national and local level is now the focus of the Trust. However, the impasse in the negotiations is temporary, and although the Trust has gone into abeyance and meets quarterly, work continues to complete the detailed proposals necessary to further advance the project.

Pamela Williamson

CASE NOTES

"Tortious conduct does not pay"

***Daniels v Thompson* [1998] 3 NZLR 22. Court of Appeal, Richardson P, Gault, Henry, Thomas, and Keith JJ.**

The majority of the Court of Appeal in *Daniels v Thompson*,[1] ignoring a developing line of authority in the lower courts, firmly rejected the possibility of obtaining exemplary damages in a civil action where a defendant has been prosecuted in criminal proceedings for the same basic acts. In what was largely a policy based decision, competing private and public interests dictated that in light of all relevant concerns, retention of exemplary damages for criminal conduct resulting in conviction could no longer be justified.

Factual Background

The judgment involved four cases in which each plaintiff sought an award of exemplary damages for acts which constituted serious criminal offending of a sexual nature.

In *Daniels v Thompson*, the plaintiff and the defendant had been living as a de facto couple for three years. At the end of this relationship the plaintiff issued proceedings seeking the return of assets which he claimed were his. The defendant counterclaimed, stating that the plaintiff abducted her and on three occasions raped her. She alleged false imprisonment and sought general damages for distress and exemplary damages totalling $71,000. The plaintiff was prosecuted and convicted on all but one count of rape and sentenced to nine years imprisonment.

The other three cases involve similar facts. The plaintiff in *J v Bell*,[2]

1 [1998] 3 NZLR 22.
2 Ibid, 27.

sought exemplary damages for the sum of $200,000 against the defendant who had pleaded guilty to a charge of sexual violation for which he received a two year jail sentence. In *H v P*,[3] the appellant was sentenced to a term of six and a half years imprisonment for sexually abusing his daughter over an eight year period. The case of *W v W*[4] was exceptional as the defendant had been acquitted on all counts. The plaintiff, a patient of the defendant, pleaded trespass to the person, negligence and breach of fiduciary duty and sought exemplary damages to the sum of $250,000.

The central issue in each of these cases was whether previous criminal prosecutions should be an absolute bar to civil proceedings for exemplary damages. This raised the spectre of double jeopardy: to allow a claim for exemplary damages for the plaintiff would constitute double punishment for the defendant.

The Majority Decision of the Court of Appeal

The Court first looked at the function of awarding exemplary damages. The origin of exemplary damages lies in two cases decided in 1763; *Huckle v Money*[5] and *Wilkes v Wood*.[6] The purpose of the awards was said to punish and deter, expressing the jury's outrage at the defendant's conduct.[7] It was concluded that exemplary damages maintained a close relationship with the criminal law regime: "They are punitive in nature - punishment is the aim ... they reflect society's condemnation of the particular conduct."[8]

Justice Henry, expressing the view of the majority, then turned to the relevant legislation. Primarily, emphasis was placed on the double jeopardy and retroactive penalties provision in s 26 of the New Zealand Bill of Rights Act 1990. Section 26(2) states:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

It was submitted that this provision constituted a bar to a civil claim for exemplary damages where the defendant had been criminally prosecuted for the same offence. Counsel supporting the bar relied on the decision of Moran DCJ in *P v P*,[9] in which reference was made to s 26(2) as authority for the principle that a person should not be punished twice for the same offence.[10] His Honour

3 Ibid, 28.
4 Ibid, 27.
5 [1763] 2 Wils KB 205.
6 [1763] Lofft 1.
7 Supra at note 1, at 28.
8 Ibid, 30.
9 [1993] DCR 843.
10 Ibid, 847.

believed there was a "very strong objection ... to a claim for exemplary damages being made against a defendant who has already been punished by the criminal law."[11]

Justice Henry in *Daniels* preferred a more literal approach to the legislation. Section 26(1), preventing retroactive punishment, clearly applied only to criminal process. As a logical consequence, s 26(2) had to be read the same way. The term "punished" in the context of this section only relates to criminal proceedings and therefore the provision does not operate as a complete impediment to an award for exemplary damages where there has been criminal prosecution for the same offence.

Reference was also made to s 11 of the Criminal Justice Act 1985 which allows reparation to be considered in sentencing. This was made in the context of a somewhat token remark regarding current awareness of victims' rights. Justice Henry felt the criminal law process recognises the right to reparation, thus "the very aims of exemplary damages are likely to be weighed and taken into account in the sentencing process."[12] From this point in the judgment, the reasoning appears to move towards the ultimate finding in the case. His Honour proceeded to appraise relevant case law and foreign Law Commission Reports. Despite lengthy evaluation, the Judge was unable to extract a common line of authority.[13]

This divergence of approach required appeal to underlying principles. The Court recognised three different situations where exemplary damages may apply. First, where a prosecution had already been instituted and a conviction entered. Second, where a prosecution had been instituted but an acquittal had resulted. Lastly, where a prosecution had been commenced but not concluded regardless of its outcome.

Conviction

Justice Henry offered three primary reasons favouring the availability of an award where a conviction had been entered. An individual has a right to bring and control a civil action and be free to seek a remedy for a civil wrong. In the event of an inadequate criminal sanction, the aggrieved party should be able to seek appropriate redress. Notwithstanding these reasons, the nature and conduct of a criminal trial is fundamentally different from a civil action.

Arguments to the contrary emphasise that there is a fundamental right to avoid double punishment: once a person has paid for their wrongdoing they should not be subjected to further punishment for the same acts. There is also a desire to retain criminal law as the forum for the imposition of a criminal penalty. A weaker proposition put forward was the multitude of problems

11 Ibid, 848.

12 Supra at note 1, at 35.

13 Ibid, 45.

associated with evaluating a court imposed penalty.

The Court concluded that exemplary damages were justified on the grounds that they effect punishment for, and deter repetition of, outrageous conduct therefore reflecting society's disapproval of such behaviour. However, if such a penalty was already imposed under the criminal law, the justification "largely if not entirely disappears".[14] Justice Henry thus queried whether there was any basis left upon which to found an award of exemplary damages. Given the close relationship of such damages with the criminal law, double punishment is inevitable. Furthermore, the concept of revisiting a sentence is an affront to legal norms and only serves to undermine the criminal process.

In closing his Honour attempted to strengthen the resulting conclusion by presenting a philosophical argument: contending that a right has been lost, merely presupposes that an existing entitlement has been taken away. Exemplary damages however are not absolute, they will only be awarded if there is a need to punish the conduct in question. If this need has been satisfied by the court system the right is removed for it has been recognised in the sentencing process.

Acquittal

An outcome resulting in an acquittal means that no punishment will be given. Despite this, the Court felt that relitigation of the matter would amount to abuse of process. It is undesirable to allow the same issues of fact to be reheard when the sole purpose of the litigation is to impose punishment. Primacy must be given to the criminal courts in imposing sanctions for criminal offending. Exemplary damages are not to be used as a "back-up sanction" for conduct of a criminal nature that has been unsuccessfully tried in a criminal court.[15]

No Concluded Prosecution

Similarly, when prosecution has been commenced but is yet to be concluded, it will be an abuse of process to pursue a civil claim regarding the same matter. Civil proceedings must be stayed at least until criminal prosecution has been concluded. It is clearly not in the public interest to circumvent criminal procedure in a bid to obtain civil redress. Only where there is not, or where there is unlikely to be, any criminal prosecution may the aggrieved pursue a claim for exemplary damages.

Therefore, the role of the state in dealing with criminal conduct is accorded primacy. This is absolute where the defendant has been convicted, and exclusive

14 Ibid, 46.
15 Ibid, 52.

if an alleged offender has been acquitted or is liable to prosecution. All four cases in the judgment failed on this basis.

The Dissenting Judgment of Justice Thomas

In dissent, Thomas J preferred "a more cautious and less radical approach".[16] He would not have imposed an absolute bar on a claim for exemplary damages where the defendant had been prosecuted of an offence involving the same conduct. Criminal prosecution and any punishment imposed would be taken into account by the civil court in determining whether an award for exemplary damages is appropriate. This follows the advances of the American and Canadian courts.

Of considerable assistance to the Judge were the *Report on Exemplary Damages* by the Ontario Law Reform Commission[17] and reports from the England and Wales Law Commission.[18] The Ontario Law Reform Commission regarded punitive damages as a vehicle for supplementing the criminal law. It recommended that prior criminal proceedings should not act as a bar, instead, merely as an indication as to what a suitable penalty may be in the present circumstances in light of the previous outcome.[19]

The British Report stressed the need for exemplary damages to be available as an effective and important means of protecting interests that may not otherwise be adequately redressed. Criminal law and the criminal process do not work perfectly and exemplary damages play a useful role in "filling these gaps".[20] Punishment, deterrence and marking the conduct for disapproval are the legitimate functions of both the civil and criminal law. The Commission concluded by stating that the argument is stronger for the retention of exemplary damages, rather than for their abolition. An offender should not be punished twice for the same offence, but that does not imply that there should be a complete and automatic prohibition. It is rather a matter for the discretion of the civil courts to consider whether or not exemplary damages be granted if the defendant has already been convicted.

Justice Thomas strongly agreed with finding of Richardson J (as he then was) in *Taylor v Beere*[21] as an expression of the correct approach to exemplary damages in the New Zealand setting. Opposition to exemplary damages comes

16 Supra at note 1, at 78.

17 Ontario Law Reform Commission, *Report on Exemplary Damages* (June 1991), cited in *Daniels v Thompson*, supra at note 1, at 56.

18 Law Commission for England and Wales, *Aggravated, Exemplary and Restitutionary Damages* (No. 247, 1997); Law Commission for England and Wales, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (No. 132, 1993), cited in *Daniels v Thompson*, supra at note 1, at 56.

19 Supra at note 17, at 56.

20 Supra at note 18, at 56.

21 [1982] 1 NZLR 81.

from those who prefer a clear division between tort and criminal law, with punishment to be the exclusive concern of the criminal regime. Although criminal law is the better instrument for conveying social disapproval, Richardson J believed it is unrealistic to expect criminal law to be the sole vehicle of social control in today's increasingly diverse and complex society.[22]

This simplistic partition lessens the significance of exemplary damages. Both tort and criminal law play a vital role in ensuring the protection of victims' rights. Exemplary damages and criminal sanctions should operate independently, supplementing, not supplanting one another.[23]

The dissenting Judgment reflected a concern for the rights and interests of victims, particularly women. His Honour noted that a bar to claims for exemplary damages denies victims the legitimate right to access to the courts; "a fundamental feature of a free society".[24] This is inherently unfair and discriminatory to women who will be most affected by the inability to seek civil redress.[25] A victim's right to a remedy should be protected by the law no less than the offender's right not to be punished twice.[26] As a consequence of the majority finding, these two apparently fundamental rights now appear to be diametrically opposed.

In conclusion, Thomas J agreed that the criminal law and process maintains primacy in criminal matters. This however, should not operate to the exclusion of a victim's right to seek exemplary damages. Redress should also be available in civil actions given the function of punitive damages, the differences between criminal and civil proceedings, and the rights and interests of victims. In his Honour's view, a complete ban on exemplary damages is too extreme. Instead, the courts should be left to weigh up the competing arguments for the imposition of such damages.

Comment

Justice Somers in *Taylor v Beere* stated that the purpose of exemplary damages is to show that "tortious conduct does not pay".[27] Sixteen years on, in light of the majority decision in *Daniels*, a somewhat more literal approach must be given to this statement. The position has been clearly stated: no longer will exemplary damages be available if offenders have been prosecuted in a criminal court for the same acts. Even if these actions constitute tortious wrongs, victims will not receive exemplary damages for their suffering.

The rationale for the majority finding is primarily focused on preventing

22 Ibid, 90.
23 Supra at note 1, at 59.
24 Ibid, 73.
25 Ibid.
26 Supra at note 1, at 75.
27 Supra at note 21, at 95.

anomalies in punishment that may arise when the same defendant is both criminally prosecuted and subsequently sued for exemplary damages. However, the Court's policy decision has failed to acknowledge the inherent differences between criminal and civil proceedings. Victims of crime will become disenfranchised, unable to seek adequate redress for the wrongs they have suffered.[28] The valuable therapeutic function of exemplary damages for victims has been blatantly overlooked.[29]

Rather than eliminating anomalies, the majority decision will cause even further friction between civil and criminal law.[30] The preferable solution to this dilemma is to follow Thomas J's suggestion in his dissenting judgment. Prior criminal conviction or punishment should mitigate penalties imposed in a later civil claim. This will ensure that both parties are treated fairly when criminal and civil processes collide.

Edward R H Glennie

28 Supra at note 1, at 74-75.

29 Ibid, 70.

30 Blower, "Exemplary Damages: Applying Natural Justice to Ensure Fundamental Fairness" [1998] NZ L Rev 313, 343.

An Uneven Balance in the Application of the 1951 Refugee Convention

S v Refugee Status Appeals Authority [1998] 2 NZLR 291. Court of Appeal, Henry, Keith, Blanchard JJ.

In two separate but similar judgments, the New Zealand Court of Appeal and the Auckland High Court affirmed the decision of the New Zealand Refugee Status Appeals Authority ("RSAA") governing New Zealand's interpretation and application of Article 1F(*b*) of the 1951 UN Convention Relating to the Status of Refugees ("the Convention").[1]

Factual Background

In *Refugee Appeal No. 70001/96 (RSDS)*[2] the RSAA heard a second appeal for refugee status by the applicant S, a Sri Lankan citizen and member of the military wing of a communist-based movement, the Janatha Vimukthi Peramuna ("JVP"). The broad aims of the JVP were to destabilise the Sri Lankan government and take over the country. Part of the destabilisation programme was to impose curfews upon shopkeepers and to forcibly demand money from shop owners in the name of the JVP.[3]

On one such occasion in 1988, the applicant was in a group of between five to eight people who went to around 40 shops, undisguised, and demanded money. Affected by heroin at the time of the incidents, the applicant maintained that he did not personally make any of the demands but was "simply there, sometimes inside, sometimes outside the shop."[4] Threatened that they would be killed and/or their shops burnt down, the shopkeepers handed over the equivalent of NZ$2,500.[5]

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1 [1961] NZ Treaty Series 2. The New Zealand government acceded to the Convention on 30 June 1960. It is currently indirectly incorporated into New Zealand domestic law by the creation of a decision-making system outside of statute. The two principal bodies are the Refugee Status Branch of the New Zealand Immigration Service and the Refugee Status Appeals Authority. Their functions and jurisdiction are governed by their respective *Terms of Reference* (in force since 30 August 1993 and amended on 30 April 1998).

2 30 April 1997.

3 *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301 (HC); supra at note 2, at 6-7.

4 Ibid, 301.

5 Ibid.

Judicial History of the Case

The New Zealand Refugee Status Appeals Authority

The two main issues before the RSAA were whether the applicant satisfied the requirements of Article 1A(2)[6] of the Convention ("the Inclusion Clause"), and whether his inclusion was nonetheless overruled by the application of Article 1F(*b*) ("the Exclusion Clause").[7] Affording him the benefit of the doubt, the RSAA found that the applicant did satisfy the Inclusion Clause but was nonetheless excluded by Article 1F(*b*). The applicant sought judicial review of the decision in the High Court.

The High Court Decision

Justice Smellie dismissed the plaintiff's application for review. Principally, based on Article 1F(*b*), the plaintiff contended that the RSAA decision:

(i) Was a mistake of fact;
(ii) Was unfair;
(iii) Was unreasonable; and
(iv) Failed to take into account relevant considerations or took into account irrelevant considerations.

The plaintiff contended that he was a mere party and he acted under compulsion. Furthermore, the crime itself was not serious and was politically-motivated. He also argued that, in any event, the seriousness of the crime had to be balanced against the underlying humanitarian purposes of the Convention and the consequences of his return to Sri Lanka.[8]

His Honour outlined four essential issues arising from the plaintiff's submissions.[9] The first issue was as to the appropriate standard of proof as dictated by the words "serious reasons for considering".[10] Justice Smellie

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6 Article 1A(2) reads:

> [O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...

7 Article 1F reads:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> ...
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee ....

8 Supra at note 3, at 302.

9 Ibid, 306.

10 Ibid.

followed the RSAA's preference for a standard of proof lower than the balance of probabilities. Applying the RSAA's dicta from *Re T P*,[11] his Honour concurred with the Canadian approach which applied this standard to questions of fact only and not to questions of law.[12]

Secondly, Smellie J relying on two Commonwealth appellate decisions,[13] elucidated the "incidence" test in order to establish criteria for deciding whether an offence is "political" or "non-political" as far as Article 1F(b) is concerned:[14]

> The first requirement of the test is that the alleged crimes must be committed in the course of and incidental to [or in furtherance of] a political disturbance such as war, revolution or rebellion ... The second branch of the test is focussed on the need for a nexus between the crime and the alleged political objective .... The political element should in principle outweigh the common law character of the offence, which may not be the case if the acts committed are grossly disproportionate [or too remote] to the objective, or are of an atrocious or barbarous nature.

Applying this test, Smellie J ruled that the plaintiff completely failed to satisfy either part. His Honour held that the robberies were directed at innocent shopkeepers and were therefore peripheral to the JVP uprising. It was inconclusive whether any true political motive was involved, whereas there was clear evidence that the robberies were for personal gain.

Upon deciding that the robberies were non-political, Smellie J then considered whether they were serious for the purposes of Article 1F(*b*). His Honour applied New Zealand's domestic standard in assessing the plaintiff's acts as analogous to aggravated robbery pursuant to s 235(1)(b) of the Crimes Act 1961. That provision carries a maximum penalty of 14 years' imprisonment. Taking the robberies collectively, such "lawless behaviour on a grand scale would inevitably have led to a high penalty."[15] Justice Smellie also speculated as to the penalty the plaintiff would receive under the Sri Lankan Penal Code (at least eight years hard labour) and concluded that in both jurisdictions such conduct was regarded as serious. His Honour concurred with the proposition that "serious crime" be informed by international jurisprudence rather than by only one of the world's legal systems. This practice is consistent with the application of international law to municipal law:[16]

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11 [1996] BIR Digest C.5.1.

12 See *Moreno v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 (CA), 313 and *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 (CA).

13 *Gil v Canada (Minister of Employment and Immigration)* [1995] 1 FC 508 (CA); *T v Secretary of State for the Home Department* [1996] AC 742 (HL).

14 *Gil v Canada*, ibid, 509.

15 Supra at note 3, at 310.

16 Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 2nd ed 1996) 105-106.

> Each State must determine what constitutes a serious crime, according to its own standards, considered against the objectives of the 1951 Convention.

New Zealand's legislation in this case however, was consistent with international jurisprudence. Only crimes punishable by several years' imprisonment, such as homicide, rape, child molestation, arson, drug trafficking and armed robbery, are of sufficient gravity to offset a fear of persecution.

Justice Smellie was not satisfied that the aforementioned mitigating factors such as acting under compulsion (in themselves questionable on the facts), outweighed the aggravating factors.

The final issue considered was whether the RSAA was entitled to carry out a balancing exercise by weighing the seriousness of the crime against the gravity of the consequences of returning the plaintiff to his homeland. Justice Smellie indicated that this issue would be valuable as a precedent given that it had never arisen in New Zealand before. Essentially at issue were two competing interests: a liberal humanitarian approach against a clear literal interpretation.[17] This was the main issue taken on appeal, and Henry J, delivering the judgment of the Court of Appeal, essentially followed the reasoning of Smellie J.

Justice Smellie dismissed the plaintiff's application for review on the basis of a failure to demonstrate any error of law on the part of the RSAA.

The Court of Appeal Decision

In the Court of Appeal, the appellant submitted that the phrase "serious crime" must be construed in the humanitarian context of the Convention and its purpose as a means of protection of fundamental rights and freedoms. In particular the appellant drew support from four key sources, including the United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees[18] and the 1984 Convention Against Torture.[19] However, the Court held that the written words must be given their ordinary meaning when that is clear and does not yield an absurd or unreasonable result:[20]

> Article 1F(b) is clear and unambiguous. It directs attention to the commission of a serious crime, nothing more, nothing less ... There is nothing in art 1F to justify reading into its provisions restrictive or qualifying words such as those which would be necessary to require a balancing exercise ...

17 Supra at note 3, at 317.

18 (Geneva: Office of the United Nations High Commissioner for Refugees, 2nd ed 1992); see in particular para 156.

19 See in particular, Article 3.1 which gives political torture victims absolute protection.

20 *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, 297.

Support for this proposition has grown in recent case law emerging from Australia,[21] Canada,[22] and the United Kingdom.[23]

Faced with this crossroads decision, both the High Court and Court of Appeal went down the 'principled' path. Justice Smellie found the judgment of Dawson J in *Applicant A*, to be instructive on this point:[24]

> [It is a] well-accepted fact that international refugee law was meant to serve as a 'substitute' for national protection .... *It would therefore be wrong to depart from the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.*

Justice Smellie also referred to the mandatory application ("shall not apply")[25] of Article 1F if the required evidential threshold is attained. This meant that the decision maker had no discretion but to apply the clear and unambiguous words of the provision.

The Court of Appeal dismissed the appeal but stated in obiter that New Zealand's commitments under the 1984 Torture Convention and its humanitarian obligations under the Immigration Act 1987 remain unaffected by the interpretation and application of Article 1F(*b*) of the Refugee Convention.

Comment

The High Court and the Court of Appeal judgments are watersheds in the evolving jurisprudence of refugee law in New Zealand. Whilst the issue of standard of proof has been largely disposed of, the remaining three issues will continue to attract considerable debate in future cases.

The decision of the New Zealand courts and international authorities to depoliticise certain offences such as armed robbery, hostage-taking and 'terrorism' is a potential source of difficulty. The argument remains that one person's terrorist is another person's freedom fighter in fear of persecution. As such, the whole notion of what is a "political offence" will continue to be subject to close scrutiny given the western world's abhorrence of the nature of crimes carried out ostensibly for political reasons. However, the courts are to be commended for enunciating set criteria to give effect to Article 1F, namely that it was enacted in order to exclude those undeserving of international protection.

Contrary to the High Court and Court of Appeals' reasoning, the words of Article 1F(*b*) are not unambiguous. Considerations of what constitutes a

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21 *Dhayakpa v Minister of Immigration and Ethnic Affairs* (1995) 62 FCR 556, applied in *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 153 ALR 385; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331.

22 Supra at note 14.

23 *T v Secretary of State for the Home Department*, supra at note 13.

24 Supra at note 3, at 317 (emphasis in original).

25 Supra at note 7.

"serious" non-political offence will continue to be subject to varying interpretations and differing applications from country to country which will weaken the effectiveness of the Convention.

Finally, the Courts' preference for a literal interpretation may have shifted the focus too far from the underlying premise of the Convention; the principle of *non-refoulement* under Article 33. This states that a person should not be returned to a country where they are in fear of being persecuted. The relevance of the UN Handbook and the Torture Convention should also not be understated. As the principle of *non-refoulement* is the cornerstone provision of the Refugee Convention, it at least merits a detailed consideration in an Article 1F(*b*) analysis.

Neville Menezes

The Relationship Between Designations and Enforcement Orders Under the Resource Management Act 1991

Watercare Services Ltd v Minhinnick [1998] 1 NZLR 294. Court of Appeal, Keith, Tipping and Williams JJ.

This case involved an interim enforcement order application by the respondent against Watercare, who was to commence work routing a wastewater pipeline across the Matukuturua Stonefields. The Stonefields are located at Wiri in Manukau City, and are recognised as an archaeological site.[1] The activity which was the subject of the application affected a 400m x 30m corridor of land within the Stonefields, and included the removal of a layer of topsoil which would later be covered by a grassed mound containing the pipeline. This was part of a major sewer pipeline upgrade between South Auckland and the Mangere Wastewater Treatment Plant.

The case is significant because it provides that a designation, where included in a district plan, gives the holder clear authority to do anything that is in accordance with the designation. Where an activity is under the authority of a designation, that work is not subject to the enforcement order sections of the Resource Management Act 1991 ("RMA"), and is also protected from the more general provisions of s 17. This substantively alters the availability of remedies

1 Under the Historic Places Act 1993, s 2, archaeological site includes places which are associated with human activity before 1900, or which may be able to provide evidence relating to the history of New Zealand. The Matukuturua Stonefields are likely to contain pre-1900 human remains as well as other evidence of earlier occupation by Maori, including the remains of gardens, domestic structures and associated artefacts.

to individuals affected by works under designations, impacting especially where the designation has been in place for a long period, or where those now affected did not have the opportunity to be involved in the designation process.

The Court also addresses the important issue of the appropriate test for determining what is noxious, dangerous, offensive or objectionable to such an extent that it has an adverse effect on the environment. The High Court's earlier approach, modifying the ordinary reasonable person test from *Zdrahal v Wellington City Council*,[2] to one involving the reasonable Maori person, is rejected and the more general test reaffirmed.

Effect of Designations Under the RMA

The principal issue in this case was the power of the Environment Court to make an enforcement order under the RMA when the activity in question is in accordance with a designation. This was not a live issue in either the Environment Court or the High Court.

A designation is a provision made in a district plan to give effect to a requirement made by a requiring authority.[3] Watercare came under the definition of "requiring authority" as a network utility operator.[4] A designation effectively sets aside land to enable the Crown, Local Authorities and network utility operators to provide certain "essential" services. Once made, designations may be included in a district plan where they operate essentially as rules.[5] The pipeline route had been the subject of a designation in the relevant schemes and plans since 1978, and was still in force. All other necessary resource consents, coastal permits, water permits and earthworks consents had been obtained.

Enforcement orders make up the civil enforcement procedures of the RMA, and are available to "any person".[6] They are very broad in scope,[7] and are made at the discretion of the Court,[8] for example where an activity contravenes the Act, regulations, rules in plans, or resource consents. They may also be made

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2 [1995] 1 NZLR 700.

3 RMA, s 166. For further guidance see Williams, *Environmental and Resource Management Law* (2nd ed 1997) paras 4.19 - 4.21.

4 Network utility operators may be approved as such by s 167 where they are providing certain services. Examples include companies involved in the provision of telecommunication services, electricity, water, drainage and sewerage systems, roads and railways.

5 Section 194(1). Note that s 192 provides that this section covers designations as well as heritage orders. While operating 'as if it were a rule', a designation is not a rule in a district plan for the purposes of ss 176 and 319. See the Court of Appeal decision, infra at note 38, at 306.

6 Section 316(1). See also Williams, supra at note 3, at paras 14.8 - 14.17.

7 See s 314. However, they may not be solely based on a breach of Part II; see *O'Sullivan v Tasman Forestry Limited*, Planning Tribunal, Wellington, 4 July 1995, W 79/95, Treadwell J.

8 The Court has emphasised that the granting of an enforcement order is discretionary in *Kawerau Jet Services Ltd v Pro Jet Adventures Ltd* [1991] 1 NZRMA 1; *Rangiora New World v Barry* [1992] 1 NZRMA 133.

under s 314(1)(a)(ii) where the activity:

> [i]s or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.

The Decision of the Court of Appeal

It was held by Keith, Tipping and Williams JJ,[9] that because the works were in accordance with the designation, they were not subject to the provisions of the RMA dealing with enforcement orders, nor to their counterpart in s 17. Watercare was entitled to do what it proposed. The decision focused on s 176, which provides inter alia:

> (1) Where a designation is included in a district plan or proposed district plan ... then, notwithstanding anything to the contrary in the district plan or proposed district plan and regardless of any resource consent, but subject to Sections 9(3) and 11 to 15, and 176A -
>
> (a) the requiring authority responsible for the designation may do anything that is in accordance with the designation.

The interpretation was based on the reasoning that since the section was *expressly* made subject to ss 9(3) and 11 to 15,[10] it would be an improper method of statutory interpretation to hold that Parliament had *impliedly* subjected it to any beyond those expressly listed. Section 176(1)(a) was to "mean exactly what it says".[11] The section was not impliedly subject to ss 314 and 319, which deal with enforcement orders. Neither was it subject to the general duty in s 17, which places on every person the duty to avoid, remedy or mitigate any adverse effect on the environment, whether or not the activity is in accordance with a rule in a plan or resource consent. This interpretation is difficult to reconcile with two earlier cases involving s 176 - *Ngataringa Bay 2000 (Incorporated) v Attorney-General*,[12] and *Donkin v Board of Trustees of the Sunnybrae Normal School*.[13] In the former case, the fact that s 17 applied to circumstances where a designation was in force was not contested. In *Donkin*, the Environment Court reasoned that "if s 17 was not to apply to designated land, then we would expect s 176 to be explicit about that".[14]

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9 The judgment of the Court was delivered by Tipping J.

10 Section 176A was inserted by s 38 of the Resource Management Amendment Act 1997, which came into force after this case was heard.

11 Infra at note 38, at 303.

12 Planning Tribunal, Auckland, 27 February 1995, A 10/95, Sheppard J.

13 [1997] NZRMA 342.

14 Ibid, 349. It was noted that this view was reached without the benefit of argument on the issue.

Implications of the Decision

Many designations existing at present result from legislative processes under significantly different statutory regimes to those which we have now. It is relatively obvious that over time our perceptions and attitudes towards the environment have undergone considerable change. Our views regarding certain social and cultural issues, notably the role of Te Tiriti o Waitangi, have also evolved. These are evidenced by a shift in the current legislation towards principles and purposes, often expressly stated as in the RMA,[15] that were not included or perhaps even reflected, in the earlier acts.[16] Given this shift, the question is raised as to whether it is reasonable for activities under designations to escape the provisions of s 17 and those regarding enforcement orders.

There have been calls for legislative reversal of this case. The Minister for the Environment has recently put forward a "smorgasbord of possible legislative changes",[17] including under the heading "Non Complex / Non Controversial":

> Courts:
> - corrections for case law decisions (designations);
>
> There is general support for a change to the Act in response to the Court of Appeal's finding on the *Minhinnick* case. This amendment would ensure that designations continue to be bound by other relevant provisions of the Act and plans.

Brabant,[18] also argues that activities carried out via designations should be subject to the same duties as activities carried out under rules in plans or resource consents. The duties in ss 16 and 17 should operate as "overriding control on the way activities are carried out after being permitted by plan rules, a resource consent, or by designation, but subject of course to the important proviso of s 319."[19]

However, focus should also be placed on what activities under designations are subject to, rather than on what they are protected from. Where a designation is valid, the holder may do anything reasonably covered by the designation, subject to ss 9(3), 11 to 15, and s 176A. This means that the requiring authority must obtain resource consent to undertake certain activities in relation to land,

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15 See ss 5-8.

16 In the High Court it was noted that while the designation process regarding the pipeline had been exposed to a public process, this was believed to carry less weight than it would have had those processes been under the RMA. The differences in emphasis between the RMA and the Town and Country Planning Act 1977 were highlighted.

17 Environet, Issue 17, 23 June 1998, page 2, http://www.arcadia.co.nz/enet/enet17.html.

18 "Sections 16 and 17 duties and designations", (1997) 2 BRMB 85.

19 Ibid, 86. The proviso in s 319(2) covers situations where the adverse effect/s complained of have been considered before the rule was established in the plan or consent was granted, an enforcement order will not be made unless there has been a change in circumstances or a period of time has passed.

subdivision, the coastal marine area, beds of lakes and rivers, water, and discharges. The consent process provides for public participation in the form of notification of applications, submissions, hearings and rights of appeal. The application must contain the requirements of s 88(4), most notably, an assessment of any adverse effects.[20] In deciding whether to grant consent the local authority has a number of matters which it must take into consideration, including Part II issues as well as those identified in s 104.[21]

A number of other provisions also ensure that works under designations do not escape the purpose and principles of the RMA. Firstly, in order to be approved as a requiring authority, the Minister must be satisfied that the applicant will give "proper regard" to the interests of those affected and the environment.[22] Secondly, there are new requirements in s 176A,[23] regarding outline plans. An outline plan of any works undertaken in accordance with a designation is to be submitted to the territorial authority before construction commences.[24] This allows the territorial authority to request changes,[25] and may be especially useful where the designation is old, or framed in very general terms, for example, "sewerage purposes". Thirdly, the process involved in obtaining a designation is a public one, broadly similar to that of obtaining resource consent.[26] In response to the submission that the decision amounted to "carte blanche" power to requiring authorities, the Court noted the importance of these procedures,[27] which allow for public input and the assessment of effects. There are also rights of appeal to the Environment Court, where designations can be cancelled or modified, and further inquiries made into adverse effects.

There are however, concerns that individuals may not become involved in either the designation or the resource consent process.[28] In cases where the designation is relatively old this concern is magnified. The layperson who considers the activity to have adverse effects, and who was not involved in, or even aware of, the public participation opportunities, may only 'discover' their concerns once work begins. By this stage, civil enforcement procedures would no longer be available to them. To ensure that all the effects of activities under designations are identified, and that individuals likely to be affected take advantage

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20 The required analysis is set out in the Fourth Schedule.

21 The first issue in s 104 is; "any actual and potential effects on the environment". The s 2 definition of "environment" includes people and communities as well as any social and cultural conditions affecting them. If identified at the resource consent stage, actual or potentially noxious, dangerous, offensive or objectionable effects would have to be addressed.

22 Section 167(4)(b).

23 Inserted by the Resource Management Amendment Act 1997, s 38.

24 Section 176A(3) sets out what must be included in the outline plan.

25 The territorial authority may only "request" changes, however they may appeal to the Environment Court if the request is refused. The Court must consider whether the requested changes will give effect to the purpose of the Act in determining any appeal.

26 See ss 168-174.

27 Infra at note 37, at 303.

28 Brabant, supra at note 18, at 86.

of the opportunities available to them, active steps should be taken to encourage effective participation by the public in all of the procedural stages relating to the designation.

It could be argued that designations under the RMA enjoy substantively the same privileged position they did under the Town and Country Planning Act 1977. However, this would be to ignore the fact that they remain subject to the carefully designed procedures involved in:

(i) being approved as a requiring authority;
(ii) obtaining a designation; and
(iii) acquiring resource consent for activities undertaken in accordance with that designation.

These procedures are designed to ensure both public participation, and the identification and management of adverse effects. There will always be a requirement to balance the needs of the public to have access to, and certainty in the provision of, services and products by those entitled to designations, with the needs of the environment and affected people as recognised in the RMA.[29] In sheltering designations from the civil enforcement provisions and the general duty in s 17, the requiring authorities need for certainty is recognised, while the necessary balance is ensured by the procedures that they must follow.

The fact that the activity was being carried out in accordance with a designation was determinative in preventing the respondent's application. However, the following issue had been fully argued, and was addressed in the decision.

The Test of Noxious, Dangerous, Offensive or Objectionable

As noted earlier, an enforcement order may be made where an activity is noxious, dangerous, offensive or objectionable to such an extent that it is likely to have an adverse effect on the environment.[30] The respondent submitted that the works proposed were, in the circumstances, objectionable and offensive, such that an adverse effect on the environment was likely, because the pipeline was to convey sewerage across an area some considered to be waahi tapu.[31]

29 See for example, supra at note 21.

30 Section 314(1)(a)(ii).

31 Loosely translated, the term conveys the idea of 'sacred place'. It is defined in s 2 of the Historic Places Act 1993 as "a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense."

The Environment Court's Decision[32]

In declining the application Sheppard J referred to the objective test for whether or not something is or is likely to be offensive or objectionable, as set out in *Zdrahal*.[33] Under this test, if ordinary reasonable persons would be offended, or find the subject matter objectionable, the activity affects the environment of those people. In contrast to the submission of Counsel for Minhinnick, the "person" involved: [34]

> [I]s a representative of the community at large, rather than a representative of a particular iwi or other section of the community; a reasonable, ordinary person in the sense of not one who puts greater value on waahi tapu than informed members of the community at large do.

The test used is the familiar ordinary reasonable person test, however, to this was added a number of specific matters which the aforementioned "person" was to be taken to have knowledge of, namely that:

(i) the activity was part of a public sewerage system;
(ii) the route had not been chosen arbitrarily;
(iii) there had been a public process of submissions, public hearings and appeals;
(iv) there had been consultation with Maori, and a blessing ceremony with iwi representatives present; and
(v) the work was not going to be undertaken in a manner disrespectful of waahi tapu or archaeological features.

Justice Sheppard concluded:[35]

> In my judgment she or he would consider that because of [the earlier five factors] ... what might otherwise have been offensive or objectionable, is regrettable but not offensive or objectionable let alone to such an extent as to have or be likely to have an adverse effect on the environment.

The Decision of the High Court[36]

Justice Salmon rejected the Environment Court's decision on the grounds that it had misdirected itself in law in relation to the identification of the reasonable person. While agreeing that the *Zdrahal* test was the correct one, it

32 [1997] NZRMA 289.
33 Supra at note 2.
34 Ibid, 310.
35 Ibid, 312.
36 [1998] 1 NZLR 63.

was held that in this case the reasonable person should not be a reasonable member of the community at large, but a reasonable Maori representative of the Maori community at large, a substantial modification of *Zdrahal*. The importance of the cultural dimension allowing such a reformulation of the test was seen to arise from Part II of the Act, especially ss 5, 6(e), 7(e) and 8. Of these, s 6(e) was considered the most significant as it includes as a matter of national importance, "the relationship of Maori and their culture and traditions with their ancestral lands, water sites, waahi tapu, and other taonga."[37]

Part II was thus seen as providing evidence for the proposition that both ss 314 and 17 should be concerned with matters that are offensive or objectionable to Maori, especially where important cultural issues were at stake. Since waahi tapu was involved and would be of greater concern to Maori, the correct test should examine what is "offensive or objectionable to a reasonable Maori person, because that is an attitude which would be respected by the balance of the community."[38] The Court did not accept that the ordinary reasonable member of the Maori community would be aware of, or take into account the matters set out in the High Court and outlined above in (i) to (v).

The Court of Appeal's Decision[39]

The narrow approach taken by the High Court was rejected. A central issue was whether or not too much emphasis had been placed on the provisions of Part II "beyond its undoubtedly important compass to one of almost decisive influence."[40] In rejecting the modified *Zdrahal* test, it was held that the Court was instead to weigh: [41]

> all the relevant competing considerations and ultimately make a valued judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject matter is seen as involving Maori issues. ... While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole, decides whether the subject-matter is offensive or objectionable under s 314. In the end a balanced judgment has to be made.

The views of individuals were to be sympathetically considered, but were not to prevail irrespective of the weight of other relevant considerations. However, if ordinary reasonable persons would be offended or find the subject objectionable, then the activity adversely affects the environment of those people. A two step

37 Ibid, 72.
38 Ibid, 76.
39 [1998] 1 NZLR 294.
40 Ibid, 301.
41 Ibid, 305.

process was identified for whether something is or is likely to be offensive or objectionable:[42]

> [U]ltimately the legislation requires the Court to form its opinion first whether the subject matter is or is likely to be noxious, dangerous, offensive or objectionable and second whether any noxious, dangerous, offensive or objectionable aspect found to exist is of such an extent that it is or is likely to have an adverse effect on the environment.

Justice Tipping held that, in the assessment of whether something is offensive or objectionable for the purposes of the RMA, there must be a consideration of all the surrounding circumstances, which were substantially the same as those recognised by Sheppard J. In its conclusion the Court stated:[43]

> If the subject matter serves an important resource management purpose and, after consideration of alternatives and consultation is found to represent the best way of achieving that purpose, it may well be appropriate to say that it is not objectionable.

Catherine Somerville

42 Ibid, 304.
43 Ibid, 305.

Gilbert v Shanahan - A Retreat From *Brickenden*

***Gilbert v Shanahan* (CA 246/97, 30 June 1998, Richardson P, Keith and Tipping JJ).**

This is a significant case in which the New Zealand Court of Appeal took the opportunity to clarify several areas of law. The areas of contributory negligence, loss of chance and indemnity as a contingent liability have been discussed in the New Zealand Law Journal.[1] This comment will analyse the manner in which the Court dealt with the issue of how closely related a breach of fiduciary duty must be to the loss suffered, before liability will be imposed for that loss.

The leading case in this area is the decision of the Privy Council in *Brickenden v London Loan & Savings Co*[2] where it was held that the breach by a fiduciary need only be material to, and not necessarily causative of, the loss suffered by the plaintiff. *Gilbert v Shanahan* signals a clear retreat from *Brickenden* and effectively narrows the circumstances in which equity will recognise liability for a breach of fiduciary duties.

Factual Background

The appellant ("Mr Gilbert"), signed a guarantee of the obligations of a company called Tudor Real Estate Ltd ("Tudor") of which he was director and shareholder. Those obligations related to a lease executed by Tudor. The respondents, a firm of solicitors called Shanahan Partners ("the solicitors") acted for both Tudor, and Mr Gilbert in his personal capacity, in respect of the lease and the guarantee. Tudor became insolvent, and Mr Gilbert was called upon to answer the guarantee.

He issued proceedings against the solicitors alleging, first, that they were in breach of their fiduciary duties to him and, second, negligence in that amongst other things, they failed to advise him that he had, in fact, no legal obligation to sign the guarantee.

Judicial History

Traditionally, in order to incur liability for a breach of fiduciary duty the breach needed only to be material to the loss suffered by the plaintiff. Thus, there was no requirement for causation. Lord Thankerton in the Privy Council ruled

1 [1998] NZLJ 251.
2 [1934] 3 DLR 465.

that:[3]

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts ... he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

There has been a steady retreat from this position in recent years in New Zealand. In the 1995 Court of Appeal decision of *Haira v Burbery Mortgage Finance & Savings Ltd (In Receivership): Koya v Haira*[4] a solicitor was said to have breached his fiduciary duties by failing to advise a client to seek independent advice. The judgment of the Court was delivered by Richardson J (as he then was). It was suggested that the question could be addressed if the evidence allowed a conclusion based on reasonable inference rather than speculation.

In the High Court decision of *Everist v McEvedy*,[5] Tipping J understood *Haira* to be a subtle but important shift from the earlier understanding of the *Brickenden* approach. Looking at the passages he cited from *Haira*, it is obvious that conceptually, a different approach is indeed being taken:[6]

> Once it is shown that the conduct of the fiduciary in breach of his or her obligations was material to the transaction from which loss resulted the Courts will not speculate on what might have happened if another course had been followed.
>
> ... there is no justification in the evidence for an inference that [the solicitor's] breach of duty was not a factor in [the Plaintiff's] decision making .... It is a matter of speculation, rather than a conclusion from the evidence, that [the plaintiff] would or might have gone ahead had her attention been drawn to the problem .... There is no basis in the evidence for deciding whether or not she would have taken independent advice if recommended by [the solicitor] to do so .... [T]here is no basis in the evidence for a conclusion that, if she had taken independent and competent advice, she would have carried through the transaction in that way and suffered the same loss.

The orthodox *Brickenden* approach stated that any consideration of what action the plaintiff would have taken, had there been no breach of fiduciary duty, was irrelevant as speculation. Subsequent to the *Haira* decision, the subject of what the plaintiff would have done if there had been no breach of fiduciary duty is

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3 Ibid, 469.

4 [1995] 3 NZLR 396.

5 [1996] 3 NZLR 348.

6 *Haira*, supra at note 4, at 408 per Richardson J, as quoted by Tipping J in *Everist*, ibid, 353.

no longer wholly precluded; it can be investigated and an answer given provided there is a sufficient evidentiary basis for that answer as inference rather than speculation.

The Court of Appeal in *Gilbert v Shanahan*

Justice Tipping, delivering the judgment of the Court, held that the only breach which could potentially support a claim of breach of fiduciary duty in the circumstances was the failure to advise the plaintiff to seek legal advice independent from that given to Tudor. The Court found on the evidence however, that it was clear that had such an opportunity been given, Mr Gilbert would not have taken it. Thus, even if there was a breach of fiduciary duty, it caused Mr Gilbert no loss as the loss would have occurred irrespective of the breach.

Justice Tipping noted that the solicitors had advised Mr Gilbert of his rights and obligations under guarantees on a number of previous occasions, as well as his right to be advised independently of Tudor in such circumstances as the present. Despite receiving such advice, Mr Gilbert had consistently declined to take separate advice, thus there was no possibility, in the Court's view, that independent advice would have been taken if offered on this occasion.

The Court in *Haira* had said that the evidence did not justify any inference that the solicitor's breach of duty was not a factor in the plaintiff's decision making.[7] The onus of proof is clearly on the errant fiduciary to show that the loss would have occurred without any breach of duty on their part. However, in *Gilbert* there was a clear evidentiary foundation for drawing the opposite conclusion. Assuming that there was a breach of fiduciary duty by the solicitors, it was clear that Mr Gilbert's loss was not caused by that breach, because it would have occurred even without the breach. Mr Gilbert had consistently declined to take such advice in similar circumstances. His claim therefore, failed on the breach of fiduciary duty cause of action.

Conclusion

This decision constitutes a conscious shift by the New Zealand Court of Appeal away from the approach taken by the Privy Council in *Brickenden*, and confirms the steady erosion of the status of that decision in earlier New Zealand cases.

It is submitted that requiring a breach of fiduciary duty to be causative of the loss suffered before liability for that loss will be imposed, is a fairer and more logical approach than the materiality approach of *Brickenden*. Further, given the much-vaunted fusion of law and equity, it seems logical to subject claims for compensation for loss arising from breach of equitable obligations, to similar

7 Supra at note 4, at 408 per Richardson J.

rigorous tests of causation as found in common law compensatory claims. If any distinction is to be retained, a more principled basis for making a distinction than the *Brickenden* materiality approach must be articulated.

Jane Doherty

Redundancy, Black Letter Law and the Obligation of Fair Dealing

Aoraki Corporation Ltd v McGavin [1998] 1 ERNZ 601, Court of Appeal, Richardson P, Gault, Henry, Thomas, Keith, Blanchard, Tipping JJ.

The decision of the Court of Appeal in *Aoraki Corporation Ltd v McGavin*,[1] confirms a move towards the strict application of orthodox principles of contract law in interpreting employment contracts under the Employment Contracts Act 1991 ("the Act"). The Court was convened to determine whether employees are entitled to redundancy compensation where this is not expressly provided for in their employment contract. In so doing the Court reviewed the five judge Court of Appeal decision in *Brighouse Ltd v Bilderbeck*,[2] in which the majority of the Court held that redundancy compensation could be an implied term of an employment contract.[3]

Factual Background

Mr McGavin ("the respondent") worked for Aoraki Corporation ("the appellant") in the computer industry. In March 1995 he was promoted to marketing manager of the company's software product JADE. Due to serious financial difficulties the company decided to restructure its business. The respondent believed he would not face redundancy because of his recent promotion and in light of what he considered were earlier reassurances that his employment was secure. He was then informed in a meeting by one of the directors of the company, verbally and in writing on company letterhead, that his position would become redundant with effect from 30 June 1995. The meeting was brief and he was not advised of the reasons why he, and not one of the other employees, had

1 [1998] 1 ERNZ 601.

2 [1995] 1 NZLR 158.

3 The decision has been construed in this way although the difficulty to discern one ratio in the majority judgments was a ground to review the decision. See infra at note 16 and accompanying text.

been chosen. He was not contractually entitled to redundancy compensation, but received, as did the other 95 redundant employees, one month's base salary in lieu of notice plus an additional two months' salary. He was also advised that counselling would be available that week, as well as job search assistance through a human resource management firm engaged by the appellant to assist the implementation of the redundancies. He was too distressed however, to attend the counselling sessions.

The respondent initiated a personal grievance alleging he had been unjustifiably dismissed from his employment. He successfully obtained an order of interim reinstatement by injunction from the Employment Court on 20 July 1995. Reinstatement, however, proved unsuccessful as the respondent was isolated from other employees and his new role was unclear since his former position no longer existed. In August 1995 he obtained a further order from the Court varying his interim reinstatement so that he was not required to work for the appellant pending the hearing of his unjustified dismissal claim.

The Employment Court's Decision[4]

The proceedings were transferred from the Employment Tribunal to the Employment Court by an order of the Tribunal on 24 August 1995.[5] In the Employment Court Judge Travis held that the redundancy was genuine and therefore substantively justifiable. However, his Honour awarded $87,688 in compensation as the dismissal was procedurally unfair. The award consisted of $50,000 for humiliation, loss of dignity and injury to feelings,[6] with the balance for lost earnings,[7] and four months' salary ($9,422) for future economic loss based on the difficulty of finding suitable alternative employment.[8] The elements of procedural unfairness identified included a failure to consult properly, a failure to give sufficient reasons for the redundancy, and a failure to provide adequate redundancy compensation.

The Appeal

The Court convened a quorum of seven judges. Notably, this was the first time seven judges sat to hear an employment appeal thus highlighting the importance of the issues to be decided. The judgment of Richardson P and Gault, Henry, Keith, Blanchard, and Tipping JJ was delivered by Gault J. Justice Thomas wrote a separate, but concurring judgment.

The judgment delivered by Gault J began with an analysis of the relevant

4 *McGavin v Aoraki Corporation Ltd* [1996] 2 ERNZ 114.
5 As enabled to by the Employment Contracts Act 1991, s 94.
6 Ibid, s 40(1)(c)(i).
7 Ibid, s 40(1)(a).
8 Ibid, s 40(1)(c)(ii).

legislation. Reference was made to the fact that the Act represents a departure from collectivist principles in previous industrial relations legislation and a move towards "free contractual bargaining".[9] The legislative intent is that the parties to the employment relationship should negotiate the terms and conditions of their employment contract without outside intervention. The Court also recognised that these factors are critical in promoting an efficient labour market,[10] and that the Employment Court cannot issue orders under its "equity and good conscience" jurisdiction which are inconsistent with the Act.[11] However, the Court also referred to the way in which the legislative provisions for personal grievances[12] and remedies[13] are intended to offer a balance to reflect the "special characteristics"[14] of employment contracts.

Reviewing *Brighouse v Bilderbeck*[15]

Having analysed the underlying philosophy of the Act, the Court decided it was appropriate to review the majority decision in *Bilderbeck* for three main reasons:

(i) There was real difficulty in discerning a single ratio in the decision. In addition the Employment Court had focused on the judgment of Cooke P rather than those of Casey J and Sir Gordon Bisson;[16]

(ii) The judgments of Cooke P and Casey J "left the Employment Court with considerable flexibility to develop a concept of unjustifiable dismissal."[17] The Court was impliedly referring to the elevation of procedure in unjustifiable dismissals;[18] and

(iii) Redundancy is an area of industrial relations law that affects many New Zealanders. It is therefore "imperative that employees and employers be able to plan with confidence and determine what their respective rights and obligations are."[19]

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9 Supra at note 1, at 611. See also the Employment Contracts Act 1991, s 104(3).
10 See the long title of the Act .
11 Supra at note 1, at 611.
12 Supra at note 5, s 27.
13 Ibid, ss 40-41.
14 Supra at note 1, at 612.
15 Supra at note 2.
16 Supra at note 1, at 616.
17 Ibid.
18 See for example, *Phipps v New Zealand Fishing Industry Board* [1996] 1 ERNZ 195.
19 Supra at note 1, at 617.

The Statutory Scheme

The Court then turned to consider the overall legislative scheme. It went on to formulate seven broad principles relating to personal grievances.[20] These can be summarised as follows:

(i) The form of remedies under s 40 of the Act must relate to the wrong done to the grievant;

(ii) Justifiability is directed at consideration of moral justice, not common law rights, and this involves balancing the interests of the employee and employer;

(iii) Employment can be terminated in three ways; for cause (misconduct, incompetence, or incapacity), redundancy, or by notice;

(iv) A dismissal may be substantively unjustifiable if cause cannot be shown or if it is subject to "such significant procedural irregularity as to cast doubt upon the outcome";[21]

(v) Where a dismissal for redundancy is substantively justifiable the next inquiry is to determine whether the termination was procedurally unjustifiable;

(vi) It is unclear from the Act whether a substantively justifiable dismissal, which has elements of procedural unfairness, should be classified as an unjustifiable dismissal or an unjustifiable action. However, the test of unjustifiability in both cases is the same;[22] and

(vii) The Act does not empower the Court or Tribunal to award redundancy compensation in the absence of any provision to that effect in the employment contract.

Redundancy and the Implied Term of Fair Dealing

The Court had to consider whether an employer must provide adequate redundancy compensation as part of the obligation of trust, confidence, and fair dealing implied by law into all employment contracts. The Court reaffirmed the approach taken in *Attorney General v New Zealand Post Primary Teachers' Association*;[23] that contracts of employment could not be treated any differently

20 Ibid, 617-620.
21 Ibid, 618.
22 Ibid, 619.
23 [1992] 2 NZLR 209.

from other commercial contracts when deciding whether or not a particular term should be implied.[24]

The Court overruled its decision in *Brighouse* by holding that there was no legal basis for implying a term entitling an employee to redundancy compensation. The Court added that to do so would be inconsistent with the statutory scheme governing labour relations. The purpose of the Act is to promote an efficient labour market:[25]

> [E]xcept where the employment contract requires payment of compensation when an employee becomes redundant ... the statute does not empower the Tribunal or the Employment Court to require any such payment. The contract rules and there is no basis conformable with the settled principles governing the implication of terms in other contracts to read in any implied obligation of that kind or to extend the mutual obligation of trust and fair dealing in that way. To do so would alter the substantive rights and obligations on which the parties agreed; it would change the economic value of their overall agreement; and it would erode the statutory emphasis on the free negotiation of employment contracts.

The Court criticised Cooke P's approach in *Brighouse* on two levels. Firstly, there was a failure to focus on the relationship between the remedy and the particular breach. As a result, the reasoning in favour of implying a term of compensation into an employment contract can become circular.[26] Although not specifically referred to by the Court, an example of this can be seen in the following statement of Chief Judge Goddard which was quoted and relied upon by Cooke P in *Brighouse*:[27]

> The assessment in this case needs to focus primarily on the amount that should be paid to the respondents to make good the unjustifiable action of the appellant in dismissing them for redundancy without paying them adequate compensation.

It is circular to say an employer is required to provide compensation in a redundancy situation which amounts to an unjustifiable dismissal simply because the employer omitted to pay such compensation in the first place.

Secondly, Cooke P held in *Brighouse* that compensation for the loss of employment itself was available under the wide and discretionary provision of s 40(1)(c)(ii) of the Act. However, the Court of Appeal in *Aoraki* held that the statutory remedies under ss 40 and 41 did not cover compensation for loss of the job itself.[28] Justice Thomas, in his separate judgment, stated that the legislative intent is manifest by reference to s 46(3),[29] which provides that the Court or

24 Ibid, 213. See also *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537.
25 Supra at note 1, at 619-620.
26 Ibid, 620. This criticism was also applied to the judgment of Sir Gordon Bisson.
27 Supra at note 2, at 162.
28 Supra at note 1, at 621.
29 Ibid, 628.

Tribunal has no jurisdiction to fix compensation where the contract provides for redundancy compensation but does not specify the amount. Thus, Thomas J reasoned that the legislature could not have intended the courts to do precisely that where the contract was silent on the issue of redundancy itself. The Court also criticised Judge Travis in the Employment Court for applying the equity and good conscience jurisdiction to award future economic loss (four months' salary) under s 40(1)(c)(ii). On the issue of compensation for the loss of the job itself the Court concluded:[30]

> Compensation, whether under the general opening words of s 40(1)(c) or under the "loss of benefit" provision of subpara (2), is not for the redundancy as such and so is not to be measured by future economic loss pending obtaining other employment. Mr McGavin did not lose 7 months' salary (3 plus 4) as a result of the particular personal grievance. That grievance as established was about how the dismissal was handled, not about its substantive justifiability.

Consultation

The issue of consultation in redundancy situations required clarification following the decision of *Phipps v NZ Fishing Industry Board*.[31] This case exemplified the influential role procedure has assumed in cases of unjustifiable dismissal since *Brighouse*. The Court in *Phipps* received considerable criticism for holding that a failure to consult before making an employee redundant is fatal to justification.[32] Chief Judge Goddard held that, without the input of the employees concerned, the redundancy could not be considered genuine. Therefore, it was unhelpful to draw a distinction between substantive and procedural shortcomings.[33]

In certain circumstances consultation may be impracticable and inconsequential; for example, where an external statutory body orders a business to cease its operations.[34]

The Court in *Aoraki* ruled out the requirement to consult as enunciated in *Phipps*, stating that there is no absolute requirement to consult prior to making an employee redundant, although a failure to consult may give rise to an unjustifiable dismissal in certain circumstances. The test as to whether

30 Ibid, 623.

31 Supra at note 18.

32 Ibid, 208.

33 Ibid.

34 See *Christchurch City Council v Davidson* [1997] 1 NZLR 275 where the council closed the Civic creche and declared the employees redundant following allegations of child abuse. The Court of Appeal held that the redundancies were genuine and that re-opening the creche was a practical impossibility. However, Goddard CJ in the Employment Court held that there was no genuine redundancy, and even if there was, the dismissals would have been substantively unjustified because of non-compliance with the applicants' collective employment contract which set out a "consultative process" in the event of redundancy.

consultation may have any effect upon the substance of the redundancy decision is one of causation. If it can be shown, for example, that a redundancy could have been avoided as a result of consultation, then the genuineness of the redundancy comes into question.[35]

The Court held that consultation could not have been expected in the circumstances of this case.[36] However, in his separate concurring judgment, Thomas J believed that some degree of consultation would have been possible, and indeed necessary, in order to comply with the obligations of fair dealing.[37] Nevertheless, his Honour found that the failure to consult did not make any difference in relation to the genuineness of the redundancy itself. This is in contrast to the finding of the Employment Court where Judge Travis stated that consultation could have resulted in an "entirely different outcome".[38]

The Court emphasised that it is for the employer, as a matter of commercial judgment in the restructuring of its business, to decide how to implement the process, including decisions relating to consultation and redeployment.[39] Justice Thomas recognised the potential for abuse of power in the employment relationship and hence the importance of the obligation of procedural fairness.[40] However, his Honour considered that it was unrealistic to say that any procedural defect could vitiate a substantively justifiable dismissal where the procedural defect may not have had any influence on the decision to dismiss.[41]

Breach and Remedies

The Court stressed the importance of establishing a causal nexus between breach and remedy in redundancy situations.[42] It is now clear that before an award can be made for loss of earnings or future economic loss arising from the loss of employment, there must be a causal connection between the procedural irregularity and the substance of the decision to dismiss.[43] The Court determined that the procedural defects were not causative in that sense, and therefore set aside the award of $37,668 for lost wages and future economic loss. The Court made it clear that there was no legal basis to claim compensation for the loss of the job itself as this was substantively justifiable.[44] This is consistent with the well

35 Supra at note 1, at 618.

36 Ibid, 624. This was based on the need for prompt action due to a large company-wide restructuring in forced circumstances.

37 Ibid, 633.

38 Supra at note 4, at 135.

39 Supra at note 1, at 618.

40 Ibid, 629-630.

41 Ibid, 630.

42 See also *Rongotai College Board of Trustees v Castle* (1998) NZELC 95, 799.

43 In some instances of genuine redundancy, claims for loss of future benefits may be made in relation to the "manner and treatment" of the employee by the employer in the implementation of the redundancy. See supra at note 1, at 627, per Thomas J.

44 Ibid, 621.

established principle of contract law that remedies can only be awarded for loss resulting from the breach.[45]

While the Court ruled on redundancy dismissals in particular, the principle of causation as it relates to breach and loss, will apply to other types of dismissal, such as dismissal for cause based on misconduct or poor performance. There is an issue as to which party in the proceedings will bear the onus of proving the link between breach and loss. The orthodox rule in claims for breach of contract is that the onus rests with the party alleging the breach, and in cases of unjustifiable dismissal this will be the employee. In personal grievances however, the onus rests with the employer to prove on the balance of probabilities that the dismissal was fair and just. Does this mean the onus will now shift to the employee in relation to this aspect of the proceedings?[46]

The Court held that the respondent was entitled to receive compensation for humiliation, loss of dignity, and injury to feelings for the procedural shortcomings relating to the unfair manner of notification, the availability of counselling, and for the failure to give full reasons at the time of dismissal. The award of $50,000 under this head was set aside however, and substituted with an award of $15,000. Justice Thomas held that an amount in the order of $25,000 to $30,000 would have been more appropriate, as the respondent had been led to believe that his job was safe, and he should also have been consulted more due to his seniority in the company.[47]

Conclusion

The decision signals the demise of the broad requirement of consultation as enunciated in *Phipps*. As a result of *Aoraki* it will be necessary in future cases to establish a causal nexus between the procedural unfairness and the genuineness of the redundancy in order to claim all the remedies available under the Act for loss of employment. Therefore, where the grievance is founded on an inconsequential failure to consult, any remedies may be limited to humiliation, loss of dignity and injury to feelings.

In overturning *Brighouse*, the Court held that where a contract is silent as to redundancy compensation, there is no longer any requirement for an employer to provide such compensation under the implied term of fairness. The decision affirms the employer's prerogative to restructure its business, and provides more certainty in terms of the employer's obligations to its employees. The specific

45 Ibid, 620.

46 In *Rongotai College*, supra at note 42, at 95,803 the Court squarely placed the onus on the employee by stating that counsel for the respondent employee was "unable to point to any evidence of substance from which it could properly be inferred that had consultation taken place a different result would have eventuated." While this was a case relating to procedural unfairness in a redundancy situation it was nevertheless a "wrongful dismissal" claim at common law, in which the primary onus always rests with the plaintiff.

47 Supra at note 1, at 632-633.