CASE NOTES

McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396 [1988] 2 NZLR 257. Court of Appeal. Cooke P, Somers and Bisson JJ.

What happens when the courts of two nations have jurisdiction over the same matter? That was the problem faced by the Court of Appeal in *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396.* The material facts were that the plaintiff, a New Zealand construction company, had insurance policies with English and New Zealand insurers. The plaintiff suffered loss on two Asian construction projects and made a claim on the policies. The insurers refused to pay, claiming that the terms of the policy did not cover the plaintiff's loss, and that the plaintiff had failed to make full disclosure when taking out the policies. The English insurers were first out of the legal blocks, seeking a declaration in the English Court that they were not liable under the policy. The construction company was not far behind, but its action to enforce the insurance policy was brought in the High Court at Auckland, and was brought against both its English and New Zealand insurers.

The New Zealand Court of Appeal, reversing Sinclair J, held that the New Zealand Court had jurisdiction over the English insurers. However, it was clear, and had already been determined in the Commercial Court in London, that the English Court also had jurisdiction over the policy with the English insurers (the contract was made in England, and the New Zealand Court of Appeal were prepared to assume that it was governed by English law, but it was to be performed in New Zealand).

The English insurers sought a stay of the New Zealand proceedings on the ground of the concurrent English jurisdiction. That raised an important issue: when can a court exercise its discretion to stay or dismiss proceedings within jurisdiction on the ground of concurrent foreign jurisdiction? It has always been recognised that such a discretion exists, but traditionally it has been a narrow one. Where a court has jurisdiction there is a *right* to bring an action in that court which is not to be lightly refused.[1] Therefore, stays were available only where the local action was oppressive or vexatious. But in the last fifteen years in England the discretion has been considerably widened. Now the English Courts will grant a stay merely on the ground that a foreign court is a more *appropriate* jurisdiction, even when the English action is not oppressive or vexatious.[2]

1 *St Pierre v South American Stores (Gath and Chaves)* Ltd [1936] 1 KB 382, 398.
2 See for example *The Atlantic Star* [1974] AC 436.

In *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* the New Zealand Court of Appeal has adopted that new English approach.[3] The New Zealand courts will no longer jealously guard their jurisdiction and hear any non-vexatious claim that is within jurisdiction. Instead, they will consider all the circumstances of the case and determine if there is a more appropriate concurrent jurisdiction in which the case should be heard. If the defendant in the New Zealand proceedings is able to prove that there is a foreign court with concurrent jurisdiction in which the case can be more suitably tried for the interests of all parties and for the ends of justice, that defendant will be able to obtain a stay of the New Zealand proceedings.

In the end, however, in *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* that was all by the by. Even on the wider appropriateness test the English insurers were unable to prove that the English Courts were a more appropriate jurisdiction to determine the insurers' liability.

In New Zealand the construction company's claims against both its English and New Zealand insurers could be heard together (there was no English jurisdiction over the New Zealand policy, which was made and to be performed in New Zealand, and governed by New Zealand law). Evidence for the trial could be more easily assembled in New Zealand, and the New Zealand action would settle the matter once and for all (compared with the insurers' English action which was merely for a declaration). Furthermore, litigation in New Zealand would be more speedy and less expensive. So the Court of Appeal refused the insurers' application to stay the proceedings. In doing so they applied the new, wider English test, especially as it is stated in *Spiliada Maritime Corp v Cansulex Ltd*.[4]

It is submitted, however, that more remains to be said in New Zealand about whether the new English appropriateness test should be adopted here. First, the Court of Appeal in *McConnell Dowell v Lloyd's Syndicate 396* did not discuss the conflict between the tests. Nor did it in *Club Mediterranee New Zealand v Wendall*.[5] It appears not to have accepted the new broader discretion unequivocally. Second, since *McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* was decided the High Court of Australia have rejected the appropriateness test and retained a narrower discretion based on vexatiousness. Third, it is at least arguable that the new, wide discretion is too wide.

It is clear from the face of the judgment in *McConnell Dowell v Lloyd's Syndicate 396* that although the Court of Appeal approved of and applied the appropriateness test, they neither dismissed the older and narrower vexatiousness test completely, nor adopted the new test irrevocably. There was no

3 See also *Club Mediterranee New Zealand v Wendell*, Court of Appeal. 26 November 1987 (CA 82/87). Cooke P, McMullin and Somers JJ.

4 [1987] 1 AC 460.

5 Supra, at note 3.

discussion of the relative merits of the tests. Indeed, only Cooke P even suggested that there was any possible test apart from appropriateness, and he merely said that he preferred that test "in the particular circumstances of this case".[6] It has already been noted that the choice of tests was immaterial to the result: even applying the wide appropriateness test no stay was granted.

It may well be that the question of which test should be used will later have to be considered more fully by the Court of Appeal, especially in light of *Oceanic Sun Line v Fay*.[7] In that case, decided after *McConnell Dowell Constructors*, the High Court of Australia rejected the new English appropriateness test and decided, by a three-two majority, to retain the more narrow vexatiousness test. In *Oceanic* the plaintiff was an Australian passenger who contracted, in Australia, with a Greek cruise company for an ocean cruise in Greek waters. While on the cruise a shotgun exploded in the plaintiff's face and he brought the action, claiming damages.

The minority (Wilson and Toohey JJ) heartily approved of the appropriateness test and, deciding that Greece was the most appropriate jurisdiction because the allegedly negligent act occurred in Greek waters, concluded that the Australian action should be dismissed. But the majority (Brennan, Deane, and Gaudron JJ) were more keen to guard the jurisdiction of the Australian Courts, along with the rights of litigants within jurisdiction to be heard there. They held that Australian proceedings should only be dismissed on the ground of concurrent jurisdiction if they are vexatious or oppressive, and so upheld the much earlier High Court decision on the point, *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners*.[8] The majority cited three major policy grounds upon which the appropriateness test should be rejected.[9] First, it would give rise to uncertainty. Appropriateness is a much less certain and more discretionary test than vexatiousness. There would, therefore, be more litigation about where to litigate. Second, the appropriateness test denies the *right* to justice in courts that have jurisdiction. That right should not depend on a broad discretion. Third, the wide test might often lead to a court declining to participate in the application of its own substantive law, which would raise "fundamental problems".[10]

There can be no doubt, however, that in many respects the appropriateness test has considerable merit. Its adoption in England has been largely on the ground that the narrow vexatiousness test is "unduly parochial and chauvinistic",[11] and the wider test is in the interests of international comity. This factor may well have been seen as more important in England with Britain's entry

6 [1988] 2 NZLR 257, 273.
7 (1988) 79 ALR 9.
8 (1908) 6 CLR 194.
9 See also Robertson (1987) 103 LQR 398.
10 Supra at note 7, at 58.
11 Robertson, supra at note 9, at 410; *The Atlantic Star* [1974] AC 436, 453; *The Abidin Daver* [1984] AC 398, 411.

into the European Community.[12] The other important advantage of the wider test is that it enables the Court to compare the interests of the parties and weigh the balance of inconvenience.

Whether or not these advantages of the wider test finally prove convincing in New Zealand is yet to be seen. The adoption of the appropriateness test in *McConnell Dowell Constructors* was tentative, and the relative merits of that test and the vexatiousness test were not discussed. Furthermore, the High Court of Australia has since adopted the view that Australian proceedings will be dismissed only on the ground of concurrent foreign jurisdiction if the Australian proceedings are vexatious or oppressive. That approach might yet find favour in New Zealand.

– *Glenn Cooper*

Northern Milk Vendors Association Inc v Northern Milk Ltd [1988] 1 NZLR 530. Court of Appeal. Cooke P, McMullin and Somers JJ.

Each year in New Zealand volumes of legislation are passed. Much of it will take effect without any specific interpretation by a Court. The few cases that do give guidance to the process of interpretation are important. One such case is *Northern Milk Vendors Association Inc v Northland Milk Ltd.*

The Milk Act 1988 established a system for the sale and distribution of milk. Under the Act a new Milk Authority was established. This body took over the role of the Milk Board, formerly responsible for milk distribution. While the Act came into effect on 1 April 1988, the new Milk Authority was not appointed until 9 June. Thus, in the time between those dates there was effectively no authority to control Milk Companies. During this period, the appellant company chose to decrease both the frequency of deliveries and the number of milk vendors in the area in which it operated. The appellant believed it could do so, as the Milk Authority from which approval would normally be needed had not as yet been established. Thus the case concerned the ability of the appellant to make decisions of this nature during the interim period.

The respondent, an Association of Milk Vendors, submitted to the Court that such decisions in the interim period were unlawful. It argued that s 16 of the Act allowed only the new Milk Authority to determine the standards, and thus the frequency, of home milk delivery. Until the Board came into existence, and authorised a reduction, full delivery for seven nights had to continue.

The Court of Appeal took the view that the question as to who was responsible for milk distribution in the interim period had not been considered by

12 See *Oceanic Sunline v Fay*, supra at note 7, at 57.

the Legislature. Cooke P, who delivered the judgment of the Court stated: "a very real problem has certainly not been expressly provided for and possibly not even foreseen."[1] In solving the problem before the Court, no clear statement could be taken from the Act to determine whether the appellant had acted legally or not. As no simple solution could be found, the Court needed to examine the Act as a whole to determine the intention of Parliament. By examining the rest of the Act, the Court could determine how the Legislature would have met the current problem, had it occurred to them. An examination was made of specific sections dealing with other possible problems, along with the Long Title, and its spirit was thus determined.

In doing so, the Court made a statement regarding the helpful nature of comments as to the general principle or purpose of an Act. Such comments might, for example, state that an Act to regulate town planning had foremost to consider the protection or development of a particular type of building. This general comment would then colour the interpretation of the rest of the Act. However, as is usually the case, no statement had been made concerning the overall objective of the Milk Act 1988. The only possible source of a general comment as to the purpose of the Act was contained in the Long Title which read:

> An Act to provide for the continued home delivery of milk; and to reduce in other respects the regulation of the processing, supply, and distribution of milk for human consumption.

The Court of Appeal considered the Long Title and concluded that the Act was implemented to protect the delivery of milk to homes. All sections should thus be read in the light of this general purpose. Only the Authority established had power to discontinue deliveries. The appellant company had no such authority to decrease delivery in the interim period before the establishment of the Authority. This was due to the Act being one to protect home delivery, rather than one designed to threaten either its existence or frequency. Thus, following the Long Title and the spirit it expressed, the actions of the appellant company were illegal.

The problem in this case was the failure of the Legislature to consider the specific questions with which the Court was now faced. Clearly, problems developing in the interim period had either not concerned the Legislature, or had not been expected. A Long Title is formed in general terms and exists to provide a clue as to the impact and effect of an Act. It seems dubious to use a Long Title to determine the desired impact of an Act on milk delivery, when it, like the Act, had been drafted without a consideration of the problem at hand. The Long Title would appear to be deficient in the same manner as the rest of the Act. As the various sections of the Act did not deal specifically with the problem, a general Long Title written also without a consideration of the particular problem seems a weak aid to interpretation.

1 At 537.

Lawyers are often criticised by the public for approaching legislation in a manner that is too technical. Often the spirit of an Act appears to be defeated by too close an examination of its particular sections. Lawyers are viewed as playing word games, in an attempt to subvert the very obvious legislative intention. Clearly a Long Title can play a part in determining what an Act is for, and can be used to avoid an interpretation that shows "tabulated legalism", when a "broad, unquibbling and practical interpretation is demanded."[2] While appreciating the need for interpretation in accordance with the spirit of the Act, it must be remembered that in the present case a Company was prevented from acting in a manner that protected its own profitability. The decrease in deliveries was made at a time when the Company was operating at a considerable loss. Yet nothing in the relevant Act of Parliament specifically stated that the number of both deliverers and deliveries must not be reduced in the interim period. To interfere with such rights, even in an interim period, surely requires legislative authority. An interpretation of an Act coloured by a general Long Title, which like the Act was drafted without a consideration of the problem at hand, seems dangerous. General Long Titles can be taken to mean almost anything. In fact even the Appellant's action in protecting their own profitability could be seen as "protecting the continued home delivery of milk". Would it be possible for substantial sections of an Act to have their meaning determined by an earlier examination of a Long Title? Avoiding technical and unjust approaches to interpretation is important. Yet, the warning to be taken from this case is that individuals ought to be free to order their own affairs, and that statutes preventing this must do so clearly. To restrict this freedom based on an extremely general Long Title, even for an interim period, and unjustifiable approach to interpretation.

If a second warning can be taken from the case, it is directed to makers and not interpreters of the law. Care must be taken as legislation proceeds through Parliament to consider all the possibilities that could arise as a result of it. At times things will be overlooked, sometimes justifiably. Yet to establish a body in June to control the distribution of milk from the preceding April ought to have been identified as a problem, and dealt with by the Legislature. It is clearly difficult for courts to carry out Parliament's intentions if its intention concerning an obvious problem is not stated. A statute such as the Milk Act 1988 ought not to have contained as manifest a problem as it did, and a case such as the present should never have needed to appear before a court.

– *Simon Mitchell*

2 *New Zealand Maori Council v A-G* [1987] 1 NZLR 641, at 655.

Dominion Rent A Car v Budget Rent A Car Systems (1970) Ltd [1987] 2 NZLR 395. Court of Appeal. Cooke P, Richardson, McMullin, Somers and Casey JJ.

The central issue to be resolved in the case of *Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd* was whether there could be concurrent rights in the use of the tradename "Budget". Both companies had used the Budget name to represent the type of service they provided in the rental vehicle business. In deciding the weight to be given to the parties' respective claims, the Court had to consider whether goodwill could transcend national boundaries. This issue touches on the elements of an action for passing off, and the distinction between goodwill and reputation.

Central to this case were the activities of the large international organisations, Avis US and the American company Budget Rent A Car ("Budget US"). In 1970 Avis US entered into a licensing agreement with Mutual Rental Cars, to impede the entry of Budget US into the New Zealand market. Mutual covenanted to operate a small, "no-frills" rental car business based in Auckland, using the name "Budget". Budget Australia (a rental car company independent of Budget US) co-operated with Avis US and Mutual, with the result that Mutual's Budget operation shared Budget Australia's logo and bookings network. Budget Australia later left the alliance, and by 1977 was a party to franchise agreements with Budget US and Dominion Rent A Car in New Zealand. Dominion commenced a Budget rental service, using the new international Budget logo. At the time of the present hearing, each party had an injunction restraining the other from using the Budget name.[1]

As a matter of law, each judgment shows an acceptance of the possibility of concurrent rights in a trade name.[2] The judgments of Cooke P and Somers J turn on whether the evidence before the Court supported a finding of concurrent rights. (Casey J's judgment emphasised the lack of harm to Mutual, and the acquiescence of Budget Australia. On those grounds he held that neither side could support its action.) Each rejected out of hand the approach of the Courts below. There, counsel had argued, and the Judges applied, the 'exclusive rights principle'. This had led to the conflicting injunctions. The word "Budget", the subject of dispute, is descriptive. It was, therefore, more difficult for Mutual to establish goodwill: "[i]ts very descriptiveness tends to make it not truly distinctive of any particular business."[3] On the other hand, Budget Australia's acquiescence weakened any claim by Dominion that Mutual were merely pirates who had taken the Budget name with no legitimate business motive. The decision hinged on the question whether, in 1977,

1 High Court, Auckland. 8 November 1984 (A 9/84). Vautier J; High Court, Auckland. 9 August 1982 (A 1954/77). Moller J.

2 At 427 per Casey J; at 421 per Somers J (Richarson J concurring); at 406 and 407 per Cooke P (citing 48 *Halsbury's Laws of England* (4th ed) para 197), 407-408 (Richardson and McMullin JJ concurring).

3 At 408 per Cooke P.

Budget Australia had protectable goodwill in New Zealand, distinct from its abortive involvement with Mutual.

It was possible to interpret the relationship between Mutual and Budget Australia before 1977 as allowing each party to share in the goodwill generated by Mutual's Budget operation. This was apparently accepted.[4] The effect is to recognise in New Zealand the line of cases which hold that an international organisation may possess an international goodwill above the reputations of local agencies.[5] Those cases implicitly question the wisdom of refusing to protect goodwill associated with persons not active within the jurisdiction.

The other possible ground upon which Budget Australia could lawfully operate in New Zealand under the name "Budget" was that its Australian activities generated protectable goodwill in New Zealand. Passing off requires a misrepresentation that the defendant's business is the plaintiff's. Mutual's action could not succeed if Dominion (as Budget Australia's agent) was merely exploiting Budget Australia's goodwill in New Zealand. Dominion would not be claiming any relationship with Mutual.

Neither Cooke P nor Somers J goes quite so far as to accept this option. There was sufficient business activity in New Zealand to establish Budget Australia's right to use the name Budget in terms of orthodox requirements. Either Budget Australia's prior activities through Dominion[6] or its association with Mutual was sufficient. On the facts before the Court, there was no need to vary existing principles.

Should an appropriate case arise, it seems likely that the Court would give relief where a business without contact with the jurisdiction was being harmed by passing off within New Zealand. It is submitted that if such a business was active in Australia, it is almost certain that the Court would recognise its reputation as attracting protectable goodwill in New Zealand.

Somers J states the law as it now is in New Zealand:[7]

> In the end the question of the existence and extent of reputation and of goodwill must be a matter of fact. In the case of a business having an international reputation which extends to New Zealand not much in the way of activity in New Zealand would I think be required to establish a goodwill. In such cases the reputation itself may be almost tantamount to goodwill, activity having importance in localising that reputation in New Zealand.

The internationalisation of trade has prompted the development of the concurrent rights approach to goodwill. On concurrent rights, Cooke P says:[8]

> [I]n cases of natural expansion of established businesses into new territories it may not be right to regard exclusive rights as acquired by the first entrant in point of time; an international reputation already earned by the second entrant and extending to the new market

4 At 410 per Cooke P; at 421 per Somers J.
5 See for example *Habib Bank Ltd v Habib Bank AG Zürich* [1981] 2 All ER 650.
6 At 412 per Cooke P.
7 At 420.
8 At 407.

militates against an automatic first-past-the-post approach to the establishment of goodwill.

If a pre-existing international reputation provides a good defence to an action for passing off against an established local trader, does this mean that that reputation attracts the same protection as goodwill traditionally does? It is submitted that business activity within the jurisdiction will soon cease to be a requirement in the action for passing off. Instead it appears that the Court will look for evidence of a substantial business reputation within the jurisdiction. If the reputation exists, it will attract legal protection. The distinction between "goodwill" and "reputation" must disappear. Now they can be distinguished because goodwill is protected by the court, while reputation (in the context of passing off) is not. Once the requirement of local business activity disappears, reputation will attract the same degree of protection where it exists.

This revision of the elements of passing off is suggested both generally by the world-wide internationalisation of trade, and particularly by New Zealand's strengthening economic ties with Australia. Cooke P referred to the "very substantial increase in two-way trade under the New Zealand-Australia Free Trade Agreement (NAFTA)"[9] and its acceleration under the CER Heads of Agreement 1982 and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZ-CERTA) 1983. His Honour considered these treaties to provide a background which should influence the Courts in Australia and New Zealand. They provide evidence of a public policy to harmonise business law. By implication, uniform protection of goodwill and other business interests is beneficial.

Finally, this case shows a flexible approach to the tort of passing off. Although Somers J referred to the leading five point formulations of the elements of the tort by Lord Diplock[10] and Lord Fraser of Tullybelton,[11] it is submitted that his Honour's judgment pushes these formulations to their limits. With respect, it would appear that Cooke P's judgment goes beyond the limits intended by their Lordships' formulations, or at least foreshadows later developments which will do so.

A new formulation might be required. Appropriately, a fitting description of the bases of the tort can be found in an Australian case on trans-Tasman business activity, *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd*.[12] In that case, Powell J held that to be successful, a plaintiff in a passing off action must establish:[13]

a. that his goods have, or his business has, acquired a certain goodwill or reputation;
b. that the actions of the defendant have caused, or in all probability will cause, the ordi-

9 At 407.
10 *Erven Warnink BV v J Townsend & Sons (Hull) Ltd* [1979] AC 731, 742.
11 Ibid, 755-756.
12 [1982] FSR 1.
13 Ibid, 11.

nary purchasers of the plaintiff's goods, or the ordinary customers of the plaintiff's business, to believe that the defendant's goods are those, or that the defendant's business is that, of the plaintiff;

c. that, in consequence, the plaintiff has suffered, or is likely to suffer, injury in his trade or business.

It is submitted that this formulation is accurate in both Australia and New Zealand, and that it reflects the view of passing off appearing in the judgments of Cooke P and Somers J.

– *Sally Ann Smith*