CASE COMMENT

STANDING TO CHALLENGE THE TOUR: *Finnigan v NZRFU* [1985] 2 NZLR 175. Cooke, Richardson, McMullin and Somers JJ and Sir Thaddeus McCarthy.

Two members of Auckland rugby clubs, Messrs Finnigan and Recordon, put their names to an action to challenge the decision of the Council of the NZRFU to send a team of All Blacks to South Africa in 1985. The legal proceedings that ensued had the result of the tour being called off; an important contribution to this result was the decision of the New Zealand Court of Appeal hearing preliminary arguments as to whether the plaintiffs had *locus standi* or standing to bring the case.

Davidson CJ in the High Court had held that the plaintiffs lacked standing because there was no direct contractual nexus between themselves and the Council of the NZRFU. Only a series of contracts could be pointed to. His Honour's reasoning is an orthodox, and completely sound, application of the law relating to sporting and other voluntary organisations, also known as the law of domestic tribunals. Such law provides that standing to challenge the decisions of the private organisation's governing body is founded upon either a proprietary or contractual right. Another well-established basis for standing is the so-called "right to work", or "restraint of trade". Since none of these "rights" could be relied upon, the action had to fail.

The Court of Appeal, however, thought fit to treat the case in, it is respectively submitted, a radical and entirely unorthodox way. Cooke J, as he then was, deftly showed by reference to New Zealand's leading domestic tribunal case, *Stininato v Auckland Boxing Association Inc.* [1978] 1 NZLR 1, that contract is not necessary to establish standing in such cases. But it is clear that this case is authority in New Zealand for the restraint of trade ground for challenging the decisions of private organisations which, as already mentioned, is well established. Having cited *Stininato* for the "no contract" proposition, Cooke J does not find it necessary to decide whether the plaintiffs in this case could point to any "right to work".

Contract is therefore not necessary. What then is the standing requirement in a case such as this? Cooke J held that there were some eight factors, all going to the question of standing with no single factor being accorded more weight than the others.

These factors included: the series of contracts linking the plaintiffs to the Council of the NZRFU; the fact that the plaintiffs were not "busybodies, cranks or other mischief makers" (per Lord Scarman in *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, 653 (HL)); the unavailability of a legal remedy for individuals such as the plaintiffs against an allegedly *ultra vires* decision of the NZRFU unless standing were to be awarded; and the desire of the Courts to be seen to be

applying the law impartially when their role is seen in the context of the multitude of prosecutions and successful criminal convictions arising out of the protest action surrounding the 1981 Springbok tour of New Zealand.

There were three other factors going to the standing "calculation" which deserve particular attention:

(1) the importance of the decision to the image of rugby in New Zealand,
(2) the importance of the decision to the New Zealand community as a whole and the international ramifications to New Zealand,
(3) that because of the national importance of the decision the NZRFU should not be strictly treated as a private sports organisation. The Court stated at 179:

> In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far. We are not holding that, nor even discussing whether, the decision is the exercise of a statutory power — although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn.

It is submitted that this passage is crucial to the whole judgment (and indeed the subsequent decision of Casey J in the High Court in granting the injunction). By deciding to treat the case as a public rather than a private law case Cooke J is attempting to provide some justification for the approach to standing he adopts; for such an approach cannot be justified in the existing domestic tribunal case law. Rather it is to be found in leading administrative law cases, notably *Small Businesses* which Cooke J appears to rely upon. In that case the question of standing is determined by assessing the sufficiency of an applicant's interest (per RSC ord.53 — judicial review) in relation to the subject matter of the application. Although Lords Diplock and Wilberforce differ as to the extent to which the Courts have a discretion ("limited by legal principle" per Lord Wilberforce, "unfettered" per Lord Diplock) it is clear that the sufficiency of interest will depend upon a consideration of the whole legal and factual context of the case. In a case of "sufficient gravity" the standing requirement need not necessarily be as strong as it would need to be in a less important case. The factors relied upon by Cooke J as above clearly reveal his reliance upon this approach to standing.

Yet Cooke J's reasoning cannot, it is submitted, be reconciled with the House of Lords' decision in *Small Businesses*. In that case the importance or "gravity" of the case is factored into the determination of whether an applicant has standing. In Cooke J's judgment, however, such "gravity" is factored into the decision whether standing is to be determined upon the basis of public or private law. This difference might not be so obvious if it were not for the fact that their Lordships were unambiguous in their view that the public law approach to standing is to be contrasted with the private law approach. Under private

law, and the House of Lords' decision in *Gouriet v Union of Post Office Workers* [1978] AC 435 as an example by Lord Diplock, the plaintiff has to show that a legal right of his own is threatened or infringed. The public law approach, described as involving the exercise of "governmental power" by Lord Diplock, imports the discretion of the Courts. It is submitted that the undoubted importance of the NZRFU's decision to tour South Africa does not, on the authorities, make that decision, or any other decision of that body a decision involving the exercise of governmental power or transform a decision falling within the ambit of private law.

There is another reason why Cooke J's merging of public and private law is open to criticism; in public law cases the "illegality" in question is a breach of the law of the land, i.e. statute. In theory, therefore, an ordinary citizen can sue in the name of the Attorney-General, in a relator action, the public official or authority in breach of the law and obtain an appropriate remedy. In such a case the illegality will be against the plaintiff to some, albeit possibly a very limited, degree, merely by virtue of the fact that the plaintiff will be a member of society. Contrast this *inherent* element of standing in a public law case with the position in a private law case. In the situation of an alleged breach of a private body's bylaws or constitution or Articles of Association, the illegality in question is only in relation to the organisation and does not extend to the world outside the organisation.

The plaintiff is accorded standing on the orthodox viewpoint by virtue of a decision of his or her association's governing body which is unlawful *in relation to* the plaintiff. Normally this will not be a breach of contract, although it may comprise infringement of a proprietary right. Another ground is restraint of trade. The decision is only *unlawful* because of the plaintiff's rights — illegality in the context of a private association's dcisions cannot be treated *in vacuo*.

By granting standing to the plaintiffs without their having to show infringement or threatened infringement of a legal right the Court has smudged the concept of "illegality" in the private law area. Although the Court is at pains to point out at 178 that its decision is not to allow "mere followers of the game or other members of the public" to sue the NZRFU, it is difficult to understand how the standing test applied by the Court can completely eliminate that possibility for the reason that the "sufficiency of interest" is determined by reference to the gravity of the decision. If the decision is indeed "grave" enough, what is to stop a person in either of these categories from bringing proceedings and since infringement of a legal right obviously has little to do with standing, why shouldn't they? This logical difficulty arises because of the failure of the Court to grasp the inherent difference between private and public law, discussed above.

Another possibility foreshadowed by the reasoning in the decision is the prospect of the decision of the directors of a company being challenged by reliance on the same standing test. Cooke J is careful to distinguish the company law position, but in theory the cases are

analogous or at least might be in certain situations. As the judgment states it is all a question of the importance of the decision both in relation to the plaintiffs and the wider community interests. Decisions of companies may at times fall within this area. There would of course be the argument that the Companies Act 1955 constitutes a "code" governing the decision-making of companies and therefore any challenges to such decision-making, but it is by no means clear whether that argument would prevail in any given situation.

Finally, mention can be made of the connection between the approach to standing and the approach to testing the validity of the decision in question. Does it follow that a public law approach to standing determines a public law approach to the validity of the decision? Perhaps not, but Cooke J's remarks cited above as to the public law nature of the present case provided nothing less, it is submitted, than a clear lead to Casey J in the High Court in his holding that the public law test of "reasonableness" be applied to the decision of the NZRFU.

Conclusion

The decision of the Court of Appeal is unsatisfactory, it is respectfully submitted, for the reasons outlined above. It undoubtedly blurs the distinction between public and private law in adopting a public law test of standing in a private law case. This may not be a bad thing in itself, but it will require a much greater depth of reasoning and careful distinguishing of case law before a convincing, let alone permanent, development in the law of standing as it relates to private bodies can be made.

— *Michael R. Bowman*

PROCEDURAL CONTROL OF COMMISSIONS OF INQUIRIES: *Badger BV and others v The Commission of Inquiry into Industrial Relations on the Whangarei Refinery Site and others.* High Court of New Zealand, Auckland Registry A1185/84 Barker J.

Introduction

New Zealand legal historians may well come to regard the 1980s as most notable for a series of judicial attacks on the privileges of Commissions of Inquiry. This is the third in a series of cases whereby the courts have attempted to apply the rules of natural justice more strictly to Commissions of Inquiry.

The decision was an unusual one for two reasons; firstly, the speed with which the Court and parties moved to review a Commission that had not received one item of evidence, and secondly, the extraordinary degree to which the parties were allowed to define the issues with which the Commission was subsequently to be concerned. The decision broke new

ground in the procedural control of Commissions of Inquiry.

For convenience the plaintiff Badger BV and others will be called MRC (Marsden Refinery Constructors) and the Commission of Inquiry into Industrial Relations ... will be called the Commission of Inquiry.

The Facts

The background to the establishment of a Commission of Inquiry into industrial relations at the Whangarei Expansion Project are complex, and it could be said that a state of conflict existed between MRC and the several unions involved in the construction project even before work began. Details can be found in the Arbitration Court decisions:

Badger - Chiyoda Joint Venture (JV II) v NZ Federation of Labour and Auckland Boilermakers (1982) ACJ 597.

Badger - Chiyoda Joint Venture v NZ Labourers IUW and NZFOL (1982) ACJ 605.

The more immediate background to the Inquiry concerned the passing of the Whangarei Refinery Expansion Project Disputes Act 1984 in June and the snap election later in June-July 1984.

The Labour Government set up a Commission of Inquiry, pursuant to the Commissions of Inquiry Act 1908, with a very general brief to look at industrial relations on the project. The Terms of Reference are set out in the judgment and stated as follows at 4:

(a) The factors that have contributed to, and the present state of, industrial relations on the expansion project construction site;
(b) How any matters prejudicial to the establishment and continuance of good industrial relations on the expansion project construction site should be removed or avoided;
(c) Any other matters that will contribute to the establishment or maintenance of good industrial relations on the expansion project construction site, such as the need (if any) for the Whangarei Expansion Project Disputes Act 1984 in its present or any revised form;
(d) Any associated matters that come to your notice in the course of the inquiry and are relevant to the general purposes of the inquiry.

The three Commissioners were, a Company Director (Chairman), a former member of the State Services Commission, and a retired Industrial Relations Manager. The Commission therefore represented a very considerable body of expertise in the fields of industrial relations and management.

The Commissioners preliminary sitting was held on 11 October 1984, where a number of interested parties were represented although no parties to the Inquiry had been cited by name. Without consultation with the interested parties the Commissioners set out their procedure.

Included in this was the statement that there would be no cross-examination. The Commission, however, reserved to itself the right to ask questions whether directly or through counsel assisting. Further to this, provision was made for prejudicial matters arising in either open or closed session to be referred to the affected parties for response.

Counsel for MRC objected to the ruling against cross-examination and reserved the right to raise the issue again. Counsel for one of the unions asked for a definitive ruling and the Commission reiterated its view that it did not wish cross-examination. In response to this MRC brought proceedings for judicial review.

The Decision

As a result of co-operation amongst Counsel, the Court was able to consider as a substantive rather than as an interim question at 3:

> ... whether in law the Commission was entitled, at the commencement of its sittings, to make a blanket ruling that cross-examination of witnesses would not be permitted at any stage to any participant in its proceedings. (3)

In practice this question was almost immediately submerged in a detailed consideration of cross-examination. In particular the need for cross-examinaiton in the resolution of disputed facts.

One instance of this line of argument was Barker J's citation of the strong condemnation of blanket prohibitions on cross-examination in *County of Strathcona v Mac Lab Enterprises Ltd.* (1971) 20 DLR (3rd), where it is held at 205 that:

> Although cross-examination is but one of the ways of making full answer and defence, in certain cases it is the best, sometimes the only, weapon in the armory of counsel.

The tension between these two issues culminates in the curious final conclusion at 35 that:

> The law is that the Commission must comply with natural justice; subject to that overwhelming requirement, cross-examination is within its power to permit or not. *I cannot escape the view that, in the circumstances of this case, controlled cross-examination must be allowed.* The Commission must remain master of its own procedure; it should be alert to keep cross-examination within reasonable bounds. (emphasis mine)

Comment

In arriving at this decision, I would suggest that two things have happened.

Firstly — That the court usurped part of the Commission's brief by crystallising issues, as a basis for judgment, that were the prerogative of the Commission. For a Commission of Inquiry the merits do not consist simply of the facts but also of the way in which the issues are formulated.

And secondly — That the court acted to pronounce judgment on these issues before they existed in a tangible form.

Crystallising the issues

A classic statement of the process of a Commission and the essential differences between that process and the function of a court deciding a *lis inter partes* is that of Cleary J in *Re Royal Commission on State Services* [1962] NZLR 96, 115-117.

> In a controversy between parties the function of the Court is 'to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the

proceedings': *Labour Relations Board of Saskatchewan v John East Iron Works Ltd.* [1949] AC 127, 149. The function of a Commission of Inquiry, on the other hand, is inquisitorial in nature. It does not wait for issues to be submitted, but itself originates inquiry into the matters which it is charged to investigate. There are, indeed, no issues as in a suit between parties; no 'party' has the conduct of proceedings, and no 'parties' between them can confine the subject-matter of the inquiry or place any limit on the extent of the evidence or information which the Commission may wish to obtain. ... Likewise I think it is plain that in the regulation of their own procedure they may presecribe or restrict the extent of participation in the proceedings, by parties cited or persons interested, the one limitation being that such persons must be afforded a fair opportunity of presenting their representations, adducing their evidence, and meeting prejudicial matter. Finally, I think it is beyond dispute that Commissioners may hear evidence or representations in private, for such a power is inseparable from the functions of a body set up to initiate an investigation and inquiry, unless the instrument of appointment otherwise provides. They may, if they think fit, exclude parties cited or persons interested from their private sittings. Should they be of opinion that matter received at any such sitting is prejudicial to some party cited or person interested, they ought to afford some fair opportunity of correction, either in public or in private, but the procedure must of necessity be left to their sense of fitness in applying the general principle wich I have already set out to the circumstances of the particular inquiry.

With the above passage in mind, the following selection of statements at 28-34 demonstrates how far Barker J moved in accepting the main focus of the Commission's investigation to those issues most in contention between the parties to the review action.

> However, having received, during the last two days of hearing before me, some inkling of the large number of issues which the *parties might legitimately wish to traverse* before the Commission ....
>
> *If it is to determine whether the controversial Act should remain in force or should be repealed or modified, the Commission must*, of necessity, look at the state of affairs prior to its enactment and to what caused that state of affairs; this search will ineluctably involve the resolution of disputed facts. I see no alternative.
>
> If it is to make *findings of blame* .... (emphasis mine)

It is not a function of a review court to enter judgment on the merits, once jurisdiction is established, nor is it to control or direct the focus of an investigation.

For both unions and management the Disputes Act was perhaps the most critical issue. It does not however take any great leap of the imagination to reccognise that for the Government it may have been an issue which they would have preferred to see reduced in importance. By giving the whole problem over to an independent Commission with Terms of Reference which downplayed the Disputes Act, the possibility at least existed for the Commission to deal with that issue in some innovative way. A Commission of Inquiry provided a way of removing the formulation of issues out of the hands of those most directly concerned.

A Decision of Hypothetical Facts

It is a general principle of Common Law jurisdictions that Courts will not entertain purely hypothetical questions. They will not pronounce upon legal situations which may arise, but generally only upon those which have arisen.

To some degree this situation has altered with the development of the

declaration of right as an independent remedy. However in the case of a dispute not being attached to specific facts or specific facts that are hypothetical a declaration will usually not be available. (Zamir, The Declaratory Judgment, London 1962).

In *Jackson v Slatterly* [1984] 1 NSWLR 599 Hutley JA observed:

> Even if there were no privative clause, this Court, in my opinion, should not give any remedy. Not only has the Commissioner not prepared his report, but submissions of counsel for one of the claimants had only begun and counsel assisting the Commission had not even been heard. All the Commissioner had done was state the unacceptable [to them] proposition that he was going to prepare his report in accordance with the views he had formed as to the proper construction of the Act and of his Commission. ...
>
> Until the report is delivered to the Governor, I would have thought that any issue as to the correctness of its contents was purely theoretical and it is accepted that the courts should not make declarations on theoretical issues (*Johnco Nominees Pty Ltd v Albury-Wodonga (New South Wales) Corporation* [1977] 1 NSWLR 43 at 53 per Street CJ) after an extensive review of authority. Until the report is presented to the Governor, the declaration is in relation to a speculative event. An indication of the future operation of a Commissioner cannot be assimilated to a kind of threat which justifies a quia timet declaration.

With regard to Canada Kavanagh J explains in *A Guide to Judicial Review* (1978) 114–116:

> Preliminary and interlocutory rulings of a tribunal such as rulings on procedure and evidence are not normally ripe for review until the tribunal has completed its proceedings. ...
>
> The attitude of the Courts towards preliminary and interlocutory rulings of tribunals is that the tribunal should be allowed to complete its proceedings expeditiously and not have them interrupted by applications for judicial review. Moreover, the view is that a tribunal may, in the course of its proceedings, change its mind about a preliminary ruling; matters are really inchoate at the preliminary state. (115) ...
>
> With regard to procedural rulings, it may not be evident until the proceedings have been concluded whether or not the particular ruling in question amounted ultimately to a denial of natural justice.

Conclusion

If, as I have submitted above, the Court's decision in this case was based on faulty grounds; firstly, the establishment of issues that pre-empted the commission's brief and secondly, passing judgment on these abstract issues, then it must be concluded that the case was wrongly decided.

— *Kaye C. Green*

RESERVATION OF TITLE: *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies (1982) Ltd* (1985) 2 NZCLC 99, 438. Barker J.

In what appears to be the first *Romalpa* case to reach the New Zealand High Court, Barker J in *Len Vidgen Ski & Leisure Ltd v*

Timaru Marine Supplies (1982) Ltd has upheld an unpaid seller's claim to proceeds of sale arising from the disposal of goods supplied subject to a reservation of title clause.

Romalpa clauses take their name from the now infamous decision of the English Court of Appeal in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552. Though initially dismissed by editors of the official reports as of insufficient consequence to merit publication, *Romalpa* has emerged as one of the most important cases this century on contracts for the sale of goods. Likewise, *Len Vidgen Ski & Leisure*, although only a decision at High Court level, is likely to prove one of the most important New Zealand cases of recent past.

A *Romalpa* clause is a clause reserving title; a term in a contract of sale which provides that property in the goods sold does not pass to the buyer until certain conditions have been fulfilled. Generally the condition is payment of the purchase price so that the buyer does not acquire title until the goods have been paid for. Prior to *Romalpa* itself simple reservation of title provisions were used widely, even to the extent that they received statutory recognition when the common law was codified through enactment of the Sale of Goods Act 1908 (section 21).

The object of such a clause is to reserve security to a seller who supplies goods on credit. Anyone who sells on credit is in a vulnerable position. In economic terms, a credit sale is equivalent to a sale accompanied by a loan back of the purchase price to the buyer. Should the buyer become insolvent before paying for the goods an unsecured seller will lose both goods and loan. This situation is easily remedied if the seller takes some form of security. An obvious solution is for the seller to require security over the goods being supplied; and a reservation of title clause is the most effective and convenient of this type of security.

Unlike a mortgage or charge, a retention of ownership provision does not require registration. This is advantageous in two respects. First, it avoids the expense and inconvenience of registration. Second, and more importantly, a buyer is more likely to consent to a security that will not be registered, for an unregistered security can be concealed from creditors generally as well as other suppliers. Not that consent is ever required in the sense normally understood; a reservation of title clause can be imposed on a buyer without his acquiescence or co-operation merely by inserting the appropriate term in the seller's standard conditions of sale. Frequently a buyer will not even be aware that property in the goods has been retained by the seller. Nor is the seller at risk of losing priority to any other secured creditor. Having retained full legal title, the seller's rights are protected by the *nemo dat* rule. It is only exceptions to this rule (and perhaps, the creation of a possessory security) that might defeat the seller's rights.

Retention of title is also attractive when considered from the buyer's point of view. As with a floating charge, the buyer is free to deal with

property covered by the security in the ordinary course of business. A specific term can be inserted granting the buyer a power to re-sell the goods or to use the goods in manufacturing new products; and even if omitted the courts will imply such a licence.

Nevertheless, a simple reservation of title clause is marred by one inherent defect. A seller will only be secured up to the value of goods held by the buyer at the time of winding up. Once goods have been sold and title has passed to sub-buyers the security is destroyed. For sellers who supply on extended terms of credit the security afforded by a simple retention of title provision would be minimal.

In an attempt to remedy this defect sellers have sought to extend the reach of the security beyond goods actually supplied. This has led to the development of an extended reservation of title clause, the fully-fledged *Romalpa* clause. The result is a clause which purports to retain ownership in three classes of property:

1. in the goods supplied;
2. in products manufactured from those goods; and
3. in proceeds arising from the sale of original goods and products manufactured therefrom.

Awkward questions have arisen as to whether property can be reserved in manufactured products and proceeds of sale. *Len Vidgen Ski & Leisure* concerns an attempted retention of ownership in proceeds of sale.

The Facts of the Case

The plaintiff supplied the defendant with ski apparel and equipment for resale (the "goods"), payment being due on the 20th of the month following the date of the invoice. In fact, no payments were ever made. The defendant became insolvent and a receiver (the second defendant) was appointed by a third party. Demand was made of the receiver for return of such goods as remained unsold at the commencement of receivership, but this claim was rejected and the goods were subsequently sold. The plainiff brought an action claiming:

1. proceeds of sale from the goods claimed; and
2. proceeds of sale from goods disposed of before the receivership.

The contract of supply contained a reservation of title clause in the following terms:

> Ownership ... is retained by [the plaintiff] until payment is made for the goods and for all other goods supplied by [the plaintiff] to [the defendant]. If such goods are sold by [the defendant] prior to payment therefore ... then the proceeds of sale thereof shall be the property of [the plaintiff].

Barker J upheld the plaintiff's claim under both heads.

The Claim to the Unsold Goods

The contract of sale between the plaintiff and defendant was silent as to:

1. the rights of the defendant to re-sell the goods (which under the retention of ownership clause still belonged to the plaintiff at the time of re-sale); and
2. the rights of the plaintiff to repossess goods not paid for, to enter onto the defendant's premises for that purpose, and to dispose of goods so recovered.

Both parties were agreed that a term had to be implied empowering the defendant to re-sell goods belonging to the plaintiff — for otherwise the whole object of the contract of supply would be defeated. It was also agreed that when the goods were re-sold by the defendant title thereto would pass to the respective sub-purchaser. As to the plaintiff's rights of repossession, Barker J held that a term should be implied granting a right of recovery and re-sale, but that such right would become exercisable only upon default in payment by the defendant:

> that is ... the plaintiff would not be entitled to recover possession ... while the term of credit agreed in relation to the goods was still running.

Because the period of credit allowed the defendant had already expired when demand was made for the return of the goods, such demand effectively determined the defendant's implied power of re-sale. The subsequent sale of the plaintiff's property without the authority or consent of the plaintiff was therefore tortious, for which the defendant was liable in conversion (the measure of damages being the value of the goods wrongfully sold).

The Claim to the Proceeds

Counsel for the plaintiff submitted:

1. that the defendant was under an obligation to account to the plaintiff for the proceeds of sale;
2. that it must be inferred that the defendant was to be a fiduciary in relation to goods supplied and not paid for; and
3. that therefore the plaintiff was entitled to trace its proprietary interest in the goods into the proceeds of their sale and beyond.

Comment

The terms implied into the agreement regarding the defendant's rights of re-sale and the plaintiff's rights of repossession are, for the most part, unremarkable. Both clearly satisfy the business efficacy test. Even the circumstances under which the plaintiff was allowed to determine the defendant's rights of re-sale appear eminently reasonable. Yet as Barker J admitted, "the second part of the plaintiff's claim gives rise to greater difficulty". The real difficulty lies in establishing the precise nature of the plaintiff's propriertary interest (if any) in the proceeds of sale.

The passing of property in these proceeds was governed by the contract of re-sale between the defendant and sub-purchaser. Here the rule is that property passes when it is intended to pass; and to whom it is intended to pass. A sub-purchaser, unaware of any claim by the plain-

tiff, would have intended that title to the proceeds vest in the defendant. It follows that the plaintiff enjoyed (at most) some form of equitable interest in the proceeds of sale.

At issue was whether the plaintiff was entitled to claim as beneficial owner under an implied trust or merely as mortgagee/chargee under an equitable mortgage or charge. If the latter, then the plaintiff's security was void for non-registration under section 103 of the Companies Act 1955. If the former, then the plaintiff was entitled to succeed in its claim to the proceeds. Barker J considered two factors crucial in resolving this point:

1. the wording of the retention of ownership provision; and
2. the period of credit allowed the defendant by the plaintiff.

Clause 4 of the plaintiff's conditions of sale provided that proceeds of sale "shall be the property of [the plaintiff]". "Property" prima facie imports full beneficial ownership, pointing to a trust (or as Barker J put it, "an obligation to account"), rather than a charge.

Against this was the provision for credit. An obligation to account would deprive the defendant of much of the benefit it might derive from credit. But as Barker J correctly observed, the defendant would still derive some benefit. With no credit, payment would fall due immediately the goods were delivered. With credit, payment would not be required until the earlier of the following events, namely:

1. expiry of the period of credit; and
2. receipt of the proceeds by the defendant.

"On balance, and after consideration of the authorities" His Honour concluded that "there was an obligation to account", notwithstanding "some aspects of the agreement" (principally the period of credit) which tended to suggest that "there was no such duty":

> In particular, the express provision in clause 4 relating to the proceeds of sale of the goods persuades me to reach this conclusion.

With respect to Barker J, it is submitted that His Honour may have reached the wrong conclusion; that the agreement, properly construed, created a charge and not a trust. It is respectfully submitted that:

1. the wording of the agreement, while important, is hardly determinative.

A charge does not become a trust merely because it is called a trust. Nor is an unregistered charge saved from invalidity simply because it is called a trust.

In this context, it appears that some judges have been deceived into thinking that it is a question of 'form versus substance'; that they are therefore bound to give effect to the form of the transaction, not to its substance. It is not a question of 'form versus substance'. Rather it is a question of 'terminology versus form' in which form must prevail.

2. 'trust' is a legal concept, as is 'charge'.

Which of the two was created by the agreement is a mixed question of law and fact, not just a question of fact. It is a question which cannot be resolved by reference to the terms of the agreement alone. Some form of legal test is required for distinguishing a trust from a charge.

The difference between a trust and a charge is not unlike that between a sale and a mortgage. To see why this should be so, consider the following extract from *Re George Inglefield* [1933] Ch 1 (per Romer LJ at pages 27–28). 'Mortgage' has been replaced by 'charge', 'sale' by 'trust'. A similar substitution has been made between related concepts.

> In a [trust] the [settlor/trustee] is not entitled to get back the subject-matter of the [trust] by returning to the [beneficiary] the money that has passed between them. In the case of a mortgage or charge, the [chargor] is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the [chargee] the money that has passed between them. The second essential difference is that if the [chargee] realises the subject-matter of the [charge] for a sum more than sufficient to repay him, with interest and the costs, the money that has passed between him and the [chargor] he has to account to the [chargor] for the surplus. If the [beneficiary] sells the subject-matter of the [trust], and realises a profit, of course he has not got to account to the [trustee] for the profit. Thirdly, if the [chargee] realises the [charged] property for a sum that is insufficient to repay him the money that he has paid to the [chargor], together with interest and costs, then the [chargee] is entitled to recover from the [chargor] the balance of the money, either because there is a covenant by the [chargor] to repay the money advanced by the [chargee], or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made. If the [beneficiary] were to re-sell the [settled] property at a price which was insufficient to recoup him the money [paid by the settlor/trustee], of course he would not be entitled to recover the balance from the [settlor/trustee].

Unfortunately we do not have the benefit of Barker J's views either on the suitability of this test for distinguising between a trust and a charge or on the result that might have been obtained had this test been applied to the facts of *Len Vidgen Ski & Leisure*. Nevertheless it would appear that clause 4 of the plaintiff's conditions of sale created not a trust but a charge. Under every head of the test the result is the same:

1. the defendant was able to extinguish the plaintiff's claim to the proceeds by paying it all moneys owing under the contract of supply;
2. if at any point in time the accumulated value of proceeds held in the defendant's bank account exceeded the amount owing to the plaintiff, then the defendant was entitled to repay the plaintiff and keep the surplus;
3. if, however, there were insufficient moneys in the defendant's bank account, then the defendant remained liable for the balance.

Regardless of whether *Len Vigden Ski & Leisure* was correctly decided on its own facts, it is certainly significant that Barker J chose to follow the decision of the English Court of Appeal in *Romalpa*. Ten years have now elapsed since *Romalpa* was first reported and Barker J is the first judge to have followed *Romalpa* in that time. This could mean that sellers who seek to rely on reservation of title clauses will be treated more favourably by New Zealand courts than their English counterparts. It could also mean that judicial attitudes have changed

since 1976. Either way, it seems clear that *Len Vigden Ski & Leisure* is not the last word on *Romalpa.*

— F. Michael Prouting

MINORITY SHAREHOLDERS' RIGHTS: *Thomas v H.W. Thomas Ltd* 1984 2 NZCLC 99,148 Court of Appeal. Richardson, Somers JJ and Sir Thaddeus McCarthy.

Introduction

Section 209 of the Companies Act 1955 provides a form of legislative redress for minority shareholders who complain that the affairs of the company have been conducted in an oppressive manner. In 1980 some substantial changes were made to the provision, not the least being the addition of "unfairly discriminatory and unfairly prejudicial" acts as grounds for relief. Whether these expressions provide a valuable extension to the rights of minority shareholders depend upon judicial interpretation of the new section. For this reason the recent New Zealand case, *Thomas v H.W. Thomas Ltd* (1983) 1 NZCLC 98,659 (HC); (1984) 2 NZCLC 99,148 (CA) is of importance in providing guidelines. The approaches taken in the case by the High Court and the Court of Appeal reveal some distinct differences with possible far-reaching consequences, although both instances found against the petitioner on the facts.

The Facts

Briefly the facts were these:

The case concerned a private, third generation family company of which the petitioner owned one third of the issued share capital. The petitioner did not allege actual impropriety in the conduct of the company's affairs. Rather his ground of complaint was that, due to the overconservative financial management of the company (which he alleged was "commercially unreasonable"), he was receiving a "grossly inadequate" dividend return on his shares. The company's financial position was however sound, particularly because of its ownership of assets worth more than $600,000.00. He claimed that the sale of his shares to an outsider was commercially unfeasible and hence he was a "locked-in" minority. There was no evidence that individual members were able to afford the purchase of his shares at current market value and so he initiated an action under Section 209 predominately in order to secure sale to the company.

The Judgment of the High Court

In the High Court Ongley J adopted a literal approach with regard to the interpretation of the new section, proceeding on a step-by-step basis

to itemise, define, and apply each of the three terms as "categories" of behaviour. In accordance with this analysis the term "oppressive" was to be given the same restrictive definition as it had been given under the former section. (For a definition of oppressive conduct see *Re Five Minute Carwash Service Limited* [1966] 1 WLR 745; *Re Jermine Street Turkish Baths Limited* [1971] 1 WLR 1042.) Any additions which the amended section made to the "armoury of a beleagured minority" were to be found in the definitions of the additional expressions "unfairly prejudicial" and "unfairly discriminatory" which in his opinion:

> clearly contemplate conduct of greater amplitude than is understood by the term oppressive.

For the minority shareholder this approach has inherent disadvantages. Firstly, it places narrow restrictions on the court's power to intervene within which he must frame his case in order to succeed. Secondly, such an approach is in line with the previous restrictive interpretation and may result in a tendency on the part of the courts, in any given fact situation, to carry over the same considerations in interpreting the new terms. This potential can be illustrated by the following example: because the Common Law favoured the supremacy of the "majority rule" the chances of a minority shareholder's success in establishing that the conduct of the majority was oppressive was slim, unless a lack of probity, good faith or an invasion of legal rights was shown. A corollary of this was the traditional reluctance on the part of the courts to interfere with matters of commercial judgment which were considered in the main, the prerogative of the majority to decide in accordance with the company's constitution. It is submitted that the possibility, if not the evidence of a carry-over of such considerations (albeit in a more lenient form) into the courts' interpretation of the new terms is illustrated by Ongley J's approach.

Ongley J decided that the definition of "unfairly prejudicial" did not apply to the facts because:

> nothing that has been done or that is likely to be done is designed to disadvantage the petitioner.

In addition:

> if he is required to abide by the decisions of the majority shareholders that is no more or no less than the Articles of Association contemplate.

It is speculative to attempt to predict the extent to which this approach results in a relaxation of the stringency of the majority rule because the decision was clearly correct on the facts. (The present tense is used because the issue is still of relevance in Australia.) However although Richardson J in the Court of Appeal agreed with the Judge's findings, the reasons for which he did so stemmed from a radical difference in the emphasis and approach. A literal approach to the amended subsection also had the result that the term "unfairly detrimental" if analysed in terms of an unjust distinction between shareholders offered

little additional assistance in a situation where all members of the company are for ostensible purposes treated in the same manner.

Ongley J's reasoning is of particular interest because it was adopted on parallel facts by the Supreme Court of Victoria in *Re G Jeffrey (Mens Store) Pty Limited* (1984) 2ACLC 421,9 ACLR 193. Thus it represents the position at present in Australia. It is to be noted that the opinion has been expressed that:

> [the] Victorian case involved a slightly stronger set of circumstances for intervention by a Court than the New Zealand case. (1985) 5ALJ 347 Bob Baxt.

In addition the equivalent Australian provision is drafted in wider terms with regard to the remedies available.

The Judgment of the Court of Appeal

In contrast Richardson J was influenced by the "changed statutory pattern, the differing views expressed as to the test under the Repeal Provisions and the wider global expression" combined with a "clear shift in the focus of the enquiry" in his opinion. It would be erroneous to carry over into the new section "previous misconceptions" with regard to the old.

Firstly, the subsection does not, in his view, refer to three distinct alternatives:

> the three expressions overlap, each in a sense helps to explain the other.

And the term "oppressive" is not to be given its former meaning.

Secondly, these expressions instead focus on the "justice and equity of the particular case" and thus must be harmonised with the "just and equitable" test which is the basis for relief under Subsection 2 of Section 209. The result is that considerations underlying the exercise of the just and equitable winding up jurisdiction, contained in Section 217(f) and hence the more liberal case law in this area are of necessity imported into the application of these three expressions. See in particular: *Re Westbourne Gallerys Limited* [1973] AC 360; *North End Motels (Huntly) Limited* [1976] 1 NZLR 446. This view is in contradistinction to that adopted in England. In *Re a Company* [1983] 2 All ER 36,44 the High Court was of the opinion that cases bearing on the exercise of the just and equitable winding up provision did not require a wider scope to be given to the English equivalent of Section 209. (It is to be noted that the amended English provision is narrower in terms than the New Zealand.)

This is in line with previous authorities which required that the facts should not only satisfy the "just and equitable test" to qualify for relief but in addition contain the requisite element of oppression. See for example, *Re H.R. Harmer* [1959] 1 WLR 62, *Re Five Minute Carwash* [1966] 1 WLR 745. It is submitted that it is an anomaly that the test necessary in order to qualify for the total termination of the company should be less than that necessary to qualify for the "lesser" relief contained in Section 209, and thus Richardson J's view is to be preferred.

Richardson's imposition of an overall equitable "standard of fair dealing" does not predicate, however, a complete relaxation of the rules in favour of minority shareholders (as is evidenced by the result arrived at on the facts). Consistent with Ongley J he emphasised the necessity for weighing conflicting interests of different groups within the company. (It is of interest to note the difference in terminology. Thus Ongley J spoke of the necessity of assessing individual members against the background of the whole body of shareholders in contrast to Richardson J for whom the issue was that of "weighing conflicting interests".) What it does do is widen the range of considerations to be taken into account by the court and reduce the question in each case to balancing the factors. Of importance is the recognition that companies are not mere technical associations but entities to convey personal aspirations and anticipations. In *Re Westbourne Galleries Ltd* [1973] AC 360 Lord Wilberforce stated at 379:

> The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

The section in addition, is no longer simply concerned with the financial interests of members as members. Perhaps the clearest illustration of this difference in approach is presented by Richardson J's application of the section to the facts. Without referring to questions of bona fide and majority decision, Richardson J dismissed the petitioner because the petitioner had not explored all possible avenues as regards sale of his shareholding. The Court was not prepared to give adverse weight to the policy of low divident payments and neither was it prepared to say that the majority were wrong in preferring to retain the company's real property as opposed to selling it. In his opinion:

> Malcolm Thomas [the petitioner] is entitled to contend that applying ordinary commercial criteria that proposed course is unfairly prejudicial to his interests.

Comment

In conformity with general trends in other areas of law the approach taken by Richardson J in the Court of Appeal places a greater emphasis on judicial discretion and an increase in the importance of the facts of each particular case (i.e. whether these conform with the courts' notions of what is "justifiable"). Both Somers J and Sir Thaddeus McCarthy briefly expressed a general consensus with his reasoning. However Sir Thaddeus McCarthy expressly raised some doubts about the weight to be attributed to the "just and equitable" cases. Whether Richardson J's approach heralds a more "adventurous" interpretation of this provision (as predicted) depends in the main upon whether it is applied in any meaningful way in the future. Some promise is evidenced in this regard by the subsequent case, *Re The Great Outdoors Company* (1984) 2 NZCLC 99,260. Although this case only involved an application for an

interim injunction and therefore the issues of law involved were not canvassed in any conclusive manner the High Court did indicate a willingness to look beyond the terms of the Constitution at the substance of a prior contractual arrangement between the members.

It will be of interest to note how this challenge is taken up in the future.

— *Julia Tolmie*

SEXUAL HARRASSMENT: *H v E* EOTI/84.

The issue before the Equal Opportunities Tribunal (the Tribunal) in *H v E* was whether the sexual harrassment of an employee by an employer, being of such a nature as to force that employee to leave her employment, could provide grounds for relief under s15(1)(c) of the Human Rights Commission Act 1977 on the basis that the employee had been dismissed, in circumstances in which other persons employed by that employer on work of that description would not have been dismissed, by reason of the sex of that person.

The plaintiff (H) was employed by the defendant (Mr E) in a food shop owned and operated by Mr E and Mrs E. The shop was in the suburb in which the plaintiff lived and was not far from her home. The plaintiff sought employment to help make ends meet and to give her an interest outside the home. She was divorced and had in her custory a teenage son. Her hours of employment suited her as she was able to be home when her son returned from school. This arrangement ran from August 1983 until mid April 1984.

The Findings of the Tribunal

The Tribunal found that from early October 1983 until April 1984 when she left that the plaintiff had been sexually harassed by Mr E, and in particular found that he had done the following:

1. tried to kiss the plaintiff, and
2. tried to lift her skirt while she was working, and
3. on 13 April 1984, he exposed his erect penis and grabbed the plaintiff's hand, telling her to touch him and tried to force her to do so, and
4. propositioned the plaintiff on a number of occasions.

The Tribunal found the plaintiff complained to Mr E and made it clear that his attentions were unwelcome. The Tribunal also found that what happened on 13 April 1984 left her with no option but to resign.

The plaintiff sought relief under s15(1)(c) of the Human Rights Commission Act 1977 (HRCA) which states

> "15. Employment - (1) It shall be unlawful for any person who is an employer ...

(c) To dismiss any person, or subject any person to any detriment in circumstances in which other persons employed by that employer on work of that description are not or would not be dismissed or are not or would not be subjected to such detriment

by reason of the sex ... of that person."

The Tribunal ruled that in order for the plaintiff to succeed she had to establish the following:

1. That the defendant was her employer.
2. That she was dismissed or subjected to detriment.
3. That the dismissal or detriment occurred in circumstances in which other persons employed by the defendant in the shop would not have been dismissed or subjected to such detriment.
4. That the dismissal or detriment occurred by reason of her sex.

The first requirement created no difficulty as the Tribunal found that the defendant fell within the definition of an employer under s15(1)(c).

On the second requirement the Tribunal found on the authority of *The Auckland and Gisborne Amalgamated Society of Shop Employees and Related Trades Industrial Union of Workers v Woolworths (New Zealand) Limited* CA 150/84 Judgment 3 April 1985 (unreported) that in a contract of employment there is an implied term that the parties will conduct themselves so that the necessary relationship of confidence and trust between them will not be disrupted or destroyed. The Tribunal found on the facts that Mr E's behaviour was a breach of the implied term leaving the plaintiff no option but to resign. This was found to be a constructive dismissal. Having established that, the Tribunal did not go on to consider whether the conduct of the defendant also amounted to a detriment to the plaintiff. It is suggested that this is the correct approach under s15(1)(c). Section 15(1)(c) provides two alternative grounds for relief, namely, either dismissal or the subjecting of a person to a detriment while being employed. The plaintiff alleged both. Once the Tribunal had determined that there had been a constructive dismissal, it was not necessary for it to consider the plaintiff's second contention. Thus the decision leaves open the question of whether a person has grounds for relief under s15(1)(c) if she has been sexually harassed while in the course of her employment but has not been dismissed or if she has been sexually harassed but decides to leave her employment for other reasons.

The third and fourth requirements to be established were the most difficult for the Tribunal. The Tribunal reached its decision that sexual harassment was within the s15(1)(c) on three grounds. First, s5(j) of the Acts Interpretation Act 1924 was invoked to give a fair large and liberal interpretation to the section. Second, the Tribunal considered New Zealand's international obligations and found that a greater degree of conformity with comparable jurisdictions would be achieved if s15(1)(c) was construed so as to include sexual harassment. Third, after considering similar legislation in Canada, America and Australia, it was found that sexual harassment was a detriment "by reason of the sex" of the

Complainant, so long as gender was a relevant factor in the detriment.

The Remedy

The plaintiff sought a declaration pursuant to s38(6)(a) of the HRCA that the defendant had committed a breach of the Act. The declaration was made.

The plaintiff also sought an order under s38(6)(b) restraining the defendant from repeating the breach or from engaging in similar conduct. The Tribunal did not make this order as it felt that the outcome of the case would be a "salutary experience for the defendant which should be sufficient to restrain him from similar conduct in the future" (p.51). It is suggested that although this may be so, it would have been more appropriate to deny the order on the grounds that the plaintiff was no longer employed by the defendant.

The plaintiff sought damages to the maximum amount allowable under the HRCA, namely $2,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s40(1)(c). The Tribunal awarded $750.00 and stated that the plaintiff was a mature, sexually experienced woman who had handled the sexual harassment in a level headed and even tolerant way. It also stated that the maximum allowable must be kept for the most serious of cases. It is suggested that $2,000.00 is an inadequate amount of allowable compensation under the HRCA. Furthermore, it is difficult to envisage a more serious case where an award of the maximum would be justified.

The Tribunal also entered judgment for the plaintiff for $177.44 being the monetary loss that she suffered during the fourteen weeks before she found alternative employment. This figure was reached by calculating what she would have earned had she still been employed by the defendant, and subtracting what she received from the Domestic Purposes Benefit. It is suggested that this established a principle in relation to lost earnings which may in future claims lead to a significant quantum of damages.

The Tribunal noted in its conclusion that it had sympathy for not only the plaintiff but also for Mr E who could not have envisaged that his conduct could lead to "such a traumatic, expensive and possible personally damaging experience as the hearing and the recording of [the] decision" (p.53). It is suggested that the sympathy of the Tribunal was misplaced.

Comment

In conclusion, *H v E* is an important case as it firmly establishes grounds for relief under s15(1)(c) for an employee who has been dismissed by reason of her sex.

Ideally, the Tribunal should have set out a definition of sexual harassment. However, because of the particular wording of s15(1)(c), the Tribunal was not required to define sexual harassment, but was

instead simply required to look at the defendant's actions to see if they amounted to a dismissal of the plaintiff by reason of her sex.

— Niamh E McMahon B.A. (N.U.I.)