CASE NOTES

Fisher & Paykel Ltd v Commerce Commission (1990) 3 NZBLC 101,655. Barker J and RG Blunt Esq.

The High Court recently overturned the decision of the Commerce Commission not to allow white goods manufacturer Fisher & Paykel Ltd (F&P) to continue to use an exclusive dealing clause (EDC) in dealership agreements.

The Facts

F&P, the sole New Zealand manufacturer of whitegoods and a major supplier to the New Zealand market, has been inserting EDCs into its distribution agreements with retailers for over 40 years. The EDCs require that the retailer not stock or sell products of any make of brand name other than those approved by F&P.

Simpson Appliances (NZ) Ltd is owned by Email Ltd, an Australian whitegoods manufacturer and supplier to the New Zealand market. Simpson/Email claimed that F&P's EDCs breached s 27 of the Commerce Act 1986 in that they were provisions in contracts that had the purpose and effect (or likely effect) of substantially lessening competition in a market. The Commerce Commission agreed with that view.

In the appeal by F&P from the Commerce Commission decision, the Commission and Bond & Bond Ltd, a New Zealand retail dealer of F&P whitegoods, were joined as first and second defendants.

The Commerce Commission Decision

The Commission's decision[1] was based, inter alia, on the fact that the EDC denied rival suppliers access to F&P's retail outlets thereby hindering competitive interaction between suppliers and dealers, and also on the finding that the EDC impeded price competition between competing suppliers in relation to F&P dealers.

The majority stated that because F&P dealers were generally firms with long-standing and proven records, including major chains and well-established regional stores, the inability to obtain access to these dealers constituted a major barrier to further expansion and market penetration.

That agreements containing the EDC could be terminated with 90 days notice was given little weight. Clearly the majority was of the opinion that a

1 Referred to in (1988) 2 JIFDL 39.

F&P dealer was unlikely to terminate an agreement with the major market supplier in order to sell the goods of lesser known suppliers.

The High Court Decision

The majority in the Commission had stated that the considerable costs of overcoming F&P's formidable reputation and brand awareness would constitute a very significant barrier for new entrants to both the manufacturing and retailing markets. Agreeing with the minority view on this point, the High Court rejected the "level playing-field" concept, stating that:[2]

> F&P is entitled to the benefit of its impressive reputation gathered over the years. That reputation, enhanced as it is by the EDC, should not be removed by a kneejerk reaction to some expression like 'level playing field'.

The Court went on to consider a number of United States and Australian authorities, including *Re Ford Motor Company of Australia*,[3] which was distinguished on its facts due to the much larger barriers to entry in the import and dealership markets for cars, and *Outboard Marine Australia Pty Ltd v Hecar Investments No. 6 Pty Ltd*,[4] the most recent Australian decision on exclusive dealing. The High Court stated that while F&P's market share,[5] strong product service package, New Zealand base and strong dealer network gave the company significant market power, it was nonetheless facing severe competition, largely through the lessening of import restrictions. They noted that no significant retail space had been foreclosed and "the establishment of retail outlets by new entrants [had] been no more difficult than could be expected".[6] These factors went to show that the Commission had erred in finding that the EDC substantially lessened competition in the market.

Interestingly the Court stated that had the EDC been held to be anti-competitive (in terms of the Act), the practice would not have been authorised under Part V of the Act as the public benefits of the EDC would not have exceeded the net anti-competitive detriments. In particular, the Court stated that the loss of the EDC would not have led to a cessation by F&P of manufacture in New Zealand. The fact that F&P had recently established a plant in Brisbane to service the Australian market, where no EDC existed, proved that the existence of an EDC was not necessary for F&P's operation to be commercially viable.

2 At 101,668.
3 (1977) 32 FLR 65.
4 (1982) ATPR para 40,298.
5 Eighty percent, made up of seventy-five percent belonging to F&P and a five percent "notional loading factor" from a company which marketed F&P goods under a competing brand name.
6 At 101,687.

Comment

In the *Ford Motors* case, where Ford failed in an attempt to force its dealers to deal solely in Ford motorcars, the applicant argued that anything which improves a particular participant's ability to compete in the market is "pro-competitive" in that it enhances competition. The Trade Practices Tribunal, rejecting this submission, stated that:[7]

> what is good for Ford may not be good for competition generally. The use of exclusive franchising to achieve a more competitive position for Ford is only achieved by restricting the ability of others . . . to compete and hence affects competition adversely.

The Tribunal took the view that there were other devices available to Ford which were pro-competitive for the individual company but which did not adversely affect the ability of others to compete.

In *Fisher & Paykel*, the High Court was critical of the Tribunals' decision in *Ford Motors*. While distinguishing the case on its facts, the Court went on to say that:[8]

> the *Ford* case may well not have been decided today in terms so forthrightly condemnatory of an EDC. It does not fit easily with later Australian authority . . . nor with recent US authority.

It is clear the High Court in *Fisher & Paykel* recognised that the use of EDCs could have pro-competitive effects: for example, in helping to strengthen the product-service package of individual brand systems, so causing an increase in competition between brands. This was especially so where barriers to entry to the retail and supply markets were minimal.

While the decision did not concern a business format franchise, the case will provide some solace for franchisors who seek to bind their New Zealand franchisees into EDCs. Indeed the High Court did not appear too concerned that their decision "earns for us the appellation of the 'Chicago School'"[9] and that this fact may signal that the New Zealand courts are starting to take a more commercially realistic approach to competition law issues than their Australian counterparts did in earlier cases such as *Ford Motors*.

– *Jonathan Stone*

7 Supra at note 3, at 84.
8 At 101,687.
9 At 101,687.

R v Wang (1989) 4 CRNZ 674. Court of Appeal. Richardson, Casey and Bisson JJ.

The appellant, Xiao Jing Wang, was charged with the murder of her husband, Jing Wah Li, and convicted of manslaughter in the High Court. She was sentenced to five years imprisonment, and appealed the conviction on the grounds that the trial Judge erred in not leaving the question of self-defence to the jury, and in the alternative against the sentence imposed. The Court of Appeal dismissed both arguments in a judgment which examines the basis of the subjective-objective test contained in s 48 of the Crimes Act 1961, and the discretionary power of the judge to determine whether or not self-defence should be left to the jury. The Court also discussed the situations in which a pre-emptive strike might be justifiable, and supported the trial Judge's concern that to sanction even a provoked execution of the victim would amount to "a return to the law of the jungle".[1]

The killing occurred on the evening of 19 July 1988, after a party which the appellant and her husband had given at their home in honour of their new son. The appellant's husband was heavily intoxicated and repeatedly forced the appellant to ring her sister in Hong Kong. During the next two hours, several lengthy telephone calls were made during which the appellant's husband threatened the lives of the appellant and her sister, and blackmailed the appellant's family in Hong Kong by demanding that $US300,000 be sent to New Zealand. He told the appellant he wanted to kill her and make it appear as if she had hung herself.

The appellant's husband then returned to his bed, still intoxicated and vomiting, and fell asleep. Thereupon the appellant tied him up and attempted to strangle him, and finally killed him by stabbing him in the stomach several times. In subsequent conversations with her sister and friends, and in interviews with the police, the appellant explained that she had acted for the protection of the family, and that she now felt "free". She stated:[2]

> I had never been so angry and I had never been so frightened, and I really hated him . . . I felt that my head was going to explode . . . I had to kill him, there was no other way.

Psychiatric evidence indicated that the appellant was suffering from a major depressive illness at the time of the killing, caused by the birth of her son and health problems, and further that her marriage was "loveless and coercive". As a result she was unable to deal with the threats, and firmly believed that they would be carried out. She was totally preoccupied with the safety of herself and her family, and killing her husband seemed the only option open to her at the time.

Her appeal against the conviction for manslaughter was dismissed. The

1 At 683.
2 At 677.

Court of Appeal quoted extensively from the High Court judgment and approved that Court's ruling that the defence of self-defence specified in s 48 of the Crimes Act was not available in this case.

The Court referred to *R v Kerr*,[3] where a new trial was ordered on the grounds that the Judge should have allowed self-defence to be put to the jury. As a result of the case ss 48 and 49 of the Act were replaced by a conceptually clearer subjective-objective test:

> Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

R v Kerr also reiterated the principle that when considering whether to put the issue of self-defence to a jury, the judge must view the evidence in the manner most favourable to the accused; the defence need discharge only an evidentiary burden. The judge may only withhold the defence from the jury where it would be *impossible* for the jury to entertain a reasonable doubt, not merely improbable. In *R v Tavete* it was held that it is the judge's duty to put self-defence to the jury where there is:[4]

> a credible or plausible narrative which might lead the jury to entertain the reasonable possibility of self-defence.

In the light of this precedent, the Court of Appeal refused to accept the submission by the appellant's counsel that whether the force used in self-defence was reasonable is always a question of fact for the jury and never a point of law for the judge. This ruling reflects the Court's concern that the judge should ensure that the jury's verdict is legally sound and not based solely on emotive or moral feelings. The Court therefore emphasises that submitting self-defence to the jury pre-supposes that a jury will act reasonably.[5]

The Court went on to examine s 48, and the implications of the self-defence test contained therein. The circumstances of the killing are to be viewed subjectively: as the accused believed them to be. But the force used in self-defence must be reasonable: an objective test. It is not enough that the accused *believed* the force to be reasonable in the circumstances. Thus the Court impliedly overruled its approach in *R v Robinson*,[6] where s 48 was apparently interpreted as a purely subjective test.

The Court of Appeal agreed with the trial Judge's finding that the appellant believed she and her family were under a real threat of harm from her husband. There was evidence that the only course of action open to her was to kill her husband, but the question at law was whether the appellant was *reasonable* in acting as she did in the defence of herself and her sister. It was

3 [1976] 1 NZLR 335.
4 [1988] 1 NZLR 428, 430 per Somers J.
5 At 431.
6 (1987) 2 CRNZ 632.

held that she had not acted reasonably. Her husband was intoxicated and asleep and thus she could have left the house or contacted the police. She was in no immediate danger. It would be impossible for a jury to find that the accused was justified in deliberately killing her husband or to entertain a reasonable doubt that she might have been so justified. The defence of self-defence was therefore not available.

Counsel for the appellant submitted that s 48 is not confined to cases where a person resists physical force, but that it applies also where there is a threat to use force. Thus he argued that a pre-emptive strike could in some circumstances be self-defence, as recognised in *R v Terewi*[7] and *R v Ranger*.[8] The Court accepted that proposition, but held that a pre-emptive strike was not reasonable where the threat could not be carried out immediately, and where the accused had alternative courses of action open to her. The Court rejected a further submission that the appellant believed that her husband might carry out his threats at any time: the threat was a conditional one, and the husband was incapable of carrying it out at the time of the killing.

Appellant's counsel referred to a number of American cases which involved women killing their husbands while they were asleep. Some dicta and dissenting judgments indicate that self-defence may in special circumstances be available for the killing of a sleeping or otherwise passive victim. However, the Court of Appeal was not persuaded by such "a leap into the abyss of anarchy".[9] The Court concluded that:[10]

> having regard to society's concern for the sanctity of human life requires, where there has not been an assault but a threatened assault, that there must be immediacy of life-threatening violence to justify killing in self-defence.

The "violent and various steps" taken by the appellant to ensure the death of her husband were not justifiable. They were indicative more of a loss of self-control than of self-defence.

This case brings the utility of the s 48 test into question. The subjective-objective division appears wholly sensible and clear-cut, but there are obvious difficulties in determining exactly what the accused's view of the circumstances was at the time of the offence, as well as judging what was reasonable in those circumstances. Does the accused's view of the circumstances include a consideration of possible courses of action in those circumstances? If so, how can it be unreasonable for the accused to pursue the only course of action which he believes is possible?[11] There would appear to be a fine line separating the two parts of the test, or even some degree of overlap between

7 (1985) 1 CRNZ 623.

8 *Jahnke v State* 682 P 2d 991, 997 (1984).

9 At 683.

10 Ibid.

11 The appellant's apparent lack of contrition some time after the event was held to be a factor relevant in determining the sentence, but it also indicates that the appellant still believed the killing to be the only option open to her.

them. This case indicates that the test prescribes an almost wholly objective standard, with the accused's subjective view of the circumstances ultimately having little effect on the decision. The accused's alleged belief that she had no alternative courses of action open to her was effectively ignored.

The inclusion of an element of objectivity in the test is necessary. A purely subjective test for determining the degree of justifiable force would be dangerous: paranoiacs could legally repel any perceived threat. Moreover, there are obvious difficulties of proof with any purely subjective test; the jury is likely to impose its own objective test by refusing, for example, to accept that the accused actually *believed* that the force used was reasonable in the circumstances. The present judgment resolves any previous uncertainties regarding the second part of the self-defence provision by confirming it as an objective test.

It might be argued in accordance with the principle that evidence must be interpreted in the manner most favourable to the accused that the Judge should still have put the defence of self-defence to the jury. Considering the appellant's depressive illness for which she had received no treatment, her comparative isolation in a foreign country with a newborn baby, and the violent threats made not only to herself but to her family, would it be impossible for a jury to entertain a reasonable doubt? This is answered by the requirement to act "reasonably" where "reasonably" is defined as applicable only to cases of imminent physical danger; the killing of a passive victim will therefore never be reasonable. Whether this restriction is confined to the facts of this particular case, or is applicable to the defence, generally, remains to be seen.

– *Kurt Van Wirkervoort Crommelin*

Paulger v Butland Industries Ltd [1989] 3 NZLR 549. Court of Appeal. Somers, Hardie Boys and Wylie JJ.

Paulger was Chief Executive of a company with debts of some $7 million. Anxious to preserve the company's good name, and confident that a forthcoming sale of the business would realise enough to pay its debts, he sent a letter to each of the company's creditors, containing the following passage:[1]

> We ask your tolerance whilst we execute this matter and advise we will make good all outstanding matters within 90 days. The writer personally guarantees that all due payments will be made.

Before the sale was completed the company went into liquidation; unsecured creditors received nothing. Butland Industries was such a creditor.

1 At 551.

At the conclusion of the 90 day period specified in the letter, it brought proceedings for summary judgment against Paulger claiming that the letter amounted to a personal guarantee. Butland was successful. Paulger appealed.

Hardie Boys J delivered the judgment of the Court of Appeal. It was held:[2]

> that Mr Paulger offered each of the creditors his personal guarantee of the company's debt, and that the respondent [Butland] accepted the offer, and so created the contract, by forbearing to enforce payment until after the 90 day period mentioned in the letter.

The letter was held to be an offer of a guarantee. The presence of offer and acceptance was objectively determinable in light of the surrounding circumstances despite Paulger's contention that he did not intend to be bound.[3] Judgment was entered in favour of Butland for the amount of the debt plus interest.

The result appears obvious, and the decision would be unexceptional were it not for Paulger's reliance on the Contractual Mistakes Act 1977 and the decision in *Conlon v Ozolins.*[4]

Conlon involved the sale of land from Ozolins, an elderly Latvian widow, to Conlon, a milkman speculator. Ozolins thought she was selling the land behind her garden: lots 1, 2 and 3. Conlon thought he was buying the land and the garden: lots 1, 2, 3 and 4. They both signed an agreement for the sale and purchase of all four lots. On discovering her mistake, Ozolins refused to sign the transfer, and Conlon successfully applied for specific performance before Greig J in the High Court. Ozolins appealed, seeking relief pursuant to s 6(1)(a)(iii) of the Contractual Mistakes Act.

That section states:

> A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract .... (a) If entering into the contract ... (iii) That party and at least one other party ... were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or law.

Woodhouse P and McMullin J allowed the appeal, although for different reasons. Woodhouse P held that "each had a mistaken impression about the boundaries of the tract of land being bought and sold", or that "each mistakenly believed that the written document correctly represented a mutual intention which did not exist".[5]

McMullin J held that:[6]

> The appellant's mistake was in thinking, as Greig J found, that she was selling only lots 1 to 3; the respondent's in thinking that the appellant intended to sell lots 1 to 4.

Somers J, dissenting, found that Conlon could not have been mistaken. He

2 Ibid.
3 Ibid.
4 [1984] 1 NZLR 489.
5 Supra at note 4 at 498.
6 Ibid, 505.

thought only what the contract said, and thus:[7]

> the instant case is one which Parliament intended to be met only if the purchaser knew of the vendor's mistake – that is to say if the case fell within s 6 (1)(a)(i).

It had been held below that Conlon had no knowledge of Ozolin's mistake, hence Somers J would not grant relief.

The case has since attracted almost universal criticism for a number of reasons.[8] In particular it has been argued that the decision allows a party to a contract to set up his own unilateral mistake as a defence, thus threatening the traditional rule that a party's assent to a contract is to be judged objectively. Fisher J in *Jones v Chatfield* viewed the:[9]

> unfortunate decision in *Conlon v Ozolins* as a standing invitation to any Defendant to a contract claim to give evidence that he or she intended a different bargain and misunderstood the document that was signed.

Paulger v Butland Industries restricts *Conlon* to its particular facts. It is clear that Hardie Boys J disagrees with the approach of the majority in *Conlon*. After quoting the critical passages cited above, he says:[10]

> These words of McMullin J are not to be read as referring to what each party believed the other intended, because then the parties' respective mistakes would have been about different things: his about her intention, hers about his; yet McMullin J held that it was a case for para (iii).

From this it may be inferred that the Court adopts the more restrictive view of Somers J's dissent.

It is not certain, however, what new interpretation of mutual mistake is offered. The judgment peripherally comments that subsections (1)(a)(ii) and (1)(a)(iii) of s 6 are inapplicable because Butland was not mistaken:[11]

> Its "mistake" was that the contract meant what it said: and that was no mistake at all.

The principal ground relied on by the Court was that Paulger made a mistake of interpretation, which s 6(2)(a) precludes from being a mistake under the Act. That section states:

> For the purposes of an application for relief under section 7 of this Act in respect of any contract, – (a) A mistake, in relation to that contract, does not include a mistake in its interpretation.

Hardie Boys J comments on the section:[12]

> Parliament plainly intended to maintain the well-established principle that contracts are to be construed objectively, and to avoid the great uncertainty that would arise were a party to

7 Ibid, 508.
8 See Coote, "The Contracts and Commercial Law Reform Committee and the Contract Statutes" (1988) 13 NZULR 160, and the references cited therein.
9 High Court, Auckland. 13 July 1989 (CP 580/87). Fisher J.
10 At 554.
11 Ibid.
12 Ibid, 553.

> be permitted to plead as a mistake that he understood the contract to mean something different from its plain and ordinary meaning.

He also says that a "mistake ... as to the effect of the letter ... [is] a mistake in its interpretation".[13] Thus any mistake as to meaning or effect is not a relevant mistake.

In dismissing *Conlon*, however, the following statement was made:[14]

> [*Conlon*] is not authority for invoking the Act where one party misunderstood the clearly expressed intention of the other, or where one party meant something different from the plain meaning of his own words. For then the mistake is one in the interpretation of the contract, and the party making it cannot avail himself of the Act. This distinction was made in *Shotter v Westpac Banking Corporation*.[15]

That is, a mistake as to intention is a mistake as to interpretation. But this is not the effect of the decision in *Shotter*. Wylie J was there attempting to distinguish the *Engineering Plastics* case, in which it was held that a mistaken belief by each party about the intention of the other was not a matter of interpretation, and therefore was not excluded by s 6(2)(a).[16]

In *Shotter* Wylie J distinguished between a mistake as to the intention of the other party, which he accepted was not a mistake as to interpretation, and a mistake as to the content of the document in question, which was. Thus it can hardly be said that *Shotter* is authority for the Court's reasoning.

It is questioned, in any case, whether this is a useful distinction at all. As Thorp J has noted:[17]

> The differentiation of "content" from "interpretation" offers endless room for argument. In one sense every mistake about the effect of a contract can be said to be a mistake about its "interpretation".

Taking all these passages together, it seems that mistakes as to intention, or as to the content, meaning or effect of a contract, will not qualify the mistaken party for relief. This severely restricts the operation of the Act. Indeed, it is not easy to conceive of a mistake that does not involve the content, meaning or effect of a contract, and it must be questioned whether Parliament can have intended that relief be so difficult to obtain.

So what does *Paulger* stand for? Three things can be said with certainty. First, it is now clear that the decision in *Conlon v Ozolins* is looked upon with judicial disfavour at the highest level. Second, this disfavour has manifested itself in a rejection of the earlier (liberal) construction of s 6(1)(a)(iii). Third, the application of the Act has been greatly restricted by the wide interpretation given to s 6(2)(a). It may perhaps be added that the confusion surrounding the Contractual Mistakes Act engendered by *Conlon* is in no way dis-

13 Ibid.
14 Ibid, 554.
15 [1988] 2 NZLR 316, 332.
16 *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985] 2 NZLR 72, 82.
17 *U-Bix Copiers (NZ) Ltd v General Finance Acceptance Ltd*, High Court, Auckland. 5 December 1989 (CL 135/88). Thorp J.

pelled. It must be suspected, after 13 years and two contradictory Court of Appeal decisions, that the problems created by the Act are incapable of solution by the courts. Perhaps Parliament should tempt fate and, once again, legislate.

– *David Murray*

Elders Pastoral Ltd v Bank of New Zealand [1989] 2 NZLR 180. Court of Appeal. Cooke P, Richardson and Somers JJ.

Mr Gunn was a farmer. He was indebted to his stock agents Elders Pastoral Ltd and the Bank of New Zealand. In June 1987, as part of a refinancing agreement, the Bank was persuaded by Elders to advance money to Gunn, secured by an instrument by way of security over his stock. The instrument was registered.

Clause 15 of the instrument provided that:

> [in the absence of any direction to the contrary by the Bank] all moneys payable in respect of the sale of any of the said stock . . . shall be paid to the bank . . . and (Gunn) shall direct every purchaser . . . making such payment accordingly.

In January 1988 Gunn, through Elders as stock agents, sold some of the stock secured by the instrument. From the proceeds of sale Elders deducted not only their costs, but also the amount of $57,987.92, being Gunn's current indebtedness to Elders. The balance of $3,015.88 was paid to Gunn's account with the Bank. The Bank sued Elders to recover $57,987.92. Master Hansen gave the Bank summary judgment for that amount. Elders appealed.

Two issues arose before the Court of Appeal. First, whether Gunn was entitled under the instrument to sell stock without the Bank's consent. The Court held unanimously that Gunn was so entitled, overturning the Master's decision in this respect. The second, and more important, issue was whether, notwithstanding Gunn's right to sell the stock, Elders was accountable to the Bank for the proceeds of sale. This turned on whether Clause 15 had merely contractual force between Gunn and the Bank, or whether it gave the Bank an interest in the proceeds of sale or a right to trace the proceeds against a party in the particular position of Elders.

Cooke P began by holding that Clause 15 did not amount to a contract by Gunn to assign a future chose in action (which would have given the bank an equitable interest in the proceeds). That of course was not the only means by which an equitable interest could arise. Cooke P referred to a statement of Cardozo J in *Beatty v Guggenheim Exploration Co*:[1]

> A constructive trust is the formula through which the conscience of equity finds expression.

1 225 NY 380, 386 (1919).

> When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

In Cooke P's view then the issue was whether Elders could consistently with conscience retain the money. He thought they could not. Although their good faith was not in question, their claim to the money had to be seen as less than conscionable for two reasons. First, they had persuaded the Bank to take the security and thus they had actual notice of the instrument (as opposed to statutory notice under the Chattels Transfer Act 1924). Second, they had received the sale proceeds as Gunn's agent. They should be treated as being equally bound by the obligation under Clause 15. Elders therefore held the proceeds on a constructive trust for the Bank.

Somers J agreed with Cooke P that Clause 15 did not amount to a contract by Gunn to assign a future chose in action. In his view the Bank would have an interest in the proceeds if Gunn or Elders stood in a fiduciary relationship to the Bank, or if the moneys received by Elders could not conscientiously be appropriated by it against the Bank.

Somers J was of the opinion that Clause 15 imposed a fiduciary obligation on Gunn, as he could only sell the stock (which was by virtue of the security, the Bank's property pending sale) on terms that any sale proceeds received by himself would be held for, and paid to, the Bank.

Clause 15 provided that the Bank could direct that Gunn keep the proceeds of sale. As purchasers of stock in the ordinary course of business would not ordinarily know if such a direction had been made they would be unaffected by Gunn's fiduciary obligation and could pay him without incurring any liability to the bank. But Elders *was* affected by the fiduciary obligation, not because it had persuaded the Bank to take up the security (a fact that Somers J thought irrelevant) but simply because Elders was Gunn's agent:[2]

> Elders was not in contract with the Bank but can stand in no better position vis-à-vis the Bank than its principal, Mr Gunn.

Somers J thus agreed that Elders held the proceeds on a constructive trust for the Bank.

Richardson J did not deliver a separate judgment, but agreed that the appeal should be dismissed broadly for the reasons given in the judgments of Cooke P and Somers J.

It is axiomatic of proprietary and contractual rights that third parties are bound by the former but not by the latter. Indeed, that is the very thing that distinguishes them. There were only two issues in this case: whether Clause 15 gave the Bank a proprietary interest in the sale proceeds, and, if so, whether Elders had sufficient notice of the interest to be bound by it.

Cooke P did not find that the obligation contained in Clause 15 gave the

2 At 193.

Bank a proprietary interest in the proceeds.[3] He imposed a constructive trust merely on the basis that it was unconscionable for Elders to retain the proceeds with knowledge of Gunn's breach of contract. Cooke P's view that constructive trusts can be imposed whenever the holder of the legal title of property cannot in good conscience retain the beneficial interest is, of course, valid. But it has never been unconscionable to receive property knowing that such receipt resulted from another's breach of a mere contractual obligation. Perhaps Cooke P thought it should be. If so, it is respectfully suggested that such a radical development in the law demands a more comprehensive legal analysis.

Cooke P also thought that Elders was subject to Gunn's obligations under Clause 15 by virtue of being his agent. But Elders' agency did not render it a party to the contract between Gunn and the Bank. Furthermore, an agent who has no notice that a breach of a fiduciary obligation is being committed is not liable merely because he acts as agent in the transaction which constitutes that breach.[4] The agency is irrelevant in the absence of notice. Notice remains the deciding issue.

Somers J's reasoning is more convincing. He held that Clause 15 imposed a fiduciary obligation on Gunn, so that any sale proceeds were held by him for the Bank. The Bank would have an equitable interest in the proceeds. But Somers J relied on the agency relationship in determining that Elders was bound to recognise the Bank's equitable interest. As pointed out above, the agency is irrelevant. The question is whether Elders had notice of the Bank's interest: whether they had notice of the obligation contained in Clause 15. That was a question not fully addressed by Somers J. It is suggested that the same result in this case could have been reached on the basis that Elders had constructive notice of Clause 15 by virtue of the Chattels Transfer Act 1924.[5]

This case is also important for the dicta appearing in both judgments. They give a strong indication that the Court will continue to expand the scope of the constructive trust as a remedy, and that the presence of a commercial relationship will not stand in their way.[6]

– *Neil Campbell*

3 Note though that Cooke P did not expressly find that the clause did not confer a proprietary interest. He simply made no finding on the issue.

4 See Reynolds (ed) *Bowstead On Agency* (15th ed 1985) 500.

5 By s 4(1) of that Act, Elders is deemed to have notice of the contents of a registered instrument. It is generally thought this will only apply to those terms which can themselves be registered. Clause 15 can be registered as it imposes a trust: see s 2.

6 At 186 per Cooke P, and 193-194 per Somers J.

Actors Industrial Union of Workers v Auckland Theatre Trust Inc. [1989] 2 NZLR 154. Court of Appeal. Cooke P, McMullin and Barker JJ.

Before 1985 an employee facing dismissal had recourse to few procedural safeguards at common law. On giving reasonable notice an employee could be dismissed without substantive cause. The employer was under no duty to warn the employee before dismissal, to give him reasons for the dismissal, nor to allow him a hearing.

The situation was different where the employment relationship was governed by public law[1] or where the employee was entitled to the protection afforded trade union members by statute.[2] In those instances dismissal was, and is, governed by procedural fairness requirements.

The distinction stemmed from the different sources of the employment. In public law the employment relationships stem from statute or prerogative. Thus the courts readily find requirements of procedural fairness to be implicit in the power from which the right to dismiss is derived. At private law, however, the relationship of employer and employee is founded in contract. As contracting parties could only be liable for the legal obligations assumed, an employee was only entitled to procedural protection where the employer had assumed an obligation to provide it. Thus Diplock LJ (as he then was) stated:[3]

> The law is concerned with legal obligations only ... not with the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.

Two decisions of the Court of Appeal in 1985 challenged this view. In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*[4] it was held that where any employee is accused of dishonesty, a term should be implied in the contract of employment that the employer must carry out an enquiry in a fair and reasonable manner. This was said to be part of the employer's wider duty of confidence and trust.

In *Marlborough Harbour Board v Goulden* the Court went further:[5]

> The position has probably been reached in New Zealand where there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever.

These decisions, both delivered by Cooke P, challenge the previously assumed basis of the contract of employment. Rather than seeing the contractual liability of the employer as the sum of the legal obligations

1 *Ridge v Baldwin* [1964] AC 40 (HL).
2 Currently the Labour Relations Act 1987.
3 *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, 294.
4 [1985] 2 NZLR 372.
5 [1985] 2 NZLR 378, 383.

assumed, Cooke P views the employment relationship as a status. The employer's liability is imposed by the courts to give effect to the fair and reasonable expectations that arise from that status. Thus as the President has said extra-judicially:[6]

> Employment, however created, is increasingly seen as a relationship involving status; and the parties to the relationship owe duties to each other reflecting the status of each, which are at least very largely summed up as duties of fairness.

In *Goulden* Cooke P said:[7]

> Fair and reasonable treatment is so generally expected today of any employer that the law may come to recognise it as an ordinary obligation to a contract of service.

As Cooke P views it, therefore, the task of the court is not to ascertain what obligations the parties expressly or impliedly intended to assume; rather it is to impose liability so as to protect the fair and reasonable expectations that arise from the employment status. It would be rare for a court to find that an employer intended to forego the right to dismiss an employee on notice, without warning or hearing. Such procedures would, however, be an entirely fair and reasonable expectation on the part of the employee. The effect of Cooke P's approach then is to impose a duty of procedural fairness upon the employer where none previously existed. Similar duties have since been imposed in a number of High Court and Labour Court decisions.

In the recent case *Actors Industrial Union of Workers v Auckland Theatre Trust Inc* the width of this duty was explored. In doing so, the members of the Court of Appeal illustrated that there is still a conflict as to the exact means of determining an employer's contractual obligations toward his employees.

Hager was hired as a stage manager at the Mercury Theatre under a fixed-term contract of employment. The contract was for an 11 month term. At the end of this time her contract was not renewed. Her work performance during the period had been satisfactory, and she had been kept on after a trail period of three months. The contracts of other workers in similar circumstances had been renewed. There was some evidence that the reason for the non-renewal was friction that had developed between Hager and the theatre's Artistic Director, although this was rejected by the Arbitration Court on the balance of probabilities.

This action was commenced before the passing of the Labour Relations Act 1987. Hager's union took her case to the Arbitration Court, claiming the non-renewal was an unjustifiable dismissal under s 117 of the Industrial Relations Act 1973. The Arbitration Court ruled against the union who appealed to the Court of Appeal.

The case was eventually decided on a technical issue, namely that there was a serious question as to whether the fixed term clause in the contract was

6 Cooke, "Fairness" (1989) 19 VUWLR 421, 428.
7 Supra at note 5, at 383.

consistent with the relevant award. The case was thus remitted to the Labour Court for rehearing pursuant to s 62B of the Act.[8] The main interest in the case, however, centred on the union's contention that the non-renewal of a fixed term contract, without proper reason, can be a dismissal under the Industrial Relations Act. This would give the court jurisdiction to investigate whether the dismissal was unjustifiable.

Cooke P accepted the union's argument. First, by taking an expansive approach to statutory interpretation, he held that the term "dismissal" has a wide meaning encompassing:[9]

> an employer's decision to send away on the expiration of a fixed period a worker who has been retained for that period after what has been expressly agreed to be a trial period.

He advanced a further ground of significance to common law dismissal, and in doing so continued the theme propounded in the *Woolworths* and *Gouldon* judgments. He thought that once Hager was kept on after her three month trial, she had a legitimate expectation[10] of her contract being renewed and thus had a right to a hearing before renewal could be denied. If she was not given that hearing, non-renewal would amount to a dismissal. His Honour stated:[11]

> the worker had a legitimate expectation of renewal of her contract and could only be denied renewal if the substantial requirements of natural justice were met

Barker J took a traditional approach, holding that unless the employer had expressly or impliedly promised to renew the contract, there was no obligation to do so. More than a reasonable expectation of a renewal was required. Thus there could be no unjustified dismissal when the fixed term expired.

McMullin J sided with Barker J in holding there was no right to renewal or to a hearing. However, there is a suggestion that on different facts he might have followed the approach of Cooke P. His Honour said:[12]

> Miss Hagar may have hoped that a new contract may have been arranged or that the old one would be renewed, but this could have only been a hope and not a legitimate expectation.

This implies that if Hagar had had a legitimate expectation of a renewal or hearing, it would be enforceable at law, whether or not the employer had agreed to such a duty. The headnote is misleading in this respect as it equates the reasoning of McMullin J with that of Barker J.

In conclusion, the judgments of Cooke P and McMullin J, when combined with the Court of Appeal's two 1985 decisions, indicate a move away from

8 This corresponds to s 313 of the Labour Relations Act 1987.

9 At 158.

10 "Legitimate expectation" is a term borrowed from the field of judicial review. "Legitimate" is now accepted as being synonymous with "reasonable"; see *Attorney-General of Hong Kong v Ng Yuen Shiu* (1983) 2 All ER 346 (PC); *Heatley v Tasmanian Racing and Gaming Commission* (1977) 51 ALJR 703 (HCA); and the authorities cited by Cooke P.

11 At 158.

12 At 160.

strict contractual theory where contracts of employment are concerned. These decisions must, however, be treated with caution. Two involved unjustified dismissal complaints under the Industrial Relations Act and the other concerned judicial review of a statutory power of dismissal. Thus any comments concerning common law dismissal must be regarded as obiter. Nevertheless, the thrust of the new approach is undeniable. The contractual duties of employer and employee towards one another are governed not by the legal obligations each intentionally assumes, but rather by what the court imposes to reflect what the parties could fairly and reasonably expect to arise from their employment status. It follows from this that procedural fairness will soon become as much a part of common law dismissal as it is at public law. In fact, given that much of modern contract law concerns the regulation of status, it is possible that the approach of Cooke P could have application outside the employment sphere.

– *Mike Josling*