman J stated: “The legal doctrine as to the exclusive right of the Queen to extinguish the Native title... operates only as a restraint upon the purchasing capacity of the Queen's European subjects, leaving the Natives to deal among themselves, as freely as before the commencement of our intercourse with them....” (ibid, at 391, per Chapman J).

⁶⁰ David Williams has pointed out that the facts of the case were politically contrived by the colonial authorities of the time in order to settle the disputed legal status of the

a C Hunter McIntosh, who insisted he had a valid title to land he had purchased directly from the Māori owners, on the strength of a certificate from Governor Fitzroy purporting to waive the Crown's exclusive right of pre-emption over such land. This certificate was not issued under the public seal of the Colony, and had none of the features of a patent, but was issued by Proclamation by the Governor, whose terms the claimant faithfully complied with.⁶¹ Yet McIntosh's claim was disputed on the grounds that the Crown had since issued the defendant with a grant to the same land, the grant being issued under the public seal of the Colony.⁶² As Chapman J stated: "The question which this Court has to determine is, Did the claimant... acquire by the certificate and his subsequent purchase (admitted to have been in all respects fair and bona fide) such an interest in the land, as against the Crown, as invalidates a grant made to another, subsequently to the certificate and purchase?"⁶³

The Supreme Court's judgment came down in favour of the defendant, and therefore against McIntosh, on the grounds that the Crown always retained the exclusive right of pre-emption over native lands, which it could not waive in another's favour.⁶⁴ But in order to justify this decision, both judges went into some detail concerning the legal foundation of the Crown's exclusive right of pre-emption. It is in this context that Chapman J's statements above concerning the Crown as the sole source of land title become meaningful, because as the following passage shows, his insistence on the Crown's exclusive right of pre-emption, and its inability to waive this in another's favour, is dependent on the Crown's status as the sole source of all land title in the colony:

Crown Pre-emption Certificates that had been issued under the previous governorship of Captain Robert Fitzroy (Williams, *supra* note 44, at 388. See also Spiller, "Chapman J. and the Symonds Case" (1990) 4 *Canterbury Law Review* 259-60; Hackshaw, *supra* note 19, at 102-105). Both the claimant and the defendant agreed to undergo legal proceedings in order to resolve this issue. The Governor, Captain George Grey, issued a Crown grant to John Jermyn Symonds, the Native Secretary and Protector of Aborigines, precisely for this purpose (Williams, *supra* note 44, at 389-90). The grant deliberately ceded land which already fell within the Crown Pre-emption Certificate previously acquired by C Hunter McIntosh, who had been Secretary to the Land Commission during the previous governorship of Captain Fitzroy (*ibid*, at 388). The legal conflict requiring resolution had thereby been created.

⁶¹ See *Queen v Symonds*, *supra* note 8, at 388-89, per Chapman J.

⁶² See *ibid*, at 387, per Chapman J.

⁶³ *Ibid*, at 388, per Chapman J.

⁶⁴ See *ibid*, at 392, per Chapman J, at 398, per Martin CJ.

It seems to flow from the very terms in which the principle, 'that the Queen is the only source of title', is expressed, that no subject can for himself acquire new lands by any means whatsoever. Any acquisition of territory by a subject, by conquest, discovery, occupation, or purchase from Native tribes (however it may entitle the subject, conqueror, discoverer, or purchaser, to gracious consideration from the Crown) can confer no right on the subject. Territories therefore acquired by the subject in any way vest at once in the Crown. To state the Crown's right in the broadest way: it enjoys the exclusive right of acquiring newly found or conquered territory, and of extinguishing the title of any aboriginal inhabitants to be found thereon...The rule, therefore, adopted in our colonies, 'that the Queen has the exclusive right of extinguishing the Native title to land' is only one member of a wider rule, that the Queen has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire, vests at once, as already stated, in the Queen. And this, because in relation to the subjects, the Queen is the only source of title.⁶⁵

The passage above makes clear that the Crown's exclusive right of pre-emption (that is, its sole right to purchase land from Māori) is premised on its legal identity as the exclusive source of title. Yet as pointed out previously, this "exclusivity" seems to preclude native title, because native title is not a title whose source derives from the Crown. Yet at the same time, we see in the passage above that such "exclusivity" is the precondition of the Crown's right of pre-emption, a right which in turn presupposes the existence of native title, because it is this title that the right of pre-emption is exercised upon. So how can this contradiction be resolved?

The answer lies in the "dual relationship" that Chapman J implicitly presupposed in the above passage. When he stated that "... in relation to the subjects, the Queen is the only source of title", Chapman J was referring to the Queen's non-indigenous subjects. This is evident from the whole import of the passage, which was a discussion of the relationship between those

⁶⁵ Ibid, at 389-90, per Chapman J. Chapman J qualifies this claim by pointing out that any private action on the part of a subject to purchase land from indigenous inhabitants, thereby violating the Crown's exclusive right of pre-emption, is not an entirely futile action. Such a purchase would conceivably be upheld in law against any party *other* than the Crown. As Chapman J states: "To say that such purchases are absolutely null and void, however, is obviously going too far. If care be taken to purchase off the true owners, and to get in all outstanding claims, the purchases are good as against the Native seller, but not against the Crown. In like manner, though discovery, followed by occupation vests nothing in the subject, yet it is good against all the world except the Queen who takes. All that the law predicates of such acquisitions is that they are null and void as against the Crown: and why? because '*the Queen is the exclusive source of title*'" (*ibid*, 390. My emphasis).

“subjects” on the one hand, and what he referred to as “Native tribes” or “aboriginal inhabitants” on the other, concerning the acquisition of the latter’s land. The passage insisted that the Crown has an exclusive right of pre-emption in relation to such lands, and this right of pre-emption limits the capacity of non-indigenous subjects to privately acquire land from Native tribes.

But it is the justification of this exclusive right of pre-emption which most clearly demonstrates the “dual relationship”. As we have seen, the Crown’s right of pre-emption is “exclusive” only against its non-indigenous subjects, because in relation to indigenous subjects, it leaves them free to acquire land from each other just as before.⁶⁶ Yet just as the Crown’s right of pre-emption only applies to non-indigenous subjects, so the justification of this right only applies to them too. In the passage above, Chapman J justified the Crown’s exclusive right of pre-emption on the grounds that the Crown is the sole source of title. But if the Crown has no exclusive right of pre-emption against Māori, then it also has no claim to be the sole source of title in relation to them, because Māori can continue to purchase traditional native land from other Māori independently of the Crown, just as they did prior to the Crown’s acquisition of sovereignty. In relation to Māori therefore, the Crown must recognize forms of title (native title) which do not have their exclusive source in the Crown.⁶⁷

⁶⁶ See supra note 59.

⁶⁷ This is evident in the nature of the Crown’s exclusive right of pre-emption itself, which is a right over a source of title (native title) which does not derive from the Crown. Yet it is important to clear up a possible source of confusion here. When I state in the text above that the Crown is not the sole source of title in relation to Māori, I mean that the Crown recognizes among Māori a native title which is based on sources (customary law) which precede the Crown’s acquisition of sovereignty. In this respect, native title does not “derive” from the ultimate or radical title of the Crown, as all other land titles do. Rather, it precedes this ultimate title of the Crown and is a “burden” upon it (see supra notes 13 and 32). Yet in claiming that the Crown is not the sole source of title in relation to Māori, I am not claiming that the Crown does not exercise radical or ultimate title in relation to them. Such radical or ultimate title is just as enforceable against the Crown’s Māori subjects as against its Pakeha ones (see *Mabo v Queensland*, supra note 13, at 63-65, 69-70, per Brennan J on the Crown’s capacity to extinguish native title on the basis of its radical title). As such, my point is that although the Crown is the ultimate source of title in relation to Māori, it is not the “sole” or “exclusive” source of title, because in the case of Māori, the Crown recognizes forms of title (“customary” or “native” title) which do not directly “derive” from the Crown’s ultimate title, but rather “precede” that title, having been in existence prior to the Crown’s acquisition of sovereignty.

Consequently, we can see the “dual” relationship between indigenous and non-indigenous subjects of the Crown clearly emerging in Chapman J’s judgment. The Crown stands in a very different legal relationship to each of them. In relation to its non-indigenous subjects, the Crown is the sole source of all title, and so these subjects have no right to acquire property independent of the Crown. In relation to Māori, the Crown is not the sole source of title because its claims to an exclusive right of pre-emption necessarily recognizes a source of title (native title) whose roots precede the Crown, and which allows Māori to continue to exchange traditional property, subject to native title, independent of the Crown.⁶⁸

Therefore the apparent contradiction cited above - where on the one hand the Crown’s exclusive right of pre-emption presupposes native title, and yet on the other the justification of that right (in terms of the Crown as the sole source of all title) seems to preclude it - is overcome once we recognise that in each instance, the Crown is referring to a different subject population. In relation to its non-indigenous subjects, the Crown is the sole source of all title, but in relation to its indigenous subjects, it also recognizes native title.

Therefore once we adopt this dual perspective, the apparent contradiction referred to above is resolved. The Crown both is and isn’t the exclusive source of all land title, because the Crown both does and doesn’t recognize sources of title preceding the Crown, depending on whether the Crown is confronting its indigenous or its non-indigenous subjects.

(e) Native Title and “Seisin in Fee”

One of the most obvious manifestations of this “dual relationship” in Chapman J’s judgment is in his discussion of native title and “seisin in fee”. In the following passages, Chapman J argued that the same land can be subject to native title, and yet at the same time be subject to Crown title under “seisin in fee”, even though “seisin in fee” is usually thought to

⁶⁸ Indeed, this “dual relationship” is also evident in Governor Fitzroy’s Proclamation, upon which the claimant, Mr McIntosh, relied for his claims, and whose concluding passage is quoted by Martin CJ in his judgment as follows: “The public are reminded that no title to land in this Colony, held or claimed by any person not an aboriginal Native of the same, is valid in the eye of the law, or otherwise than null and void, unless confirmed by a grant from the Crown.” (*The Queen v Symonds*, supra note 8, at 398, per Martin CJ). In this statement, Governor Fitzroy clearly assumes that it is only in relation to non-indigenous subjects that all land titles must *derive* from the Crown. “Aboriginal Natives” are excepted.

extinguish any prior claim to native title.⁶⁹ While this appears to be a contradiction, it is once again resolved when we interpret Chapman J's statements in terms of the wider "dual relationship" which he presupposes between the Crown and its indigenous and non-indigenous subjects.

The first passage in which Chapman J clearly recognised native title as co-existing with the Crown's "seisin in fee" is as follows:

In order to enable the Court to arrive at a correct conclusion upon this record, I think it is not at all necessary to decide what estate the Queen has in the land previous to the extinguishment of the Native title. Anciently, it seems to have been assumed, that notwithstanding the rights of the Native race, and of course subject to such rights, the Crown, as against its own subjects, had the full and absolute dominion over the soil, as a necessary consequence of territorial jurisdiction. Strictly speaking, this is perhaps deducible from the principle of our law. The assertion of the Queen's pre-emptive right supposes only a modified dominion as residing in the Natives. But it is also a principle of our law that the freehold never can be in abeyance; hence the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. This technical seisin against all the world except the Natives is the strongest ground whereon the due protection of their qualified dominion can be based. This extreme view has not been judicially taken by any colonial Court that I am aware of, nor by any of the United States' Courts, recognizing the principles of the common law. But in one case before the Supreme Court in the United States there was a mere naked declaration to that effect by a majority of the Judges.⁷⁰

It would seem that the term "seisin in fee", when applied to the Crown in the passage above, is somewhat misleading. "Seisin in fee" refers exclusively to freehold estates, and so is a form of tenure held from the Crown.⁷¹ Because

⁶⁹ "Seisin in fee" is often thought to extinguish any prior claim to native title, because it refers to a freehold estate derived from the Crown (see *infra* note 71). Given that freehold is the most complete form of tenure one can hold from the Crown, it would in ordinary circumstances be presumed to have extinguished any prior incompatible titles attached to the same land. Hence in the *Mabo* judgment, it was widely held that the Crown's alienation of land, through the issue of a land grant, automatically extinguished the native title, since the granting of such tenure clearly indicated an intention on the part of the Crown to extinguish any previously existing incompatible titles (see *Mabo v Queensland*, *supra* note 13, at 64-65, 69-70, per Brennan J; at 89-90, per Deane and Gaudron JJ).

⁷⁰ *The Queen v Symonds*, *supra* note 8, at 391-92, per Chapman J.

⁷¹ See Nygh and Butt, *supra* note 15, at 1060. See also Chambers, *supra* note 50, at 90. Indeed, the only form of title which is not held in the form of tenure from the Crown is

the Crown does not have a tenure relationship with itself, it cannot have a “seisin in fee” over the land it holds. Rather, when the Crown holds land it either has absolute ownership, “... called ‘allodial title’ or ‘allodium’ (meaning the entire property)”.⁷² Or else it has “radical title” to the land.⁷³ In cases of terra nullius, there being no prior owners of the land, the Crown comes to assume full beneficial (allodial) title over the land rather than merely radical title.⁷⁴ At all other times, radical title is adopted by the Crown, as not inconsistent with the continued existence of a prior native title.⁷⁵ At times, as in the passage of Chapman J above, judges seem to have mistakenly conflated “seisin in fee” with “allodial title”.⁷⁶

native title, because native title does not derive from the Crown, and so is not held in the form of a Crown grant (see Nygh and Butt, *supra* note 15, at 1157. See also *supra* note 13 and 32).

⁷² Chambers, *supra* note 50, at 86.

⁷³ Radical title does not refer to such an absolute or full (allodial) possession of the land. Rather, as Brennan J states, “[T]he radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (where the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown’s territory).” (*Mabo v Queensland*, *supra* note 13, at 50, per Brennan J. See also *ibid*, at 47-48, per Brennan J). Because radical title does not, in itself, give rise to the full or absolute possession of the land on behalf of the Crown (only providing the means for the Crown to acquire this full title if it wishes) it is consistent with the maintenance of native title (see *ibid*, at 50-51, per Brennan J. See also *supra* note 13 and 32).

⁷⁴ Brennan J distinguished the allodial title of the Crown from radical title in cases of colonization as follows: “If the land were deserted and uninhabited, truly a terra nullius, the Crown would take an absolute beneficial title (an allodial title) to the land.....there would be no *other* proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land.” (*Mabo v Queensland*, *supra* note 13, at 48, per Brennan J.).

⁷⁵ See *supra* note 13 and 32.

⁷⁶ Whereas Chapman J appears to confuse “seisin-in-fee” with allodial title, other judges have confused or conflated “seisin in fee” with radical title, referring to the two as if they were synonymous. This is evident in the Privy Council’s judgment in *Nireaha Tamaki v Baker*, *supra* note 2, at 379, where Lord Davey uses the two terms as if they were interchangeable: “[T]he Native title of possession and occupancy [is not] inconsistent with the seisin in fee of the Crown. Indeed, by asserting his Native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession.” (my addition). Indeed, the mistaken

Nevertheless, despite this mistaken terminology, we see in the passage above another example of the “dual relationship” which forms the unarticulated background framework within which Chapman J’s judgment acquires meaning. Once again, the indigenous and non-indigenous subjects of the Crown stand in a different relationship to the Crown under the law. As Chapman J stated, in relation to her non-indigenous subjects, the Queen does have “full and absolute dominion over the soil” (what Chapman J has mistakenly referred to above as a “seisin in fee as against her European subjects” but what is perhaps better described as an allodial title) because, in relation to these non-indigenous subjects, the Crown is the sole source of title. Yet Chapman J pointed out that this “technical seisin” is good against all the world “except the Natives”.⁷⁷ Why did he make an exception for “Natives”? Because in relation to these indigenous subjects, the Crown does not have “full and absolute dominion over the soil” since, in their case, it recognizes a prior native title, which “... is not theoretically inconsistent with the Queen’s seisin in fee as against her European subjects”.⁷⁸ Consequently, once again, this “dual relationship” emerges in the passage above, where the Crown both is and isn’t the sole source of land title depending on whether it is confronting its indigenous or its non-indigenous subjects.

tendency for judges to define the Crown’s or (in the case of the United States) the state’s radical title as “seisin-in-fee” goes back a long way. For instance, Marshall CJ made the following claim in one of the earliest American Indian title cases: “It was doubted whether a state can be seized in fee of lands, subject to the Indian title... The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.” (*Fletcher v Peck* 10 US (6 Cranch) 87 (1810), at 142-43). Again, for the reasons outlined earlier, I think it is misleading for the Crown/state’s radical title to be defined as “seisin-in-fee”. As we have seen, “seisin-in-fee” is a form of tenure (freehold estate) that the Crown issues to its subjects in the form of a Crown grant, subject to the continuing radical title of the Crown. This indicates that “seisin-in-fee” and “radical title” are in no way synonymous. Perhaps what the authors of the erroneous statements above meant to convey is that the Crown has sufficient title over the land to issue grants in fee to others, allowing these others to then be “seised” of them. Such a statement would have meaning in law, but is quite different from the ostensible (and erroneous) import of the statements above - that the Crown’s ultimate or radical title to land is itself a form of “seisin-in-fee”.

⁷⁷ *The Queen v Symonds*, supra note 8, at 391, per Chapman J.

⁷⁸ *Ibid.*

Admittedly, Chapman J is rather unusual in claiming that native title co-exists with the Crown's claim to land as a "seisin in fee" (or what is better referred to as an allodial title). Usually, native title and allodial title are perceived as incompatible, allodial title being a full and complete title to land which excludes all others.⁷⁹ It is the Crown's "radical title" with which native title is usually deemed to co-exist.⁸⁰ But it is because he perceived the relationship between the Crown and its subjects in a "dual" manner that Chapman J was able to make this unusual claim, and avoid the contradiction that would otherwise arise. For Chapman J, the Crown's recognition of native title and its claim to "seisin in fee" (allodial title) are compatible because, on the one hand, the Crown's recognition of native title clearly does not apply to those subjects (non-indigenous) to whom it asserts its possession of land as a "seisin in fee", and on the other hand, its assertion of "seisin in fee" does not apply to those subjects (indigenous) to whom it recognises native title. As such, no contradiction arises.

(f) The Question of Court Jurisdiction

But what of Chapman J's earlier claim above that the Courts are only entitled to recognise land titles deriving from the Crown?⁸¹ Surely this is a clear indication that native title is excluded from the Courts, and therefore for all intents and purposes, the Crown is the exclusive source of all title at common law? Once again, the answer to this question rests on the "dual relationship" that, I have argued, Chapman J presupposed as the implicit framework of his judgment. As the following passage makes clear, although the Courts will not recognise native title in suits brought by non-indigenous plaintiffs, Chapman J claimed that they will do so in suits brought by indigenous ones:

The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been

⁷⁹ See supra note 73 and 74.

⁸⁰ See supra note 13 and 32.

⁸¹ As Chapman J stated above: "As a necessary corollary from the doctrine, 'that the Queen is the exclusive source of private title', the colonial Courts have invariably held (subject of course to the rules of prescription in the older colonies) that they cannot give effect to any title not derived from the Crown (or from the representative of the Crown, duly authorized to make grants), verified by letters patent." (*The Queen v Symonds*, supra note 8, at 388).

extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians. In the case of the *Cherokee Nation v State of Georgia* [(1831) 5 Peters 1] the Supreme Court threw its protective decision over the plaintiff nation, against a gross attempt at spoliation; calling to its aid, throughout every portion of its judgment, the principles of the common law as applied and adopted from the earliest times by the colonial laws.....⁸²

Regardless of the extent to which Chapman J mistook this American precedent as authority for his own position, nevertheless it is evident that in the context of his evocation of this precedent he was once again assuming a “dual relationship”, arising from the fact that the Crown stands in a different legal relation to its indigenous and non-indigenous subjects when it comes to native title. Chapman J claimed that while the US Courts will not consider a claim to native title arising in a suit between any of their own subjects, they “would certainly not hesitate to do so in a suit by one of the Native Indians”.⁸³ It must be noted that American Indians occupy a different legal status in the US compared to Māori in New Zealand.⁸⁴ However the

⁸² Ibid, at 390, per Chapman J. However as Prendergast CJ pointed out in his *Wi Parata* judgment some thirty years later, Chapman J erroneously cited the US Supreme Court in support of his position here (see *Wi Parata v Bishop of Wellington*, supra note 1 at 81). I believe Prendergast CJ is correct that Chapman was mistaken in his interpretation of this US precedent. Although within this US case Marshall CJ recognized the native title of Indian tribes (see *The Cherokee Nation v The State of Georgia* (1831), 30 US (5 Pet) 1 at 17), nevertheless he did not believe that they had the capacity to enforce such title within the Supreme Court. This is because, although he held that these tribes have the status of “domestic dependent nations” (ibid), nevertheless they lacked the status of “foreign states” over which, under the Constitution, the Supreme Court would have “original jurisdiction” in any case arising (see *The Constitution of the United States*, Article III, Section 2). As Marshall CJ put it: “The Court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States” (*The Cherokee Nation v The State of Georgia*, ibid, at 20). Hence Marshall CJ concludes: “If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.” (ibid).

⁸³ *The Queen v Symonds*, supra note 8, at 390, per Chapman J.

⁸⁴ The primary difference in the legal status of American Indians compared to New Zealand Māori arose from the early Indian cases adjudicated on by the US Supreme Court. The Court indicated very early that it considered the Indian tribes of the United States to have the status of “domestic dependent nations” – or in other words, to be

same distinction still holds. Chapman J assumed (erroneously in the case of *Cherokee Nation v State of Georgia*) that the US Courts would adopt a different position on native title depending on whether the suit was brought by a native or non-native plaintiff. In affirming this American precedent and its application to New Zealand, Chapman J was implying that the same dual relationship applied here, so that New Zealand municipal Courts do have jurisdiction over native title, as long as the suit in question is brought by Māori subjects of the Crown.

Once again therefore, we see the “dual relationship” arising. Just as Chapman J’s statement that the Crown is the sole source of all title only applies to non-indigenous subjects, so also does his claim that Court jurisdiction is limited to recognizing only those titles deriving from the Crown. In relation to indigenous subjects on the other hand, the situation is very different. The fact that, in their case, the Crown is willing to recognize native title means that, from their legal perspective, the Crown is not the sole source of all title, nor are the Courts limited to recognizing only those titles deriving from the Crown.

(g) The Reason for Chapman J’s “Dual Relationship”

But why did Chapman J not explicitly articulate this “dual relationship” as the framework within which his otherwise contrary statements could be resolved? Why are we left to assume the implicit existence of this framework as the only means by which we can make sense of his judgment? One answer is that the facts of the case led to a judicial concentration on the legal relationship of the Crown with its non-indigenous subjects, rather than encouraging a comparison between this relationship and the Crown’s other

“nations” within a nation. As Marshall CJ put it in 1831: “Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.” (*The Cherokee Nation v The State of Georgia*, supra note 82, at 17). However this status of “domestic dependent nations” did not imply that the Indian tribes had sovereignty relative to the United States as a whole. On the contrary, as Marshall CJ stated: “They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.” (ibid, at 17-18).

legal relationship with its indigenous subjects. The result was that the binary and distinct relationship of the Crown with its indigenous subjects on the one hand, and its non-indigenous subjects on the other, was assumed rather than explicitly articulated throughout the judgment.

But why did the facts of the case lead to an overriding focus on the relationship of the Crown with its non-indigenous subjects? The answer is as follows. The case involved the status of the Crown's right of pre-emption and whether it could be waived in favour of non-indigenous settlers. Chapman J was concerned to insist that the Crown could not waive this right, and was therefore anxious to justify this in terms which would discourage other settlers from attempting to acquire native land by private purchase.⁸⁵ He therefore insisted strongly on the Crown as the exclusive source of title, in order to preclude any claim that such title could be acquired by settlers independently of the Crown, through private purchase from Māori tribes. His insistence that the Courts would only recognize titles deriving from the Crown also needs to be understood in this context – as once again directed towards settlers in an attempt to discourage them from violating the Crown's exclusive right of pre-emption. Any such violation, Chapman J was suggesting, would be overturned by the Courts, because in

⁸⁵ Indeed, Chapman J justified this concern to discourage such acts of private purchase by pointing to the deleterious effects that he believed such a practice could have on the welfare of the Māori tribes, through the rapid dispossession of their land (see *The Queen v Symonds*, supra note 8, at 391, per Chapman J). He therefore presented the maintenance of the Crown's exclusive right of pre-emption as a humanitarian principle protective of Māori welfare (ibid). However David Williams has challenged the idea that the Crown's exclusive right of pre-emption worked in this manner, insisting that it often had the opposite effect, placing the Crown in a monopoly position in relation to the sale of Māori lands, to the disadvantage of the Māori themselves (see supra note 44, at 395-98). Williams insisted that the real purpose behind the Crown's insistence on its exclusive right of pre-emption was "as a device to maintain Crown control over colonization [rather] than to protect Māori interests" (ibid, 397, my addition). Indeed, the reasoning of Martin CJ in the *Symonds* case comes far closer to this view of the matter, when he justifies the "rule" concerning the Crown's exclusive right of pre-emption precisely in terms of the Crown's desire to control the colonisation process. He stated: "It may well be presumed that a rule so strict and apparently severe, and yet so generally received, must be founded on some principle of great and general concernment.... The principle is apparently this: that colonization is a work of national concernment, a work to be carried on with reference to the interests of the nation collectively; and therefore to be controlled and guided by the Supreme Power of the nation." (*The Queen v Symonds*, supra note 8, at 395, per Martin CJ).

relation to settlers, the Courts would only recognize titles deriving from the Crown.

Consequently, because the case was concerned with the status of the Crown's exclusive right of pre-emption, the judicial focus was on the legal relationship between the Crown and the settler (non-indigenous) population against whom that right was exercised. In this context, there was a strong emphasis on the Crown as the exclusive source of title and the Courts as recognising only titles deriving from the Crown. Chapman J's other statements within his judgment, concerning native title, appeared to contradict this view. But this contradiction is resolved when we recognize that these statements were directed not at non-indigenous settlers, but rather toward the Crown's Māori subjects, over whom the Crown did not exercise an exclusive right of pre-emption, and therefore to whom a contrary set of legal assumptions applied. Because the facts of the case emphasized the former set of legal circumstances rather than the latter, they mitigated against both sides of this dual relationship being explicitly articulated within the judgment as a whole.

(h) Martin CJ's Judgment

Martin CJ indicated that he was in full accordance with the opinion of Chapman J in this case, but provided further affirmation of the legal status of native title by citing American authorities as follows:

I shall content myself with citing two passages from the well-known Commentaries on American Law, by Mr Chancellor Kent, of the State of New York. I quote this book, not as an authority in an English Court, but only as a sufficient testimony that the principle contained in the rule of law above laid down – and which same principle, with no other change than the necessary one of form, is still recognized and enforced in the Courts of the American Union, is understood there to be derived by them from the period when the present States were Colonies and Dependencies of Great Britain. 'The European nations', says Mr. Chancellor Kent, Vol. 3, p. 379, 'which respectively established Colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The Natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the Government claiming the right of pre-emption'.⁸⁶

⁸⁶ Ibid, at 393-94, per Martin CJ.

Therefore we see that Martin CJ insisted (on the authority of Chancellor Kent) that the Crown's "exclusive right to grant title in the soil" was always subject to the recognition of native title. Martin CJ clearly indicated that in expressing such a view he was in accord with the judgment of Chapman J in the present case.⁸⁷

However in the passage immediately following the one above, Martin CJ once again cited Chancellor Kent, but this time to apparently opposite effect. Whereas the passage above indicates that native title survives the Crown's acquisition of sovereignty in the new colonies and is a burden on the Crown's claim to "ultimate dominion", and also insists on the legal right of the "Natives" to retain possession of that land, the following passage implies that the Courts do not have jurisdiction to enforce native title claims at law:

Those governments asserted and enforced the exclusive right to extinguish Indian titles to land inclosed [sic] within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties; and they held all individual purchases from the Indian, whether made with them individually or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the State, and a Government grant was the only lawful source of title admitted in the Courts of justice. The Colonial and State Governments, and the Government of the United States, uniformly dealt upon these principles with the Indian nations dwelling within their territorial limits.⁸⁸

Once again we see an apparent contradiction similar to that in Chapman J's judgment above, where on the one hand there is an apparent affirmation of native title, and its legal status in common law, and yet on the other, an insistence that the Courts can only recognise title deriving from the Crown, to the apparent exclusion of native title. However the fact that Martin CJ directly juxtaposed these two apparently contrary statements indicates that he did not conceive them as contradictory. Indeed, like the apparent contradiction in the judgment of Chapman J, this one is also resolvable by placing it in the broader context of the facts of the case.

Like Chapman J, Martin CJ emphasised the Crown's exclusive right of pre-emption. Such an emphasis was necessary in order to reject the argument of the claimant that the Crown had waived this right in his favour. In this

⁸⁷ As Martin CJ stated: "The very full discussion of this subject in the judgment of my learned brother, Mr. Justice *Chapman*, renders it superfluous for me to enter further upon the question" (ibid, at 393).

⁸⁸ Chancellor Kent, *Commentaries on American Law*, Vol 3, at 385, cited in *The Queen v Symonds*, supra note 8, at 394, per Martin CJ.

context, a close reading of the two passages from Chancellor Kent, cited by Martin CJ above, indicate that while the first refers to the legal situation prior to the Crown's exercise of its exclusive right of pre-emption, the second is referring to the legal situation which arises after that right has been exercised, and the native title had been extinguished. It is in this context that we must understand Chancellor Kent's claim that "... a Government grant was the only lawful source of title admitted in the Courts of justice".⁸⁹ Such was certainly the case after the native title to the land in question had been extinguished. But prior to this, as Chancellor Kent points out in the first passage, "[t]he Natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion ...".⁹⁰

(i) Conclusion

To conclude therefore, the subsequent reading of *The Queen v Symonds* by New Zealand judicial authorities, and their elevation of this precedent to a major authority justifying the exclusion of native title from the jurisdiction of the municipal Courts, is based on a selective citation of some of Chapman J's comments, and a failure to interpret these comments in the broader context of his judgment as a whole. In particular, it represents a failure to understand that Chapman J's reference to the Crown as the sole source of all title, and the inability of the Courts to recognize any title not deriving from the Crown, was a statement of law meant to apply to the Crown's non-indigenous subjects only. In relation to its indigenous subjects, Chapman J held that the Courts were willing to recognize the legal existence of native title. By abstracting Chapman J's comments on these matters from this wider context, subsequent Courts were able to erroneously claim that *The Queen v Symonds* provided, along with *Wi Parata*, authority for refusing to recognize native title claims brought before the Courts by indigenous subjects of the Crown.

However this selectivity is encouraged by Chapman J's failure to articulate the implicit "dual" relationship within which his apparently contradictory statements acquired their broader resolution. The result is that his judgment does read as if he is upholding contrary and apparently contradictory claims concerning native title and its recognition in the Courts. Subsequent New Zealand judicial authorities have therefore focused on some of these claims, without attempting to resolve their meaning in terms of the others.

⁸⁹ Supra note 88.

⁹⁰ See supra note 86.

2. Colonial Consciousness

However even if the “dual” relationship which provides the background framework to Chapman J’s judgment was not spelt out in his reasoning, nevertheless it is clear upon even a cursory reading of his judgment that it contains contrary (and apparently contradictory) statements regarding native title. Therefore what requires explanation is why, in the wake of *Wi Parata*, subsequent New Zealand judicial authorities would selectively adopt some of Chapman J’s statements as authoritative precedent, and yet pointedly ignore those others that yield a contrary point of view? The answer lies in terms of the “colonial consciousness” which I believe shaped New Zealand judicial opinion on native title from *Wi Parata* onwards.⁹¹

Native title raised a significant material threat to New Zealand settler society, and it did so for the following reasons. Firstly, native title could act as a legal barrier to settler expansion, since native title had first to be extinguished before the Crown could issue grants to land. If Māori chiefs refused to consent to such extinguishment, for instance by refusing to sell land to the Crown, this could limit the amount of land available for settlement. Secondly, land settlement in general in New Zealand was a highly volatile issue in the second half of the nineteenth century, with large-scale wars between some Māori tribes and the Crown erupting during the 1860s.⁹² Indeed, in his judgment in *Hohepa Wi Neera v Bishop of Wellington*, Stout CJ referred to judicial decisions on native land questions actually having the potential to fan the flames of war during this period.⁹³ Finally, native title issues threatened to throw all existing settler titles to land into legal doubt. If it was found by the Courts that (contrary to *Wi Parata*) the Crown did not have a prerogative power over native title, this

⁹¹ The few minor exceptions to *Wi Parata*’s judicial legacy in the second half of the nineteenth century are outlined in *supra* note 2.

⁹² See Orange, Claudia, *The Treaty of Waitangi* (1989) ch. 8.

⁹³ Hence Stout CJ referred to the Native Rights Act, 1865, and said: “It ought to be remembered that, if this Act had been read as an Act authorising an individual Māori to sue for possession of tribal land, the result of an interference by the Supreme Court with such land would have in some instances created a civil war.” (*Hohepa Wi Neera v The Bishop of Wellington*, *supra* note 2, at 666). Indeed he points out: “It is well known that in many parts of the colony the sittings of the Native Land Court had to be suspended after 1865 in order that the peace might be preserved.” (*ibid*). This was the wider political context in which New Zealand judicial decisions on native title were arrived at in the latter half of the nineteenth century, and it would not be surprising if it exerted some influence on New Zealand judges in their deliberations on the legal issues before them.

meant that the Crown's declaration concerning the extinction of native title over any particular piece of land might not be binding on the Courts. This in turn meant that all land held by Crown grant could conceivably be subject to native title claims, because the Crown grant itself would not be held by the Courts to be sufficient proof that the previously existing native title over that land had been lawfully extinguished by the Crown. If the Crown could not simply declare such native title claims void, and if the Courts were not bound to accept the Crown's declaration as binding, then the holders of existing Crown grants might have their title to land declared invalid if the Courts found that native title had not been lawfully extinguished by the Crown prior to the issue of the grant. In other words, from the perspective of New Zealand settler society, any judicial suggestion that the Crown did not have full prerogative power over native title inevitably threw all existing titles to land in New Zealand into doubt.⁹⁴

Consequently, it would not be surprising if such wider issues weighed heavily on the minds of New Zealand judges when they adjudicated on native title issues. It is this that I see as characteristic of a "colonial consciousness" – a sense of the material interests at stake in any land settlement issue given the wider commitments and concerns of the settler society.

The attribution of an overriding "colonial consciousness" to judicial perceptions on native title provides a possible explanation as to why senior New Zealand judicial authorities, in the wake of *Wi Parata*, isolated specific statements made by Chapman J to give the misleading impression that *The Queen v Symonds* anticipated *Wi Parata* in excluding native title from the jurisdiction of the Courts. Such actions can be explained in terms of the

⁹⁴ Prendergast CJ gave voice to this concern in the *Wi Parata* judgment when he suggested that any interpretation of the Native Rights Act 1865 which gave the Courts power to enforce native title claims against the Crown "would be indeed a most alarming consequence", because it would enable "... persons of the native race to call in question any Crown title in this Court." (*Wi Parata v Bishop of Wellington*, supra note 1, at 79). Needless to say, the Chief Justice avoided any such possibility in *Wi Parata*, firstly by declaring that the Crown was not bound by the Native Rights Act 1865 (see *ibid*, at 80); and secondly by declaring that the very existence of a Crown grant was itself sufficient declaration by the Crown that the native title had been lawfully extinguished, and that this declaration was binding on the Courts (*ibid*, at 78). In this way, the *Wi Parata* precedent ensured against the possibility that existing Crown grants might be challenged on the basis that the prior native title had not been lawfully extinguished, because the precedent held that the very existence of the grants themselves was sufficient proof of their own lawful validity.

material interests which were served for settler society in legally concluding that the Courts could not recognize (and therefore could not enforce) native title claims against the Crown. Such a conclusion would deny Māori tribes any native title rights against the Crown enforceable in common law. It would therefore provide the means for resolving the land settlement issue entirely in the Crown's favour, by leaving all native title issues to the "conscience" of the Crown alone. Indeed this is precisely what the *Wi Parata* precedent did do. The selective focus on isolated statements within *The Queen v Symonds* was therefore a convenient means for subsequent Courts to reinforce this *Wi Parata* precedent by reading the earlier *Queen v Symonds* judgment as consistent with it.

Such a "colonial consciousness" not only explains how *The Queen v Symonds* could be systematically misread by New Zealand judicial authorities in the wake of *Wi Parata*. It also explains how the other early New Zealand native title case, *In re 'The Landon and Whitaker Claims Act 1871'*, could be effectively ignored by these same authorities in so far as it too upheld judicial conclusions contrary to *Wi Parata*. Indeed, we have seen that this colonial consciousness gave rise to a commitment to *Wi Parata* that was so strong that, at one point, the New Zealand Solicitor-General argued that *In re 'The Landon and Whitaker Claims Act 1871'* "could not have been meant to conflict with the judgment in *Wi Parata v Bishop of Wellington*", despite the fact that *Landon and Whitaker Claims* was decided five years earlier.⁹⁵

However to impute this "colonial consciousness" to New Zealand judges during this period is effectively to accuse them of extreme partiality. It is to suggest that these judges consistently favoured settler over indigenous interests in any legal case involving land issues. Such an accusation therefore places the judicial integrity of these judges in question, in so far as such integrity presupposes impartiality and judicial independence, which in turn is inconsistent with any prior commitment to the interests of particular groups over others in colonial society. Indeed it was precisely this integrity and independence which the New Zealand Court of Appeal felt bound to defend against the Privy Council in 1903. The very tenor of this Protest indicates that New Zealand judges themselves did not perceive their outlook to be distorted by colonial interests. Rather, they suggested the opposite, claiming that their close proximity to New Zealand affairs provided them

⁹⁵ See *Tamihana Korokai v The Solicitor-General*, supra note 2, at 332, per Solicitor-General.

with a wisdom and insight into New Zealand law which was denied a more distant and remote Privy Council.⁹⁶

Nevertheless it seems that such a presumption of partiality is the only way to explain some of the peculiarities of the New Zealand judiciary's position on native title during this period, in particular their systematic misreading of *The Queen v Symonds* in the wake of *Wi Parata*, and their agonistic desire to defend the *Wi Parata* precedent at all costs, even at the expense of an open breach with the Privy Council.⁹⁷

Further evidence that such a "colonial consciousness" animated the views of these judges arises from two other sources. These are the expressions of concern, articulated by some Court of Appeal judges, about the "stability" and "security" of land settlement in New Zealand during this period; and the isolated instances where two New Zealand judges actually articulated a doctrine of terra nullius in response to Māori native title claims.

(a) "Stability" and "Security" of Land Settlement

Within a "settler society", the acquisition and settlement of territory defines the colonial process. Therefore a central political and legal issue in any settler society is the security of land tenure - and it is concern over this issue which is therefore a defining feature of "colonial consciousness". One of the clearest pieces of evidence that senior elements of the New Zealand judiciary, from the time of *Wi Parata*, were informed by this "colonial consciousness", involves statements by some Court of Appeal judges which clearly reflect these concerns. At various points these judges defended their commitment to *Wi Parata*, and therefore rejected any attempt to enforce native title claims against the Crown, on the grounds that any movement away from the *Wi Parata* precedent would undermine the "stability" and "security" of land settlement in New Zealand.⁹⁸

⁹⁶ See "*Wallis and Others v Solicitor General*, Protest of Bench and Bar", supra note 2 at 758-59, per Edwards J. See also supra note 5, which details those points in the Protest where the Court of Appeal judges accused the Privy Council judges of ignorance concerning New Zealand law.

⁹⁷ See supra note 5 which explains that the underlying motive animating the Court of Appeal's Protest against the Privy Council in 1903 was indeed the Privy Council's departure from the *Wi Parata* precedent in *Nireaha Tamaki v Baker* and *Wallis v Solicitor General* (supra note 2).

⁹⁸ See supra note 94, where Prendergast CJ expresses the same concerns concerning "security" of land settlement in New Zealand, and the threat posed to it by native title.

So for instance, in the New Zealand Court of Appeal's judgment in *Nireaha Tamaki v Baker* (not to be confused with the Privy Council's judgment on this case some six years later), Richmond J delivered the judgment of the Court, and argued that the "security of all titles in the country" depends on the "maintenance" of the principle cited in *Wi Parata* that native title is purely a matter of Crown prerogative, and that the Crown alone must be the sole determinant of justice in such matters.⁹⁹

Similarly, in their Protest against the Privy Council in 1903, the Court of Appeal judges again insisted that any departure from the *Wi Parata* precedent would threaten the "stability" and "security" of land settlement in New Zealand. Hence in the context of his Protest, Stout CJ said that if the Privy Council dicta in *Nireaha Tamaki v Baker* were given effect, "... no land title in the Colony would be safe".¹⁰⁰ Edwards J articulated a similar sentiment, insisting that the Privy Council's position on native title (involving the rejection of the *Wi Parata* precedent) placed New Zealand land settlement in jeopardy:

It would be easy by reference to numerous decisions of the Court of Appeal and of the Supreme Court of this Colony, and to statutes which, passed after such decisions, recognizing their validity, have virtually confirmed them, to show still further that the interpretation which their Lordships have put upon the laws relating to Native lands in this Colony is subversive of the law which has prevailed from its foundation; and that if that interpretation were acted upon, and carried to its legitimate conclusion in future cases, the titles to real estates in this Colony would be thrown into irretrievable doubt and confusion.¹⁰¹

⁹⁹ See *Nireaha Tamaki v Baker*, supra note 2, at 488.

¹⁰⁰ "*Wallis and Others v Solicitor General*, Protest of Bench and Bar", supra note 2, at 746, per Stout CJ.

¹⁰¹ *Ibid*, at 757, per Edwards J. Needless to say, the Crown shared these concerns about the stability and security of land settlement. In his presentation of the Crown's evidence in *Tamihana Korokai v The Solicitor-General*, supra note 2, at 331-32, the Solicitor-General asserted the view that "Native title is not available in any manner and for any purpose against the Crown", and defended this principle in terms of the security of existing land title, stating: "If this is not the principle the Natives could go on a claim based on customary title to the Native Land Court and claim to have the title to *all* Crown lands investigated." (my emphasis). The Solicitor-General then concluded that this outcome could only be avoided if the principle that the Crown is the ultimate judge of its own conduct in native title matters (in other words, the *Wi Parata* precedent) were maintained. As he put it: "If, therefore, any dispute exists as to whether the land is Native customary land or Crown land the *ipse dixit* of the Crown is conclusive, and the question cannot be litigated in this or any other Court.....There is no known method

In all of these statements, there is a clear concern for the stability of colonial land settlement in New Zealand - a settlement which by the late nineteenth century had not only been secured through landmark decisions such as *Wi Parata* but also through the Crown's military victory over various Māori tribes. Not surprisingly therefore, the maintenance of this settlement was an interest which dominated colonial society, and the statements above show that it also animated the views of some of the Court of Appeal judges in their deliberations on native title. Such concerns are a clear example of a "colonial consciousness" at work, in so far as that consciousness is defined by an overriding concern for the material interests of settler society.

(b) Isolated Assertions of Terra Nullius

The doctrine of terra nullius is usually associated with New Zealand's neighbour across the Tasman. It is rarely associated with New Zealand because the existence of the Treaty, the clear references to native land ownership in successive Crown statutes and ordinances from the time of settlement, and also the existence of the Native Land Court from the 1860s onwards, indicate that Māori occupation of large segments of New Zealand, on a customary basis that preceded the Crown, was a legally recognised fact.¹⁰² Nevertheless at two points in the history of New Zealand judicial deliberations on native title, New Zealand judges have articulated views which amount to a complete denial of the existence of native title – that is, an assertion of terra nullius. The instances I refer to are aspects of Chief Justice Prendergast's judgment in *Wi Parata*, and a view expressed by Stout CJ in his Protest against the Privy Council in 1903. I have already discussed Prendergast CJ's assertion of terra nullius above. The following is therefore devoted to Stout CJ's position on the same.

In its judgment in *Wallis v Solicitor General for New Zealand*, the Privy Council clearly ruled that the Treaty of Waitangi was the legal basis for Māori land rights in New Zealand.¹⁰³ It was this claim which drew some of

upon which the validity of a cession can be determined, and so if the Crown's claim is not conclusive there is no method of determining its title, *and the security of title to all Crown land will be jeopardized.*" (ibid, at 331, 332, my emphasis).

¹⁰² Indeed, as Chapman J stated in his *Tamihana Korokai* judgment: "The creation of [the Native land Court] shows that Native titles have always been regarded as having an actual existence." (ibid, at 356 per Chapman J, my addition).

¹⁰³ As Lord Macnaghten put it: "As the law then stood under the Treaty of Waitangi, the chiefs and tribes of New Zealand, and the respective families and individuals thereof, were guaranteed in the exclusive and undisturbed possession of their lands so long as

the most vigorous responses from the Court of Appeal in its “Protest” in 1903. For instance, in the following statement, Stout CJ denied that the Treaty had any status in New Zealand law. But what is even more significant is that in the context of this claim, he went even further and insisted that native title lacks any such existence as well:

It is an incorrect phrase to use to speak of the Treaty as a law. The terms of the Treaty were no doubt binding on the conscience of the Crown. The Courts of the Colony, however, had no jurisdiction or power to give effect to any Treaty obligations. These must be fulfilled by the Crown. All lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown had agreed to grant. The root of title being in the Crown, the Court could not recognize Native title. This has been ever held to be the law in New Zealand: see *Reg v Symonds*, decided by their Honours Sir William Martin, C.J., and Mr Justice Chapman in 1847; *Wi Parata v Bishop of Wellington*, decided by their Honours Sir J. Prendergast and Mr Justice Richmond in 1877, and other cases. Nor did the Privy Council in *Nireaha Tamaki v Baker* entirely overrule this view, though it did not approve of all the dicta of the Judges in *Wi Parata's* case.¹⁰⁴

The legal position articulated by Stout CJ in this statement is nothing short of extraordinary. While the first part of the statement reflects the conventional and uncontentious view that the Courts have no jurisdiction to take account of the Treaty of Waitangi in and of itself, independent of its embodiment in statute, the rest of the statement amounts to a complete denial of the very existence of native title, thereby according with that element of the *Wi Parata* judgment which asserted a doctrine of terra nullius.

How did Stout CJ deny the existence of native title in the statement above? His claim that “[t]he root of title being in the Crown, the Court could not recognize Native title” could simply be one more selective (mis)reading of

they desired to possess them, and they were also entitled to dispose of their lands as they pleased, subject only to a right of pre-emption in the Crown.” (*Wallis v Solicitor-General*, supra note 2, at 179).

¹⁰⁴ “*Wallis and Others v Solicitor General*, Protest of Bench and Bar”, at 732, per Stout CJ. See *ibid* at 747-48, per Williams J. Stout CJ’s claim at the end of this passage that the judgment of the Privy Council in *Nireaha Tamaki v Baker* “does not entirely overrule this view” [that is, that “[t]he root of title being in the Crown, the Court could not recognize Native title”] is clearly disingenuous since Lord Davey insisted that the Courts could recognize (and enforce) native title so long as it fell within the boundaries of statute (see *Nireaha Tamaki v Baker*, supra note 2, at 382-83).

The Queen v Symonds judgment, and Stout CJ did cite this case in the passage above as support for this view. Yet it is not this aspect of the passage above which amounts to a complete denial of native title. Rather it is Stout CJ's claim that "[a]ll lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown had agreed to grant". Such a statement entirely excludes the possibility of native title because it effectively claims that after the Crown's acquisition of sovereignty in New Zealand, any legal title to land held by either party to the Treaty had to be acquired from the Crown by Crown grant issued under the Letters Patent. Crown grants necessarily exclude the coexistence of native title because the extinction of native title is generally held to be the precondition for the issue of a Crown grant to any piece of land.¹⁰⁵ Consequently, for Stout CJ to claim in the passage above that upon the Crown's acquisition of sovereignty, all title to land derived from Crown grant, means that he is denying the very existence of native title. Therefore the passage is effectively an assertion that upon the Crown's acquisition of sovereignty, the territory of New Zealand was rendered terra nullius.

In his statement above, Stout CJ was going much further than Chapman J in *The Queen v Symonds*. Chapman J had argued that upon the Crown's acquisition of sovereignty, the Crown had "full and absolute dominion over the soil" in the form of a "seisin in fee" – a full beneficial title which excludes native title.¹⁰⁶ But as we saw, Chapman J's judgment implied that this absolute title of the Crown only applied to the Crown's relationship with its non-indigenous subjects. In relation to its indigenous subjects, the Crown recognised the existence of native title.

Similarly, in those parts of *Wi Parata* where Prendergast CJ accepted the existence of native title but asserted that the Courts could not recognise it, he still allowed that native title could be recognized by the Crown, through its prerogative powers.¹⁰⁷ In contrast, Stout CJ seemed to be in accord with that other aspect of Prendergast CJ's judgment in suggesting native title does not exist at all.

Consequently, in the context of his assertion of terra nullius in the passage above, Stout CJ's contention that "[t]he root of title being in the Crown, the

¹⁰⁵ See supra note 69.

¹⁰⁶ *The Queen v Symonds*, supra note 8, at 391, per Chapman J. On the problems associated with Chapman J describing the Crown's ultimate title to land as a 'seisin in fee', see the section "Native Title and 'Seisin in Fee'" supra.

¹⁰⁷ See *Wi Parata v Bishop of Wellington*, supra note 1, at 78-79.

Court could not recognize native title”, takes on a new meaning. Rather than following the *Wi Parata* precedent that the Courts could not recognize native title because it was a matter for the Crown’s prerogative and so outside their jurisdiction, Stout CJ seemed to be saying that the Courts could not recognize native title because native title does not exist at all.

How can Stout CJ claim in his passage above that all title to land derived from Crown grant when it would have been clear that prior to and even after the establishment of such institutions as the Native Land Court, there were vast tracts of land occupied by Māori to which no Crown grant had been issued, not to mention the various statutes and ordinances which made specific reference to “native lands”? The answer I think is that Stout CJ was thoroughly confused when he made his statement above. He was confused because the three Ordinances which he goes on to cite in support of his view bare absolutely no relation to it.

After Stout CJ cited both *The Queen v Symonds and Wi Parata* in support of his view that all land title in New Zealand derives from Crown grant, he went on to claim:

There are three Ordinances of the New Zealand Parliament dealing with the subject. These enactments are in accordance with the judgments in the New Zealand cases referred to.¹⁰⁸

However the passages which Stout CJ quoted from these Ordinances refer not to his claim that all titles to land derive from Crown grant; nor to his claim that only such titles can be recognised in the Courts. Rather, each passage refers to the Crown’s exclusive right of pre-emption over native lands, and the inability of settlers to privately purchase land from Māori individuals or tribes, when the land of these individuals or tribes is not held under Crown grant.¹⁰⁹

In other words, Stout CJ’s purported Ordinance evidence, intended to substantiate his claim that all title to land derives from Crown grant, in fact proves the contrary. First, these Ordinances deal with the Crown’s exclusive right of pre-emption over those Māori lands that do not derive from Crown grant. And secondly, they detail the restrictions placed on settlers when dealing with these same Māori lands. In other words, these Ordinances

¹⁰⁸ “*Wallis and Others v Solicitor General, Protest of Bench and Bar*”, supra note 2, at 732, per Stout CJ.

¹⁰⁹ On this latter point see the Native Land Purchase Ordinance, 1846, s. 1, cited by Stout CJ, *ibid*, at 733.

clearly presuppose the existence of a form of title (native title) that does not derive from Crown grant, but rather precedes such grants.

Stout CJ concluded that had the Privy Council known of these Ordinances, they would not have made the claim above in *Wallis v Solicitor-General* concerning native rights under the Treaty of Waitangi, but would "... have said that the natives were not entitled to dispose of lands that had not been granted to them by Crown grant or Letters Patent".¹¹⁰ While this is a fair summing up of the legal import of the Ordinances, it certainly does not substantiate Stout CJ's claim that these Ordinances confirm his earlier proposition that "[a]ll lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown agreed to grant".¹¹¹ On the contrary, the references in the Ordinances to the Crown's exclusive right of pre-emption necessarily confirms the existence of native title as a form of title not deriving from Crown grant, since it is this title that the Crown's pre-emptive right is exercised over. Further, Stout CJ's claim that these Ordinances meant that "... natives were not entitled to dispose of lands that had not been granted to them by Crown grant or Letters Patent", far from denying native title, simply refers to the restrictions imposed on Māori tribes should they attempt to extinguish their native title to any party other than the Crown.

Consequently, Stout CJ's citation of these Ordinances as substantiation for a statement which denies the existence of native title altogether, is clear evidence of his confusion on the matter, since these Ordinances clearly affirmed the contrary. Either Stout CJ did not understand what was required to support his denial of native title, or he never intended to deny native title in the first place. Perhaps he only meant to affirm the conventional precedent which subsequent Courts derived from *Wi Parata* - that native title exists, but is subject to the exclusive prerogative of the Crown? Yet his statements above make no mention of that view. Rather, his claim that, after the Crown's acquisition of sovereignty, all land title derived from Crown grant, is a clear reference to the sort of terra nullius doctrine which applied in Australia, where the Crown had full and beneficial title to land, unencumbered by any prior native title, and all private property tenures were therefore held of the Crown, in the form of some sort of Crown grant.¹¹²

¹¹⁰ *Ibid*, at 733, per Stout CJ.

¹¹¹ *Ibid*, at 732, per Stout CJ.

¹¹² See *Cooper v Stuart*, supra note 52, at 291, 292; *Mabo v Queensland*, supra note 13, at 26-28, per Brennan J.

In each of these instances, the assertion of terra nullius by Prendergast CJ and Stout CJ was juxtaposed with other elements of their judgments which clearly affirmed the contrary. This would indicate that these assertions were perhaps the outcome of unclear thinking rather than specific intent. But why were such assertions of terra nullius even suggested, when the doctrine was so clearly contrary to all other features of the Māori-Pakeha settlement in New Zealand and should have appeared anomalous from the start?

Again, I think the only explanation is in terms of the workings of a “colonial consciousness”. The material interests at stake in New Zealand land settlement clearly animated the minds of these judges in ways which were highly defensive of settler interests against any assertions of native title by the indigenous inhabitants. Terra nullius was of course a legal doctrine which had the effect of organising land settlement entirely in the interests of settlers, since it denied the very existence of native title, and therefore removed any problem of its legal recognition or accommodation. One can only assume that both Prendergast CJ, and Stout CJ, in articulating a terra nullius position which departed from the otherwise clearly recognised legal situation in New Zealand (and from other elements of their own judgments) were simply over-zealous in their defence of settler interests, and therefore allowed their “colonial consciousness” to momentarily get in the way of their better legal judgment. In Stout CJ’s case, this occurred in the heat of his Protest against the Privy Council, a Protest which was animated precisely by such settler interests, in the form of a defence of the *Wi Parata* precedent against recent Privy Council departures.¹¹³

IV. CONCLUSION

There is clear evidence that significant senior elements of the New Zealand judiciary were fundamentally influenced by an overriding “colonial consciousness” in their rulings on native title in the last quarter of the nineteenth and first decade of the twentieth century. This is most clearly evident in their agonistic desire to uphold the *Wi Parata* precedent during this period, and the lengths to which they were willing to go in order to do so. This included a systematic misreading of the early native title cases in New Zealand to ensure that they accorded with the later *Wi Parata* judgment; and also a willingness to engage in open breach with the Privy Council in defence of this precedent. It was not until the Court of Appeal’s judgment in *Tamihana Korokai v Solicitor-General*, that the New Zealand judiciary ultimately broke from the *Wi Parata* precedent, in so far as they acknowledged a limited jurisdiction of the municipal Courts over native title

¹¹³ See supra note 5 as to the underlying motive for this Protest.

issues.¹¹⁴ But *Tamihana Korokai v Solicitor-General* did not return to the recognition of native title under common law which had characterised *The Queen v Symonds* and *In re 'The Landon and Whitaker Claims Act 1871'*. Rather, it only recognized native title on the basis of statute – a position which had characterised the Privy Council's judgment in *Nireaha Tamaki v Baker*.¹¹⁵ According to some authorities, it was not until the High Court's decision in *Te Weehi v Regional Fisheries Officer*¹¹⁶ that the New Zealand Bench finally recognised the status of native title in common law and so finally returned to the opinion of *The Queen v Symonds*.¹¹⁷

¹¹⁴ See supra note 7.

¹¹⁵ See *Nireaha Tamaki v Baker*, supra note 2, at 382. Indeed it was precisely because the judges in *Tamihana Korokai v Solicitor-General* did not recognise the status of native title in common law that they refused to accept that the municipal Courts had jurisdiction to inquire into native title as an end in itself. Rather, they insisted that the jurisdiction of the municipal Courts only extended to binding the Crown over to the Native Land Court under the terms of the Native Land Act 1909. As Edwards J stated in that case: "The Supreme Court has no jurisdiction to inquire into purely Native titles, nor can it investigate questions arising out of the procedure and practice of the Native Land Court so long as that Court confines itself within the limits of its peculiar jurisdiction. The Supreme Court has, however, jurisdiction to interpret the statutes to which the Native Land Court owes its existence and its jurisdiction; to confine that Court within the limits of that jurisdiction if it is being exceeded; and to compel that Court to exercise its jurisdiction if, for some fancied reason not arising out of Native customs and usages, it refuses or fails to do so." (*Tamihana Korokai v The Solicitor-General*, supra note 2, at 349, per Edwards J.).

¹¹⁶ [1986] 1 NZLR 680 (HC).

¹¹⁷ See McHugh, *The Māori Magna Carta*, supra note 7, at 130-31. However Frederika Hackshaw has argued that although *Te Weehi v Regional Fisheries Officer* recognized traditional Māori fishing rights at common law, "[t]he finding does not.....affect the statutory bar which operates against the enforcement of customary rights based on aboriginal title to land....." (Hackshaw, supra note 19, at 116). This "statutory bar" refers to the various attempts by the New Zealand legislature to enshrine the *Wi Parata* precedent in legislation by protecting the Crown from native title claims. Such an attempt was evident in section 84 of the Native Land Act 1909 which stated: "Save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other manner." (Native Land Act [1909] 9 Edw VII. No. 15, s 84, in *The Statutes of the Dominion of New Zealand* [1909] at 181). However it is important to note that this Act and the statutes which came after it did not deny the existence of native title, and therefore are not an attempt to reassert the *terra nullius* aspects of *Wi Parata*. Rather, as Stout CJ argued in *Tamihana Korokai v Solicitor General*, supra note 2, at 344, 345, the 1909 Act constitutes a statutory recognition of

Nevertheless the early native title cases which preceded *Wi Parata* were pioneering in a New Zealand context, particularly in their willingness to uphold a position on native title, and its status in common law, which clearly recognized Māori rights against the Crown. Indeed, from the perspective of later judicial authorities, these early cases were a little too pioneering, and in the wake of *Wi Parata*, these later authorities were forced into a state of denial concerning the import of these early cases for native title. However this state of denial was of a peculiar nature. Far from suffering an eclipse, *The Queen v Symonds* was copiously cited by subsequent New Zealand authorities, but always in a context which systematically focused on those isolated (and therefore misleading) statements which appeared to give credence to the view that the Courts could only recognize land titles deriving from the Crown. This misreading was encouraged by the desire to assimilate *The Queen v Symonds* to the later *Wi Parata* precedent, but it was made possible by the *Symonds* judges' failure to articulate the background context against which these isolated statements acquired their broader, and very different, meaning.

But ultimately this misreading of *The Queen v Symonds*, along with the effective overlooking of *In re 'The Lundon and Whitaker Claims Act 1871'*, in the years after *Wi Parata*, can only be explained in terms of a wider "colonial consciousness" which animated the outlook of key senior elements within the New Zealand judiciary at this time, and fundamentally influenced their perceptions on native title. This wider "colonial consciousness" was also demonstrated in the clear concern that some of the judges of this period manifested for the "stability" and "security" of land settlement in New Zealand, where such "stability" and "security" was understood primarily in terms of insulating this settlement from native title claims. It was also revealed in the two isolated instances where New Zealand judges actually went so far as to assert a doctrine of terra nullius within New Zealand law – denying the existence of native title altogether – despite the very different settlement that the Crown had reached with New Zealand's indigenous tribes, compared to the Crown's less honourable actions in Australia.

In all these respects therefore, the early native title cases of New Zealand stand as a beacon of judicial independence and fair-mindedness compared to

native title, and requires the Crown to abide by specific procedures for its extinguishment. Indeed far from denying native title, section 90 of the Act reserved to the Native Land Court the ".....exclusive jurisdiction to investigate the title to customary land, and to determine the relative interests of the owners thereof." (Native Land Act 1909, section 90).

the fate which awaited native title in the years after. They demonstrate such qualities because they reveal no trace of that “colonial consciousness” which had such a distorting influence on judicial perceptions of native title as the century progressed. Whether the judges who delivered these judgments were personally immune from the material interests of the settler society of which they were a part, or whether these interests had yet to coalesce into a series of firm legal predispositions, these cases affirming the common law status of native title were prescient not only for their own time but for over a century afterward, as is evident from the fact that it was not until the 1980s that the New Zealand judiciary finally returned to a common law recognition of native title.

BOOK REVIEWS

THE DISPUTES TRIBUNALS OF NEW ZEALAND (second edition), by Peter Spiller, Wellington, Brookers, 2003, 160pp. New Zealand price \$45 plus gst.

New Zealand's Disputes Tribunals (previously known as Small Claims Tribunals) have played a valuable role in the civil justice system. The Tribunals provide the opportunity for readily accessible, inexpensive, informal, non-legal, and fair resolution of small claims. Professor Spiller's first edition, published in 1997, was described in the Foreword to that edition by the Hon Douglas Graham, Minister of Courts, as the first "general reference text which thoroughly and systematically explains the working of the Tribunals" (p xi). The second edition was necessitated by the significant developments that have occurred in the Disputes Tribunals as a result of changes in statute law, continuing case law on the Disputes Tribunals, new institutional practices, and information gathering activities associated with the operation of the Tribunals. Professor Spiller has been able to produce a concise book that incorporates these developments, in particular, the extended jurisdiction of the Tribunal and the creation of the office of Principal Disputes Referee, changes affecting proceedings, and other aspects of the Disputes Tribunals.

The instant appeal of this book is evident in its readability. The book provides a clear understanding of the key aspects of the framework and operation of the Tribunals in an easy to read fashion. It has a logical structure beginning with the history and nature of the Tribunals in Chapter 1. This provides a deeper understanding as to the objectives underpinning the establishment of the Tribunals.

The important issue of jurisdiction is discussed in Chapter 3. Professor Spiller outlines the types of claims within the jurisdiction of the Tribunals and dispels the myth as to the requirement of a "cause of action" as opposed to a "dispute" (p 25). In this chapter Professor Spiller demonstrates his ability to explain technical legal concepts such as contract, quasi-contract and tort, using simple explanations suitable for lay people, with examples that provide further clarification of the concepts. The result of this approach in the book is that, where technical legal concepts arise, Professor Spiller has avoided where possible any unnecessary technicality. Throughout the book Professor Spiller demonstrates this skill, and again this is illustrated further in Chapter 7 where he discusses the Orders in the Tribunals and the types of remedies available. It is important for those seeking to apply to have a claim heard in the Tribunal to understand the types of dispute able to be heard by the Tribunal and where there are limitations to hearing certain disputes. Professor Spiller has clearly outlined the causes of action that are

excluded from the Tribunal's jurisdiction (p 35) and extensively listed the considerable number of other statutory restrictions on jurisdiction (pp 37-39).

Whilst the book has a particular focus on Disputes Tribunals of New Zealand, Professor Spiller throughout the book demonstrates his extensive knowledge of processes of both New Zealand and overseas jurisdictions with similar small claims tribunals. Of particular interest is the outline of future developments in relation to the jurisdiction of the Tribunal namely in reference to areas such as section 9 of the Fair Trading Act 1986 (p 40), given that this is a cause of action that is encroaching significantly in commercial disputes.

In Chapter 6, Professor Spiller discusses the "Functions of the Tribunals" and the delicate role of the Referee in the determination of disputes. Determination of the dispute by a Referee shall be "according to the substantial merits and justice of the case" (p 96) which is crucial to a fair and appropriate decision. Negotiation and adjudication are key elements underlying the decision-making process of the Tribunal. There are however inherent tensions between negotiation and adjudication that require careful balancing by a Referee. Lay people must be given the opportunity to be active participants in the resolution of their disputes. This includes being able to present their story, which is often coupled with emotion. The assistance and guidance of a Referee is key to the process, however the Referee is the ultimate adjudicator and as such may have to make a binding decision in relation to the dispute so that it may be laid to rest.

Chapter 8 deals with a common misapprehension as to the grounds for appeal. In accordance with section 50(1) Disputes Tribunals Act 1988, appeal is on the grounds that the proceedings were conducted by the Referee in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings. There are no grounds for appeal on the basis of merit or an error of law.

In writing this book Professor Spiller has been able to draw on his background as a leading academic with extensive publications on a number of legal issues, and 14 years of involvement with the Tribunal. In addition, Professor Spiller's own experience as a Referee of the Tribunal along with the shared experience of his colleagues provides hands-on knowledge that ensures the practical flavour of the book. This is evident in Chapter 9, the concluding chapter, where Professor Spiller has provided five case studies to demonstrate the Tribunals at work. This material gives an insight into the workings of the Tribunal that is hard to come by due to the private nature of

the hearings. Professor Spiller concludes each case study with valuable comments as to features of the particular disputes and the complexity of the role of the Referee. These case studies illustrate the role that law, merits, and justice play in the decision-making process so that a Referee may reach a fair and appropriate decision.

Overall, this is a concise, inexpensive book that permits a wide-ranging audience to gain valuable insights into the operation of the Disputes Tribunals. Prohibition on appearances by legal counsel may limit the book's appeal for practitioners, and lay people with a "one off" claim may not see a need for this book. The book is, however, an authoritative practical guide and reference work for all those "who have some involvement in the Tribunals, be they disputants, legal or consumer affairs advisers, insurance company representatives, court staff, departmental officials or Referees" (p xi). As it is not part of the court system, the Tribunal may present many uncertainties for lawyers and lay people alike. This book canvasses many key elements in relation to Tribunal procedure and outcomes, and so may assist in alleviating some of the uncertainties or fears associated with the process. Successful operation of the Disputes Tribunals as a forum for lay people to have their small claims heard is dependent upon knowledge of the processes. This reference book is an invaluable resource for provision of this information and ultimately improves access to justice.

Cheryl Britton*

CONSTITUTIONAL CONVERSATIONS: GEOFFREY PALMER TALKS TO KIM HILL ON NATIONAL RADIO 1994-2001, by Sir Geoffrey Palmer, Wellington, Victoria University Press, 2002, 504 pp. New Zealand price \$39.95 plus gst.

The recent publication of *Constitutional Conversations* provides an excellent opportunity to reflect on both the extent to which constitutional issues pervade public affairs and the extent to which much of the public lacks an understanding of the constitution. The sheer range of topics covered in this publication illustrates the first point: the book includes the resignation of a judge, Treaty negotiations, a constitutional convention, visits by diplomats and various social policy initiatives, all looked at through a constitutional lens. As to the second point, Palmer notes in the Preface (p 9):

The broadcasts had an educational purpose and were designed to fill a gap. That gap was the absence in New Zealand of a good understanding of civics. By that, in this context, I mean broadly understanding how the system of government works.

* Lecturer in Law, University of Waikato.

This is not the first time that Palmer has decried the New Zealand public's lack of understanding about constitutional issues: in *New Zealand's Constitution in Crisis* (1992, p. 2), Palmer commented that “[m]embers of the public do not understand New Zealand’s constitutional arrangements, generally speaking. There is a crying need for good courses in civics at school”.

What the talks aim to do, then, is to bring the constitution to the public through the medium of radio (and print, via the book). In keeping with this aim, the broadcasts are centred on practical, “hands-on” constitutional issues rather than matters of deep theory. This does not mean that theory is ignored absolutely. Indeed, ideas like judicial independence, the separation of powers, and the role and purpose of civil society creep in and out of the broadcasts. And this is entirely as things should be. It is impossible to talk seriously about something as ethereal as a constitution without grounding the discussion in some kind of theoretical basis.

One talk which cleverly integrates the theoretical and the practical – and in doing so draws attention to the pervasiveness of constitutional issues – is “Bagehot on fame: 9 September 1997” (pp 221-226). Kim Hill begins by talking about the death of Princess Diana and raises the question of whether this will expedite the end of the monarchy. Palmer then uses these comments to highlight such matters as the distinction between the public and private realms of life, the constitutional role of the monarchy, and the ideas of Walter Bagehot in *The English Constitution* (1867).

As Palmer puts it (p. 222):

The English Constitution really says there are two parts to the Constitution – the dignified part and the working part. The monarchy is the dignified part of the Constitution [while as to the working part, Bagehot] saw Cabinet as being the efficient secret of the English Constitution.

This extract does not really do justice to Bagehot (or Palmer). To quote Bagehot more fully, he does indeed say that there are two parts to the English constitution (p 7):

[F]irst, those which excite and preserve the reverence of the population, - the *dignified* parts ... and next, the *efficient* parts, - those by which it, in fact, works and rules The dignified parts of government are those which bring it force, - which attract its motive power. ... the efficient parts only employ that power.

Bagehot then goes on to express his admiration for such an arrangement (pp 10-11):

The brief description of the characteristic merit of the English Constitution is, that its dignified parts are very complicated and somewhat imposing, very old and rather venerable; while its efficient part, at least when in great and critical action, is decidedly simple and rather modern The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers [through Cabinet].

These extracts expand on the broadcasts somewhat. This is not to take anything away from Palmer who, after all, is seeking to simplify matters for the general public, and hence must try to avoid mid-Victorian style and syntax. Indeed, Palmer gets across the point about there being dignified and efficient aspects to the constitution rather well. He is fulfilling the points raised above: combating the public's lack of understanding about the constitution while highlighting the pervasiveness of constitutional issues.

Palmer's thoughts on this matter are further emphasized in "The Great Hui: 11 April 2000" (p 386):

It should not be a mystery as to how New Zealand's constitutional arrangements function now. But if you go into the schools, I bet not very many people know. When I teach students at the university in the first and second years they do not know. They are highly educated people. How can you own your own constitution if you do not know what it is and how it works?

Yet many New Zealanders do have at least a vague sense of things like political parties, the Prime Minister, Cabinet and MMP. They understand *politics*: political matters are in the news all the time. What the public perhaps does not always understand are the *constitutional* aspects of political issues. This is, of course, something which Palmer's broadcasts and book are seeking to combat: the broadcasts show that political news can be seen through a constitutional lens, and that such a viewpoint will often enhance our understanding of certain issues.

The extracts from the talk on Bagehot were not chosen at random. Returning to Bagehot's point about the efficient and dignified aspects of the constitution, it could be argued that, in New Zealand, we tend to focus *too much* on the efficient part. News stories are often about, and hence people often discuss, political power-plays, changes in Cabinet, the Prime Minister's leadership, and so on, while the dignified part of the constitution is almost entirely ignored, both in the media and in civil life.

Palmer's argument is a good one. People do need to know what the New Zealand constitution is and how it works. But it is reasonable to contend that a better appreciation of what the constitution *is* would come from a greater emphasis on its dignified part. And given the present state of the New Zealand constitution, we do not need to see the dignified part as being made up solely of the monarchy. A more expansive understanding is possible.

To take an example, the United States abandoned monarchical government at the time of the War of Revolution. In his recent book *Taking the Constitution Away from the Courts* (1999, chapter 1), however, Mark Tushnet divides the US Constitution – in the sense of the written document – into “thick” and “thin” parts. The “thin” constitution comprises the Preamble and the Declaration of Independence. It is these that matter most to the public. The “thick” constitution includes all the details of how the nation is to be governed, including rules on the minimum age of the President, how many Senators there are to be, and processes for judicial appointments. In a sense, the “thin” constitution is what is dignified, while the “thick” constitution is what is efficient. The American public “own” their constitution because they know in essence what it is, even if they do not always understand the details of how it works.

What might the “thin” part/dignified part of the New Zealand constitution look like? Such a question is so fraught with difficulty that it seems dangerous to venture any kind of answer. Unlike the United States, New Zealand has no Declaration of Independence to revere. We *do* have a monarchy to venerate, but it plays less of a constitutional role than in England today, let alone the England of Victorian times.

To some, the Treaty of Waitangi probably comes closest. It is analogous to Tushnet's “thin” constitution in being small in size, well known publicly, and somewhat vague in execution. It can also be seen as “somewhat imposing, very old and rather venerable”, as Bagehot described the dignified part of the constitution. But New Zealand's constitutional arrangements are much more complex than the Treaty allows, and opinion about its relevance and its legal status remains divided. Knowledge and understanding of the Treaty by itself is by no means enough for New Zealanders to “own” their constitution.

But it is a start. Ascertaining the dignified part of New Zealand's constitution may be difficult, but this does not mean that this is impossible. Others may have their own opinions and ideas, and these should be encouraged. Civics in schools is not enough. In order to have a better grasp

of their government, and in order to “own” their constitution, New Zealanders need to develop a sense of constitutional faith, an understanding of constitutional issues, that goes beyond the rough and tumble of day-to-day political affairs.

Again, this is not to take anything away from Palmer. Helping to make the public aware of the many and varied ways in which the constitution affects our lives is an invaluable task, and, by taking us into such a wide range of topics in this book, Palmer achieves this very well.

Thomas Gibbons*

NEW ZEALAND COURT OF APPEAL 1958-1996: A HISTORY, by Peter Spiller, Wellington, Brookers, 2002, 475 pp. New Zealand price \$84 plus gst.

It is perhaps surprising that no books prior to Professor Spiller’s excellent history of the Court of Appeal have been dedicated to analysing the highest New Zealand-based court. The Court of Appeal is discussed in various introductory legal texts, but there has been very little academic comment on the performance of the Court over time, the influence of personalities and backgrounds on approaches to judging, and their ultimate implications for the outcome of cases. This book thankfully fills that gap in New Zealand legal scholarship by providing a thoroughly researched, comprehensive history of the modern Court of Appeal.

The New Zealand Court of Appeal was established as a permanent Court, separate from the Supreme Court of New Zealand, in 1957, and heard its first appeals in 1958. Prior to that time, judges of the Supreme Court were essentially seconded to the Court of Appeal from time to time. The book covers the first 38 years of the Court as a separate institution, ending with Cooke P’s retirement from the position of President of the Court in 1996. This broad time period covered in the book allows for assessment of trends, and permits the author to comment on the consistency of approach (or otherwise) taken by individual judges at various times, as well as more general comments on the Court as an institution and its development.

The book is carefully structured, with each chapter making generous use of sub-headings where appropriate to assist the casual reader. The sub-headings are logical, however, and do not disrupt the narrative flow. The book is divided broadly into two parts. The first focuses on biographical details of the permanent judges of the Court between 1958 and 1996. These chapters

* Barrister and solicitor, Auckland.

are structured so that the life and career, judicial personality and approach to judging of each judge are examined, followed by a conclusion as to each judge's general approach and assessment of the strengths and qualities that they contributed to the Court during their tenure on the bench. Each chapter covers a selection of judges who were appointed to the Court of Appeal bench at roughly similar times, in roughly chronological order. The case study sections at the end of the biographical chapters should provide useful resources for teachers of legal method seeking to illustrate the importance of judicial personalities on the outcome of cases.

The use of consistent headings allows for contrasts to be drawn between various judges, such contrasts being drawn out at the end of each chapter with case analyses involving the relevant judges. The biographies are interesting and well-written, and the use of consistent headings allows comparisons to be drawn between the styles of different judges. The biographies begin with the backgrounds of the judges prior to their joining the legal profession, and also their legal careers prior to being appointed to the bench. The author then uses that background material to contextualise the judges' approaches to judging when on the bench, providing interesting analyses. At times the narrative is slowed by the author's careful and deliberate introductions and conclusions to points that he makes, although this didacticism leaves the reader in no doubt as to the author's conclusions, nor his reasons for those opinions. The language used is descriptive but not emotive. Professor Spiller's conclusions are measured, and always well-supported with clearly developed logic.

The book examines the judges' experiences and backgrounds as a crucial tool for considering the contexts of their decisions. As such the analysis moves beyond simplistically labelling judges as liberal/activist or conservative/ formalist, but rather considers the practical decisions which they made when confronted with choices in interpreting or applying the law while on the bench. Such analyses are particularly interesting when used to contrast different decisions taken by different judges in important cases, as illustrated in the case study sections. The book's observations and conclusions therefore reflect the American Realist view of the nature of judging, and of the law generally, as an essentially human endeavour.

The case analyses contained in the book are first-rate, and both senior law students and junior practitioners would hone their professional skills by taking time to review Professor Spiller's close reading of various key judgments. The case analyses show the importance of the critical assessment of precedents, and the importance of understanding the context of a case and

its decision to being able truly to understand the case and rely upon it as an advocate.

The second part of the book builds on the descriptions of the various personalities and discerns trends and themes in the Court's operation across the nearly forty years covered. Each chapter is prefaced with a caveat that each judge is different (as shown by the first part of the book) and it can therefore be difficult to make generalisations. However, the time period covered allows assessment of developments and general changes in approach and attitude, all of which are supported with extensive references to primary materials in footnotes.

In the second part Professor Spiller focuses not only on the personalities of the judges, building upon the ideas from the first part of the book, but also the personalities of the litigants and (to a lesser extent) counsel. The case summaries are written as analytical narratives, presenting the facts and then pausing to surmise the meanings of those facts. The case studies often contain extraneous facts of interest that have been omitted from the judgment of the Court, reflecting meticulous research on the author's part. The case summaries contain down-to-earth descriptions of the factual background to the litigation, and seem less formal because of the author's practice of referring to real locations and using the first names of the relevant parties. Despite the perceived informality, however, the analysis remains rigorous and Professor Spiller provides insightful comments on the cases. The narrative style also makes the case summaries more lively and interesting to read, rather than simply repeating the facts as set out in the judgments. The focus on the stories of the litigants, and the real nature of the stories which led to the major Court of Appeal cases discussed, is refreshing. This focus reflects Professor Spiller's deliberate attempt to humanise the Court of Appeal and the people involved in the Court's work, again reflecting Realist concerns.

The book is exceptionally well-researched, making good use of publicly available material such as cases and extra-judicial writing, but importantly Professor Spiller also refers to interviews which he conducted with the judges and other relevant parties. The author also helpfully outlines his research sources and method in the book's preface.

There are points which might have been worthy of more detailed examination in the book, such as greater consideration of the impact of the Court's workload on its performance, and the Court's responses to workload in developing the Civil and Criminal Appeal Divisions. Practitioners might also have been interested in a discussion of the increasing importance of

written advocacy in the modern Court, and reflections of judges in this regard. These minor omissions, however, may as much reflect editorial decisions on the scope of the work, given the length of the finished book as it is.

Professor Spiller's book is one of precious few works on specialist aspects of New Zealand's legal history, and is a welcome addition to the growing body of scholarship in that area. It is difficult to find fault with such a well-researched and clearly expressed book on one of the most important institutions in New Zealand's legal system.

Kevin Glover*

EQUITY AND TRUSTS IN NEW ZEALAND, by Andrew S Butler (General Editor), Wellington, Brookers, 1247 pages. New Zealand price \$136 plus gst.

This is the first book on equity ever written specifically for New Zealand students and practitioners. Equity and the law relating to trusts in New Zealand are the central themes, although the scope of the book is wide-ranging. This book recognises the independent development of equity and the law of trusts in New Zealand while acknowledging the influence of jurists worldwide. It is a comprehensive text written in four parts over forty chapters, the first two chapters of which are devoted to an historical introduction and basic concepts. Dr Butler, as the general editor of the book, has written or contributed to 17 of the chapters. The other contributors are academics and practitioners from throughout New Zealand, in almost equal proportions. The wide range of experience represented by the list of authors is one of the strengths of the book.

The book is divided into sections, the first of which, part A, deals with trusts. The trust is a device borne out of equity and the principles of equity are well illustrated through the medium of the trust. Part A deals with what would be expected to be found in a traditional trusts course, forming part of an undergraduate degree programme, where the rules and principles on the creation and administration of express trusts are generally accepted as fixed. The text refers specifically to New Zealand trusts and it is on these principles that most of our family and commercial arrangements are firmly based. However, the proper understanding and teaching of trusts should not be limited to these basic concepts and this book addresses the wider and less certain issues by applying the principles to particular circumstances and

* Barrister and solicitor, currently at University of Cambridge.

contexts in part D. In part D we find a detailed account of equitable principles applied to commercial dealings and the case against such intervention. The material is predominantly taken from New Zealand cases but with appropriate examples and texts from other common law jurisdictions.

Part B deals with Modern Equity and in part C Equitable Remedies and Defences are thoroughly examined. The four-part structure of the book is, in my opinion, at the same time a strength and a possible drawback for student use. The strength of the structure is in the focus that has been achieved by adopting this fresh approach, particularly in the section entitled Equity in Context. Throughout the book, topics are grouped together in such a way as to step away from a more traditional "linear" approach where, for example, remedies are usually relegated to the end of the book almost as an afterthought or necessary evil. The lack of continuity that I feared would be evident with so many contributors is simply not present, and there is a strong sense of energy which is pervasive throughout.

My only reservation is in relation to students who have been accustomed to a more traditional textbook that takes them from beginning to end of a subject as if on a conveyor belt. *Equity and Trusts in New Zealand* is a text that demands an enquiring approach to ensure that best use is made of the extent of knowledge it contains. Students reading one chapter may well have to refer to other parts of the book to gain the best possible understanding of a particular topic. This is no bad thing and it is right to dispel the myth that law divides itself into neat categories to be learnt. I believe that, with guidance, students will find this book invaluable in learning about trusts and equity. Moreover, the book may prompt a new sense of enquiry into where equity fits in modern society and its relationships with other areas of law.

Sue Tappenden*

* Lecturer in Law, University of Waikato.



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THE MCCAW LEWIS CHAPMAN ADVOCACY CONTEST

BOTTRILL V A

BY ROSEMARY ROBERTSON*

I. INTRODUCTION

This case concerns the test to be applied in a claim for exemplary damages for negligence resulting in personal injury and the applicability of that test to a determination of whether new evidence warrants the granting of a new trial under High Court Rule 494.

Between 1990 and 1996 the appellant, Dr Bottrill, misread cervical smear slides taken from the respondent, Mrs A. As a result, Mrs A's condition required significant and invasive treatment amounting to personal injury under accident compensation legislation. After being compensated for that injury, Mrs A brought a claim against Dr Bottrill for exemplary damages for negligence. The High Court dismissed the claim, holding that Dr Bottrill's negligence did not reach the high standard necessary for an award of exemplary damages. Re-examination of a large number of slides allowed a recalculation of Dr Bottrill's error rate. On the basis that evidence was now available which disclosed the possibility of a miscarriage of justice meriting a new trial, an application for re-trial was granted under High Court Rule 494(3)(e).

II. SUBMISSIONS FOR THE APPELLANT

May it please the Court, the submissions for the appellant are the following:

1. That the award of exemplary damages for negligence requires subjective awareness that the conduct creates a risk of harm, and deliberate action in reckless disregard of that risk.
2. That, on an application of the true test for exemplary damages, the new evidence does not merit a new trial.

* BA (Cantuar), DipTeach, LLB honours student, winner of the 2003 McCaw Lewis Chapman Advocacy Contest. The competitors in the Contest were required to stand in the shoes of either counsel for the appellant or counsel for the respondent, and present an argument as at the date of the hearing in the Court of Appeal.

1. That the award of exemplary damages for negligence requires subjective awareness that the conduct creates a risk of harm, and deliberate action in reckless disregard of that risk

Section 396 of the Accident Insurance Act 1998 provides that exemplary damages may be claimed for personal injury arising from accident. The section confirms the decision in *Donselaar v Donselaar* that exemplary damages will be available for purely punitive purposes¹ in which the focus is on the quality of the conduct causing harm, not the harm suffered.² As the harm suffered is adequately compensated by the statutory scheme, issues of compensation are not to be considered in claims for exemplary damages arising from personal injury.³

Exemplary damages are to be awarded only in rare cases where the conduct amounts to high-handed infringement of the plaintiff's rights.⁴ The application of the remedy to cases of negligence must be based on a careful assessment of the principles by which exemplary damages are normally awarded for intentional torts, including the purpose of the remedy and the level of conduct meriting an award.⁵

The primary purpose of exemplary damages in New Zealand tort law is punishment.⁶ Punishment's primacy is also recognised by the Australian Courts⁷ and by Law Reform Commissions in the United Kingdom⁸ and Ontario.⁹ The primacy reflects a lack of separation between the law of intentional torts and the criminal law.¹⁰ An underlying justification for the application of punitive measures in each area is the need to condemn and deter deliberate behaviour which harms another person or group.¹¹

¹ *Donselaar v Donselaar* [1982] 1 NZLR 97, 107, per Cooke J.

² *Ibid*, 109, per Richardson J.

³ *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424, 433.

⁴ *Ellison v L* [1998] 1 NZLR 416, 419.

⁵ *Supra* note 3.

⁶ *Ibid*. See also *Taylor v Beere* [1982] 1 NZLR 81, 89; *Donselaar* *supra* note 1, at 109.

⁷ *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9.

⁸ *Aggravated, Exemplary and Restitutionary Damages* United Kingdom Law Commission Report No 247.

⁹ *Report on Exemplary Damages* Ontario Law Reform Commission (1991) 38-39.

¹⁰ *Daniels v Thompson* [1998] 3 NZLR 22, 28.

¹¹ *Garrett v Attorney-General* [1997] 2 NZLR 332, 349

In criminal law, culpability may be based on intention or subjective recklessness, the conscious taking of a risk.¹² An objective assessment of the facts has to find that the defendant “must” rather than “ought to” have known of the risk.¹³ It is submitted that by analogy with crime and intentional torts, awards of exemplary damages in negligence require conscious and deliberate risk-taking which goes beyond simple negligence¹⁴ or inadvertence.

The burden in criminal prosecutions is for proof beyond reasonable doubt. The lower burden of balance of probabilities required in civil cases reinforces the need for a high threshold test for the award of exemplary damages in civil cases.¹⁵

The level of negligence required before the threshold for an award of exemplary damages is met has been established in *McLaren Transport Ltd v Somerville* as:

[A] level of negligence ... so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment.¹⁶

Australian authority emphasises that any action undertaken in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff must be engaged in consciously.¹⁷ The *McLaren* formulation omitted consciousness, but held that the defendant employee knew that his behaviour risked harm.¹⁸ The description of the conduct as outrageous and flagrant implied both subjective recklessness and deliberation. As the fact of knowledge was relied on in the decision, the ratio therefore omitted an important material element.

The test of gross negligence was considered to provide too simplistic a test since it did not incorporate the ingredients necessary to make up the totality of the criteria.¹⁹ It is submitted that *McLaren's* facts reveal the necessary elements to be subjective awareness of risk and a decision to disregard the risk. The requirement for disregard of the plaintiff's safety implies disregard

¹² *R v Harney* [1987] 2 NZLR 576, 581.

¹³ *R v Dixon* [1979] 1 NZLR 641, 647.

¹⁴ *Supra* note 4.

¹⁵ *W v W* [1999] 2 NZLR 1, 3.

¹⁶ *Supra* note 3, at 434.

¹⁷ *Supra* note 7, at 9, adopting *Whitfeld v De Lauret and Co Ltd* (1920) 29 CLR 71, 77.

¹⁸ *Supra* note 3, at 435.

¹⁹ *Supra* note 3, at 434.

of a known risk, rather than ignorance of that risk. Both subjective awareness of risk and a decision to continue with the conduct regardless of risk must combine for the conduct to become so outrageous as to merit punishment.

The requirement of subjective recklessness contended for finds support in the United Kingdom Law Commission's Report on *Aggravated, Exemplary and Restitutionary Damages*, which states that the minimum threshold is the subjective recklessness of the defendant.²⁰

It is submitted that the *McLaren* formulation omits an essential element. The true test for the award of exemplary damages for personal injury is the punishment of behaviour consciously undertaken in outrageous and flagrant disregard of the plaintiff's safety.

2. That, on an application of the true test for exemplary damages, the new evidence does not merit a new trial

In order to meet the requirement in Rule 494 that there has been a miscarriage of justice meriting a new trial,²¹ new evidence must be shown to be capable of having an important influence on the trial.²²

Any new trial must apply the correct test for the award of exemplary damages for negligence. In order to have an important influence on the trial, the evidence must demonstrate that Dr Bottrill was subjectively aware that his conduct risked the plaintiff harm, and that he continued in reckless disregard of that risk.

The new evidence is relevant only to Dr Bottrill's level of accuracy. It contributes nothing to an assessment of his subjective awareness and does not disclose that he was at any point put on notice of his inadequacy. As procedures that might have put Dr Bottrill on notice were not in place, there can be no assumption that he was at any point put on notice. The question is not what Dr Bottrill "ought" to have known but what he "must" have known, by objective assessment of his subjective state.²³

²⁰ Supra note 8, paragraph 5.47.

²¹ High Court Rules No 494(3)(e).

²² *Ladd v Marshall* [1954] 3 All ER 745, 748.

²³ Supra note 12.

An objective assessment of Dr Bottrill's level of awareness was made by the Ministerial Inquiry,²⁴ which found him to be unaware that his practice entailed risk for his patients. In the absence of subjective awareness, his continuation in practice did not constitute reckless or high-handed disregard for the safety of his patients.²⁵

Should the evidence in fact disclose subjective awareness, it is clear that exemplary damages are awarded only where the conduct complained of can be punished in no other way.²⁶ The appropriate punishment has been applied by the Medical Council's disciplinary body, making further punishment unwarranted.

It is acknowledged that exemplary damages can perform secondary functions of education and deterrence.²⁷ Dr Bottrill's retirement obviates the need for personal deterrence, while provision for education and deterrence for other professionals has been met by publicity surrounding the trial and Ministerial Inquiry.

On application of the correct test, the evidence now available would not have an important influence on a new trial.

III. CONCLUSION

In conclusion, for the appellant it is respectfully submitted that:

1. The award of exemplary damages for negligence requires subjective awareness of a risk of harm, and deliberate action in reckless disregard of that risk. This requirement recognises that the punitive role of exemplary damages will be reserved for rare cases where the negligence complained of amounts to outrageous and flagrant disregard for the rights of the plaintiff. The imposition of punishment only where the defendant is subjectively aware of the risk of reflects the need to ensure that a high threshold test balances the lower burden of proof in civil cases and is consistent with the remedy's origins in intentional torts.

²⁴ *Report of the Ministerial Inquiry into the Under-Reporting of Cervical Abnormalities in the Gisborne Region* (April 2001).

²⁵ *Supra* note 4.

²⁶ *Cable v Robertson* unreported, Court of Appeal, 10 May 1996 (CA125/95) Richardson P, Keith and Blanchard JJ, adopted in *Dunlea v Attorney-General* [2000] 3 NZLR 136, 148.

²⁷ *Supra* note 10, at 68, per Thomas J.

2. On an application of the true test for exemplary damages, the new evidence does not merit a new trial. The evidence can only have an important influence if it discloses that Dr Bottrill was aware that his conduct risked harm. There is no such evidence. Secondary functions which might support an award of exemplary damages have been served and no principled purpose would be served by re-litigation.

The appellant respectfully submits that the High Court Judge's order for a new trial be quashed.

May it please the Court, that concludes the submissions for the appellant.