

The New Zealand Bill of Rights Act 1990 and the Law of Contract

Ten years ago, an article¹ appeared in the New Zealand Law Journal in which it was argued that the then newly enacted New Zealand Bill of Rights Act 1990 (“Bill of Rights”) should have a direct impact on the private common law² of New Zealand. The basis of this argument was that the common law, as ‘judge-made law’, is the product of judicial action. It followed, so the argument went, that the Bill of Rights will apply to judicial acts by virtue of section 3(a)³ which states that the Bill of Rights applies, inter alia, to acts of the judicial branch of government. The result of this was said to be that “the common law is subordinate to the provisions of the Bill of Rights, and so a common law rule must give way in favour of the Bill of Rights in the case of conflict”.⁴

This way of thinking was not universally accepted. Jurists who took a contrary view pointed to pre-legislative material and constitutional case law from foreign jurisdictions. This material suggested that the Bill of Rights is better viewed as a ‘public body’ statute that regulates the activity of the Crown and other public authorities. The Bill of Rights was said to have no relevance “in purely private litigation based upon common law action”.⁵

For the past decade there has been a degree of uncertainty about the proper place of the Bill of Rights in the private common law, in particular in the law of contract. Decisive judicial pronouncements on the subject have been scarce and, at times, contradictory. The issue is important for a number of reasons. At present, it is not clear whether a contract between two citizens that is incompatible with the Bill of Rights would be unenforceable by reason of that incompatibility alone. If it is unenforceable, the Bill of Rights has the potential to seriously undermine freedom of contract. Furthermore, if a New Zealand court must apply the

¹ Butler, “The New Zealand Bill of Rights and Private Common Law Litigation” [1991] NZLJ 261.

² The term ‘private common law’ refers to all judge-made law which applies between non-public persons, be they individuals, corporate entities or otherwise.

³ Section 3 provides: “This Bill of Rights applies only to acts done – (a) By the legislative, executive, or judicial branches of the government of New Zealand; or (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.”

⁴ *Supra* note 1, 262.

⁵ Rishworth, “The Potential of the New Zealand Bill of Rights” [1990] NZLJ 68, 70; see also Paciocco, “The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill” [1990] NZ Recent LR 353.

Bill of Rights when adjudicating private contractual litigation, the usefulness of some foreign common law precedent may be reduced because that precedent will not have considered New Zealand's Bill of Rights. Thus the Bill of Rights may drive a wedge between New Zealand's common law of contract and the law of contract in other common law jurisdictions.

The purpose of this commentary is to address two key issues: whether the Bill of Rights applies to the law of contract and, if so, what is its effect? Recently, the case of *Attorney General for England and Wales v R*⁶ has offered a valuable glimpse into the law surrounding this important aspect of New Zealand's constitutional matrix. This case, and several others, will be examined in an attempt to answer these two important issues.

The Applicability of the Bill of Rights to Contract Law

*Peters v Collinge*⁷ was the first case to examine the relationship between the Bill of Rights and the private common law of contract. This 1993 case concerned a private contract whereby the plaintiff agreed not to stand as a parliamentary candidate without the endorsement of the defendant. The High Court held that the contract was contrary to public policy and illegal. In reaching this conclusion, Fisher J held that the Electoral Act 1956 and section 12 of the Bill of Rights concerning electoral rights:⁸

At the very least ... form an important background to the question whether a non-competition clause of this type is legally enforceable. I think it unnecessary to decide finally whether unenforceability flows directly from an implied legislative intention in the Acts themselves, although I am inclined to favour that view.

In 1996, the issue of the proper place of the Bill of Rights in the private law was again raised. *M v Board of Trustees of Palmerston North Boys' High School*⁹ concerned a pupil who was expelled from the defendant's boarding house. The plaintiff argued, inter alia, that the expulsion occurred in breach of the principles of natural justice as set out in section 27 of the Bill of Rights. The High Court held that the Bill of

⁶ (6 December 2000) unreported, High Court, Auckland Registry, CP 641/98; noted in 24 TCL 6/2.

⁷ [1993] 2 NZLR 554.

⁸ Ibid 565.

⁹ [1997] 2 NZLR 60.

Rights did not apply because the relationship between the boarder and the boarding house was one of a private contractual nature. Goddard J said that the Bill of Rights: “applies only to public and governmental action and not to private actions”.¹⁰ This case is, therefore, clear authority for the view that the terms of private contracts will not be subject to the Bill of Rights.

However, it is submitted that the authorities Goddard J cited do not support her conclusion that the Bill of Rights is not applicable to private contracts. The first case Goddard J relied on was *Simpson v Attorney General [Baigent’s Case]*.¹¹ This case arose from the execution of a search warrant by the Police and, accordingly, concerned the application of the Bill of Rights to a non-contractual act of the Executive. Further, when discussing the applicability of the Bill of Rights, Cooke P (as he then was) went on to state:¹²

Section 3 also makes it clear that the Bill of Rights applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.

This dictum may suggest that, contrary to Goddard J’s interpretation, at least one member of the Court of Appeal in *Baigent’s Case* was of the view that the Bill of Rights does apply to judicial decisions in the private common law.

Goddard J also cited in support of her view *Television New Zealand Ltd v Newsmonitor Services Ltd*.¹³ However, this case did not concern a private contract: it concerned the relationship between the Copyright Act 1962 and the Bill of Rights. Further, Blanchard J stated that:¹⁴

[A] New Zealand court must always be conscious of the fact that the rights and freedoms contained in the Bill of Rights are affirmed, as [section] 2 of that Act states, and that it would be undesirable for a Court to make a decision inconsistent with those rights and freedoms. In this indirect way the Bill of Rights is always present in the background to judicial decision-making.

Blanchard J stated that it was “fortunately unnecessary” for him to come to any firm conclusion about the application of the Bill of Rights to

¹⁰ Ibid 71.

¹¹ [1994] 3 NZLR 667.

¹² Ibid 676.

¹³ [1994] 2 NZLR 91.

¹⁴ Ibid 95.

private common law judgments.¹⁵

In 1997, the High Court decision in the defamation case of *Lange v Atkinson and Australian Consolidated Press New Zealand Ltd*¹⁶ raised the issue of the place of the Bill of Rights in private tort law. Elias J (as she then was) strongly rejected an argument, based on Canadian Charter of Rights and Freedoms jurisprudence, that the common law is not subject to the Bill of Rights under section 3. Her Honour stated:¹⁷

In my view, the New Zealand Bill of Rights Act protections are to be given effect by the Court in applying the common law... The application of the Act to the common law seems to me to follow from the language of [section] 3 which refers to acts of the judicial branch of the Government of New Zealand, a provision not to be found in the Canadian charter.

The Bill of Rights featured in the 1998 High Court decision in *Attorney-General for England and Wales v Television New Zealand Ltd*.¹⁸ In this case the plaintiff unsuccessfully sought an injunction to prevent Television New Zealand (“TVNZ”) from broadcasting an interview TVNZ had conducted with a former United Kingdom Special Forces soldier. In giving the interview the soldier had breached a confidentiality contract between him and the United Kingdom Ministry of Defence. The plaintiff argued that in broadcasting the interview, TVNZ would commit the tort of interference with contractual relations. TVNZ responded by arguing for freedom of expression under section 14 of the Bill of Rights.¹⁹ In upholding this argument, Anderson J stated that “[i]t is properly inevitable that in a case such as this a publisher should invoke the right to impart and receive information assured by indigenous and international instruments of freedom”.²⁰

The Attorney-General appealed. The Court of Appeal affirmed Anderson J’s treatment of the Bill of Rights argument, stating that section 14 was “directly applicable”.²¹ It is submitted that the only way the Bill of Rights could be “directly applicable” between private tort litigants such as the Attorney-General for England and Wales, TVNZ or Lange and

¹⁵ Ibid 96.

¹⁶ [1997] 2 NZLR 22.

¹⁷ Ibid 32.

¹⁸ (16 November 1998) unreported, High Court, Auckland Registry, CP 568/98; noted in [1999] BCL 112.

¹⁹ Section 14 provides: “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”

²⁰ *Attorney-General for England and Wales v Television New Zealand Ltd* (16 November 1998) unreported, High Court, Auckland Registry, CP 568/98, 14.

²¹ *Attorney-General for England and Wales v Television New Zealand Ltd and Anor.*(1999) 44 IPR 123, 129 (CA).

Atkinson, is if it is accepted that judging the case is an act of the judicial branch of government. Nothing in section 3(a) of the Bill of Rights provides any basis upon which to distinguish private tort actions from private contract actions. These tort cases provide strong support for the notion that the Bill of Rights will be directly relevant in private contractual litigation.

In 2000, *Attorney-General for England and Wales v R*²² came before the High Court. In this case, the United Kingdom Ministry of Defence sought to directly enforce the confidentiality contract against R,²³ a former member of the United Kingdom Special Forces. R argued, inter alia, that to uphold the contract would be to unreasonably limit his freedom of expression as guaranteed in section 14 of the Bill of Rights. It was unnecessary to address this submission because of the finding that the contract was invalid due to R having suffered duress.²⁴ Nevertheless, Salmon J did so, stating that he had “no doubt” that the Court was bound by section 3(a) of the Bill of Rights.²⁵

To review, there have been few decisions since the Bill of Rights was enacted in 1990 that have considered the applicability of the Bill of Rights in private contractual litigation. In these cases, the courts have reached conflicting conclusions. In *Peters v Collinge*, Fisher J held that the Bill of Rights was relevant as a background consideration. In *M v Board of Trustees of Palmerston North Boys' High School*, Goddard J held that the Bill of Rights was inapplicable. In *Attorney-General for England and Wales v R*, Salmon J held that there was “no doubt” that the Bill of Rights was directly applicable.

In addition, tort cases such as *Lange v Atkinson* and *Attorney-General for England and Wales v Television New Zealand* provide clear precedent for the view that the Bill of Rights is directly relevant in private litigation which, by implication, must also include contractual litigation.

The Effect of the Bill of Rights on Contract Law

If it is accepted that the Bill of Rights is directly relevant in contractual litigation, the more complex issue is what effect this will have on New Zealand contract law.

²² Supra note 6. This decision was appealed. As at 13 September 2001, the Court of Appeal decision is yet to be released.

²³ R is the same soldier concerned in *Attorney-General for England and Wales v Television New Zealand Ltd*, supra notes 18 and 21.

²⁴ Supra note 6. See Rickett and Myburgh, “The Soldier, the Order and the Contract” [2001] NZLJ 157 for an analysis of this aspect of the judgment.

²⁵ Supra note 6, 51.

There are two aspects to this inquiry. The court must first determine whether a particular contract unduly restricts a right or freedom protected by the Bill of Rights. If it is found that the contract does unduly restrict a right or freedom, the court must then consider what effect this will have on the contract involved in the litigation.

In determining whether a contract restricts a right or freedom protected by the Bill of Rights, section 5 of the Bill of Rights is key. It provides the framework for regulating the applicability of the particular rights and freedoms protected. Section 5 of the Bill of Rights provides:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The limiting framework in section 5 will need to be adhered to by counsel and judges alike. Therefore, the Bill of Rights will affect litigant and judicial methodology in private contractual litigation.

If the court finds that a contractual provision unjustifiably limits a right or freedom protected by the Bill of Rights, the court must then determine what effect this will have on the contract. The Illegal Contracts Act 1970 (“ICA”) governs the effect of contracts in breach of a statute.²⁶ Section 5 of the ICA provides:

A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

This section raises the issue whether a contract that unjustifiably limits a right or freedom protected by the Bill of Rights can be lawfully entered into. Salmon J in *Attorney-General for England and Wales v R* appears to have reached the view that it is possible to lawfully enter into a contract contrary to the Bill of Rights. His Honour stated that “it does not seem likely that it was ever intended that the Bill of Rights Act could be used to invalidate confidentiality provisions in a contract otherwise properly entered into”.²⁷

In the author’s opinion, this view must be correct. There does not appear to be anything “inherently inimical”²⁸ in voluntarily surrendering

²⁶ See Burrows, Finn and Todd, *Law of Contract in New Zealand* (1997) para 12.5.

²⁷ *Supra* note 6, 51-52.

²⁸ *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573, 584 per Tipping J.

the rights and freedoms protected by the Bill of Rights. For this reason, it is submitted that it should be lawful to enter into a contract that unjustifiably limits a right or freedom protected by the Bill of Rights, provided the consent is fully informed and freely given. This is not to say that the contract will necessarily be upheld.²⁹ The basis for not upholding the contract should not be inconsistency with the Bill of Rights. Rather, it should be due to a breach of a pre-existing contractual doctrine, such as public policy. Freedom of contract should not be undermined by an overly paternalistic application of the Bill of Rights.³⁰

If it is possible to lawfully enter into a contract that unjustifiably limits a right or freedom protected by the Bill of Rights, another issue raised by section 5 of the ICA is: whether the Bill of Rights expressly provides, or its object clearly requires, that the contract become illegal or unenforceable. The Bill of Rights does not expressly provide that a contract in breach of the Bill of Rights is illegal or unenforceable. The object of the Bill of Rights is to affirm the rights and freedoms contained within it.³¹

It has not been decided whether the Bill of Rights' object of affirming rights requires incompatible contracts to be rendered illegal or unenforceable. No case has considered this point directly. However, it is the author's view that the Bill of Rights should not be permitted to render an otherwise valid contract either illegal or unenforceable. A party should be permitted to consensually surrender his or her rights and freedoms. Moreover, this surrender should not be revoked under the cover of the Bill of Rights. To believe otherwise is to dilute the value of a promise in New Zealand society and thereby destabilise the institution of contract.

Conclusion

The interface between the Bill of Rights and the law of contract is a relatively unexamined and complex area of law. It is submitted that the Bill of Rights does apply to contract law, just as it applies to all of the private common law of New Zealand. In applying the common law, judges are undertaking a judicial act. Section 3(a) of the Bill of Rights provides that it applies to judicial acts of the government of New Zealand.

²⁹ See, for example, *Peters v Collinge*, supra note 7.

³⁰ See supra note 6, 52 citing *Christchurch International Airport*, supra note 28, 585 per Tipping J: "It would be unduly paternalistic and precious to say that [freedom of expression] is a kind of right which people should not be allowed to surrender for what they see as their own advantage."

³¹ The long title of the Bill of Rights states that it is: "An act - (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights."

Recent precedent from the High Court and Court of Appeal supports this conclusion.

The more complex issue is the effect that the Bill of Rights will have on contract law. It is clear that the test in section 5 of the Bill of Rights will be the starting point for determining whether a contractual limitation on a Bill of Rights right or freedom is justifiable. However, the key question that remains to be resolved is whether a contract that is found to unjustifiably limit a right or freedom protected by the Bill of Rights will be, or will become, unenforceable on that ground alone.

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