CASE NOTES

Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd, High Court, Wellington, 1 December 1992 CP 661/92. McGechan J.

The common law imposes duties on monopoly suppliers of essential services such as postage, electricity, gas, telephone, and water.[1] In New Zealand, the suppliers of these services historically have been state or local authorities, and common law duties have been supplanted by statute or statutory regulations. The recent wave of corporatisation and privatisation has removed most of these statutory duties. *Federated Farmers of New Zealand v New Zealand Post Ltd*[2] is the first significant test of whether the common law duty, in this case to deliver mail free within the monopoly area,[3] has survived the demise of the statutory regime.

In the year to 31 March 1992, the loss on the rural delivery service of New Zealand Post was estimated at $12.1 million.[4] In an effort to recoup some of the shortfall, New Zealand Post announced an increase in the rural delivery service fee ("RDSF") from $40 to $80 per annum. Rural box holders were angered by what they saw as arbitrary treatment. On their behalf, Federated Farmers brought this action, pleading that either New Zealand Post did not have the power to charge the RDSF or it had a duty to deliver to rural addresses without fee. Although seven causes of action were pleaded, I intend to deal with only five of them.[5]

First, the plaintiffs sought a declaration that New Zealand Post had no power to require addressees to pay the RDSF. They argued that at common law, postal authorities were unable to demand additional payments from addressees as a condition of delivery and that demands for fees required statutory authority. Since the statutory regulations[6] empowering the old Post Office to charge the RDSF had been revoked, the plaintiffs argued that the contracts entered into with the rural

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1 For example, Lord Hale's business "affected with a public interest" in *De Portibus Maris; Allnut v Inglis* 12 East 527 (1810); 104 ER 206; *Minister of Justice for Canada v City of Levis* [1919] AC 505 (PC); *Wairoa Electric Power Board v Wairoa Borough* [1937] NZLR 211 (SC). This principle was recently affirmed in New Zealand in *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd*, High Court, Auckland. 18 February 1993 CL 20/92 Barker J.

2 High Court, Wellington. 1 December 1992 CP 661/92 McGechan J.

3 At that time they were called postal towns. See *Barnes v Foley* (1768) 5 Burr 2711; 98 ER 423; *Stock v Harris* (1771) 5 Burr 2709; 98 ER 422; *Rowning v Goodchild* (1773) 2 Black W 906; 96 ER 536; *Smith v Powditch* (1774) 1 Cowp 182; 98 ER 1033.

4 It is not stated in the judgment how this loss was calculated.

5 The plea that as a member of the Universal Postal Union New Zealand was bound by the Universal Postal Convention, which does not permit a charge for international postal articles, was rejected as an attempt to enforce a treaty as domestic law; supra at note 2, at p50. The seventh cause of action concerned boxholders who had paid fees at the old rate and was rejected by McGechan J; supra at note 2, at p59-60.

6 Post Office (Inland Post) Regulations 1977 (SR 1977/253), clause 22 of the 1st Schedule.

delivery box holders were beyond New Zealand Post's powers and so, therefore, was a demand for increased fees.

McGechan J reviewed at some length the origins of the common law position. This was in fact a gloss on the Statute of Anne (9 Anne c10) which established a Crown monopoly over postal services between and within postal towns[7] (primarily as a revenue gathering exercise rather than a public service). A line of eighteenth century cases[8] established that the Statute recognised a monopoly right to deliver and "a corresponding duty to deliver, within the so-called "limits of delivery"."[9] Since the limits of delivery coincide with the limits of the monopoly grant, and the Postal Services Act 1987 gives New Zealand Post a monopoly throughout New Zealand, the common law seems to require free rural as well as urban delivery.

McGechan J found no express authorisation of the power to charge such fees in the Postal Services Act, but held that:[10]

> There is no doubt ... that postal charges were envisaged. Clearly it was expected NZP would continue to sell stamps, and charge for private bags and post office boxes and the like. Section 3, providing for monopoly below (now) the 80 cent and 200g level, implicitly recognised NZP would be able to charge.

As to specific authority to charge the RDSF, his Honour relied on the assumption that "[i]f Parliament turned its mind specifically to the RDS fee" it would have intended that the existing fees regime should continue in existence.[11] His Honour concluded that:[12]

> It is not a case where Parliament would have intended the powers of this new commercial entity would be limited by ancient doctrine .... The modern controls are commercial and political. Any former common law disability – if such ever existed – no longer applies.

While McGechan J is undoubtedly correct in concluding that New Zealand Post is entitled to charge for its services, his specific finding on the RDSF is less soundly based. Costs of the rural delivery service could equally well be recovered by increasing stamp charges or establishing a differential postage rate for rural addresses, neither of which would necessitate the abolition of the common law rule. His Honour relies on a judicial power to "fill a gap" in legislation where Parliament has not considered the point. However, the case he cites as authority for this power, *Northern Milk Vendors Association Inc v Northern Milk Ltd*,[13] was an example of the Court continuing an existing regime only as an interim measure, pending the establishment of new standards. Here McGechan J is using this power

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7 Section 22 expressly allowed others to carry post into and out of postal towns.

8 Supra at note 3.

9 Supra at note 2, at p10.

10 Ibid, p19.

11 Ibid, p20.

12 Ibid.

13 [1988] 1 NZLR 530 (CA); ibid.

to graft[14] onto a statute a permanent regime, which arguably crosses the line from judicial to legislative perogative.[15]

With the extinction of the common law duty the plaintiffs sought elsewhere for a duty to deliver. The second cause of action was that New Zealand Post had breached a statutory duty to deliver postal articles to the addresses specified on them. The plaintiffs relied on ss 2(2) and 2(3) of the Postal Services Act which stipulate when an article is deemed to have been "posted" and "delivered".

McGechan J rejected this argument:[16]

> I do not think it advisable to strain to impute a statutory duty from a mere interpretation section. Statutory duty, if any, must come from a wider source.

Nor did his Honour find anything else in the Postal Services Act that imposed such a duty. However, McGechan J did find the requirement in s 4 of the State-Owned Enterprises Act 1986 that State-Owned Enterprises (SOEs) "operate" as successful businesses meant that New Zealand Post "is not licensed to lie moribund".[17] Since it is granted a monopoly in a very important sector "it is not hard to impute intended obligation".[18] This is curiously inconsistent with his ruling on the common law duty, which he rejects despite acknowledging that it too arises from a monopoly grant. However, his Honour held that this duty, deriving as it did from s 4, was limited "to the commercially realistic", and that in this case "the duty does not require provision of a rural delivery service which does not pay its way".[19]

Thirdly, the plaintiffs pleaded that when New Zealand Post accepts letters from a sender, it enters into a contract to deliver those letters to the addressees. Although such a contractual relationship between the sender and the Post Office has been rejected by the common law in the past,[20] McGechan J, referring to New Zealand Post's reconstitution as an SOE, held that:[21]

> [C]learly this is a quite different animal from the postal authorities on which the traditional common law developed. It is a fully commercial animal, with commercial purposes and needs.

Again, noting the requirement in s 4 of the State-Owned Enterprise Act that New Zealand Post operate as "a successful business", his Honour held that "[a] successful business obtains revenue by selling goods or services under contract."[22] Thus, McGechan J concluded that there was a contractual relationship between the

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14 Since it is there neither expressly nor by necessary implication.

15 However, Hammond J adopts a similar position in *Hamilton City Council v Waikato Electricity Authority*, High Court, Hamilton. 7 July 1993 CP21/93.

16 Supra at note 2, at p23.

17 Ibid, p26.

18 Ibid.

19 Ibid, p27.

20 *Lane v Cotton* (1699) 1 Ld Raym 646; 91 ER 1332; *Whitfield v Le Despencer (Lord)* (1778) 2 Cowp 754; 98 ER 1334; *Treifus & Co Ltd v Post Office* [1957] 2 QB 352 (CA).

21 Supra at note 2, at p35.

22 Ibid.

sender and New Zealand Post. However, the terms of the contract incorporated the Postal Users Guide, which included the terms and conditions of the rural delivery service, and therefore the sender would not expect the mail to be delivered unless entitlement to delivery actually exists. Alternatively, it was held that the contract is to deliver "correctly addressed" mail, and mail addressed to the rural delivery box of a non-paying box holder is incorrectly addressed. Accordingly, his Honour found no breach of contract.[23]

The plaintiffs' next cause of action was based on s 4(1)(c) of the State-Owned Enterprises Act, which requires SOEs:

> [T]o exhibit a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage those when able to do so.

The plaintiffs argued, inter alia, that it was in the interests of the rural community and all New Zealand through its export earnings that mail be delivered promptly and efficiently to rural addressees. However, McGechan J followed the line established by *Wellington Regional Council v Post Office Savings Bank Ltd & New Zealand Post Ltd*,[24] where Greig J held that in s 4(1) "the overriding consideration is commercial" and stated that he attached "some importance to the phrase in para (c) the endeavour to accommodate and encourage the interests of the community is "when able to do so"."

McGechan J accepted that prompt and efficient postal delivery was in the interests of the rural community, but held that:[25]

> Clearly, NZP is not required to provide efficient and prompt gate delivery if in doing so it makes a substantial business loss and does not make compensating gains of some other commercial character. It does make such a loss.

His Honour's deference to the commercial imperatives of the SOE is consistent with other High Court decisions.[26]

Finally, the plaintiffs sought a declaration that the RDSF was in breach of s 14 of the New Zealand Bill of Rights Act 1990,[27] as it unlawfully restricted the plaintiffs' right to "receive information and opinions in the form of postal articles addressed to them".[28]

His Honour accepted that mail handling was a "public function"[29] as it is

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23 Ibid, p43. Nor, by extension, could the plaintiffs succeed in bailment; ibid, p44.

24 High Court, Wellington. 22 December 1987 CP 720/87 Grieg J. Cited with approval in *Landmark Corporation Ltd (in rec) v Telecom Corporation of New Zealand Ltd* (1990) 5 NZCLC 66, 264; *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd*, High Court, Auckland. 18 February 1993 CL 20/92 Barker J.

25 Supra at note 2, at p52.

26 Supra at note 24.

27 Section 14 provides that, "[e]veryone has the right to freedom of expression, including the right to seek, receive and impart information and opinions of any kind in any form".

28 Supra at note 2, at p53.

29 Section 3(b) provides that the Act only applies to acts done "[b]y 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".

carried out "for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and ultimately controlled by the Crown".[30] It was also accepted that this function was conferred by law, specifically the State-Owned Enterprises Act, the Companies Act 1955, and the Postal Services Act, plus the on-flow of private contracts.[31] Thus, his Honour held that New Zealand Post was bound by the New Zealand Bill of Rights Act. With regard to s 14 of the Act, it was considered that New Zealand Post's refusal to deliver unless the RDSF was paid was a hindrance to the flow of information. However, it was also held that the RDSF was a reasonable limit prescribed by law (s 4(1) of the State-Owned Enterprises Act requiring New Zealand Post to operate as a successful business) and therefore permitted by s 5 of the Act.[32]

At a time when many essential services are being removed from direct political control and restructured into commercial enterprises, without the regulatory watchdogs found overseas,[33] it is disturbing to find a New Zealand Court extinguishing an established common law restraint on the monopoly provider of an essential service. New Zealand Post's common law duty is replaced by those arising from s 4 of the State-Owned Enterprises Act. McGechan J relied on the requirement to "operate as a successful business" to find a power to contract and a power to charge, to oust duties of the common law and those of the New Zealand Bill of Rights Act, and to both impose and limit a general statutory duty to deliver. Further, his Honour followed the line consistently adopted by the High Court in interpreting s 4 as giving priority to commercial considerations over "a sense of social responsibility".

Having determined that the duty to deliver arises from s 4, it was perhaps inevitable that McGechan J found that the controls on the duty are "political and commercial" and "the market".[34] With respect, it is difficult to believe that these controls will be effective over a semi-autonomous monopoly provider of an essential service. Although consumer protection is more the province of the legislature, it is submitted that in the current deregulated environment it is more important than ever for the courts to take a vigorous approach to enforcing the few common law safeguards which exist. From this point of view, *Federated Farmers* is a disturbing step backwards.

Scott Mataga

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30 Supra at note 2, at p55.

31 Ibid.

32 Ibid, p56.

33 For example, the Office of Telecommunications in the UK, State Public Utilities Commissions in the USA, and Austel in Australia.

34 Supra at note 2, at p19-20.

R v Goodwin [1993] 2 NZLR 153. Court of Appeal. Cooke P (dissenting), Richardson, Casey, Hardie Boys, Gault JJ; *R v Goodwin (No 2)* [1993] 2 NZLR 390. Court of Appeal. Cooke P, Richardson, Casey, Hardie Boys, Gault JJ.

R v Goodwin involved two separate decisions by the Court of Appeal on the scope of ss 22 and 23 of the New Zealand Bill of Rights Act 1990.[1] The first case also considered the rationale for exclusion of evidence obtained in breach of the Act.

The appellant had been convicted of the manslaughter of his baby daughter. On appeal he sought to challenge the decision of the trial judge to admit incriminating statements made by him during police questioning. The police had initially questioned the appellant and his de facto wife separately. At the conclusion of the interview Goodwin was told by the interviewing detective that he was free to leave, but if there were inconsistencies between his statement and that given by his wife he would be required for a second interview.

As Goodwin was leaving, he was told by another officer to remain at the station. Later he was informed that he would need to answer further questions. During this second interview, Goodwin was vigorously cross-examined by a detective. It was put to Goodwin that only he or his de facto wife could have caused the child's injuries. He replied that they should not be questioning his wife any further. At this stage the interviewing officer cautioned him that he was not obliged to say anything, but did not advise him of his right to counsel. Goodwin then made further incriminating statements. He subsequently sought to have these excluded on the basis of the failure to inform him of his right to counsel, but was unsuccessful.[2]

Section 23

The first issue on appeal concerned whether Goodwin had been "arrested or detained under any enactment" so as to trigger his right to counsel under s 23(1)(b).[3] It was conceded by the Crown that Goodwin had been told he was not free to leave. It followed that as there was no statutory power to detain him for questioning, there had been an unlawful detention.

Although the only member of the Court to dissent, the judgment of Cooke P provides the most comprehensive examination of the issues involved. His Honour gave weight to the trial judge's observation that the accused would reasonably

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1 Hereinafter referred to as the "Bill of Rights" or "the Act".

2 Although Goodwin would seem to have had other grounds for challenging the admissibility of the statements, the appeal was restricted initially to consideration of s 23(1)(b), and subsequently to s 22.

3 Section 23(1)(b) provides, "[e]veryone who is arrested or who is detained under any enactment ... shall have the right to consult and instruct a lawyer without delay and to be informed of that right ...."

have thought he was not free to leave at the time of the second interview, and concluded that the accused was either under de facto arrest or de facto detention.[4] As the only powers of arrest in New Zealand are those authorised by statute, every "arrest" is also a "detention under any enactment". His Honour considered that there was no material difference between these two concepts where the detention was unlawful. Furthermore, s 23(1)(c)[5] shows that the subsection is not confined to lawful arrests and lawful detentions. Therefore, the unlawful detention in this case was covered by the Act.

His Honour did recognise the difficulty with s 23, namely that on a literal reading a person who is not arrested or detained under any specific statutory power would not be entitled to the rights conferred by that section, even though the person in this situation is arguably the most in need of protection.[6] He dealt with this problem by adopting a purposive approach to interpretation:[7]

> To seek to cut down the scope of s 23(1) by denying its protection to some persons who are unlawfully deprived of liberty and interrogated by police officers on suspicion of an offence is necessarily an exercise in tabulated legalism.

There must be some doubt over this approach. A wider purposive approach is undoubtedly appropriate when interpreting the Bill of Rights, but the underlying purpose or objectives of the Act cannot be elevated above the clear words used, particularly when the purpose of the late addition of "under any enactment" appears to have been to narrow the scope of s 23.[8] The appropriate course is to work within the confines of the Act and leave the legislature to correct what appears to be either an unintentional oversight or a startling defect in the scope of rights secured under s 23. This is the approach favoured by Hardie Boys J:[9]

> It may well be that the addition of the words "under any enactment", focusing attention on the meaning of arrest, and rendering inapplicable much of the Canadian jurisprudence, has led to unexpected results. But the Court must take the statute as it finds it.

In direct contrast to Cooke P, the majority of the Court considered that there was a distinction between an arrest and a detention under any enactment.[10] In the present case, because there was no statutory power to detain for questioning, the detention was not one "under any enactment". Their Honours then considered whether the detention came within the meaning of "arrest".

Richardson J concluded that arrest in the context of the Bill of Rights has the same meaning as it does under the common law and in the Crimes Act 1961. He

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4 *R v Goodwin* [1993] 2 NZLR 153, 159.

5 Section 23(1)(c) provides, "[e]veryone who is arrested or who is detained under any enactment ... shall have the right ... to be released if the arrest or detention is not lawful."

6 Supra at note 4, at 167, 174; see also at 201 per Hardie Boys J.

7 Ibid, 168.

8 Ibid, 187 per Richardson J.

9 Ibid, 200.

10 Ibid, 186 per Richardson J, 196 per Casey J, 200 per Hardie Boys J, 204 per Gault J.

expressly disagreed with the definition of arrest laid down by Cooke P in *R v Butcher*,[11] and concluded that the detention in the case before him did not trigger the rights under s 23.

Hardie Boys J recognised that detention for the purpose of questioning may be an arrest under the Act, because it is in this situation that a suspect has the greatest need of legal advice. However, he then concluded, rather surprisingly, that because the interviewing detective had been unaware of the constable's instruction to the accused that he was not free to leave the police station, there had been no arrest.

The approach of Hardie Boys J seems closest to the dissent of Cooke P. However, his conclusion that good faith action on the part of the police may be relevant to the issue of breach is difficult to support. Depending on the exclusionary rationale adopted it may be relevant to the appropriate remedy,[12] but from the suspect's perspective it must be irrelevant to the issue of breach. A breach of rights is nonetheless a breach if committed in good faith.

With regard to arrest, Gault J simply maintained the views he expressed in *R v Butcher*[13] and held that it was not restricted to formal arrest; it also included situations where the suspect is detained and the police intend to subsequently arrest him or her, or where it is made clear that the suspect is not free to go. However, he concluded that there was no arrest in this case, presumably because he considered that Goodwin thought he was free to leave.

This conclusion seems difficult to support on the facts. Although Goodwin had been told that he was not under arrest, he had previously been informed that he would be called back if it transpired that his statement was inconsistent with that given by his wife. Furthermore, he was accused of deceit and vigorously cross-examined. When he informed the police that they should be talking to him rather than his wife, it is unrealistic to suggest that he would have still considered himself free to leave.

Casey J concluded that there will be an arrest whenever the words or conduct of the arresting official make it clear that a suspect has been deprived of his or her liberty. Accordingly, his judgment is open to the same criticism as those of Gault and Hardie Boys JJ, as it seems reasonable to conclude that the conduct of the police gave the suspect sufficient justification to believe that he had been deprived of his liberty.

There are obviously still some differences of opinion amongst the members of the Court on the scope of s 23. Of greater concern, however, is the unrealistic application by Hardie Boys, Gault and Casey JJ of the principles laid down in their own judgments.

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11 [1992] 2 NZLR 257, 264.

12 For example, on a deterrence-based rationale the good faith of the police might be relevant, since the exclusion of evidence would not establish any deterrence principle.

13 Supra at note 11.

Exclusion of Evidence

The differing views expressed in *R v Butcher* as to the basis on which a court will exclude evidence obtained in breach of the Bill of Rights is in part resolved by this decision.[14] The judges who considered the issue favoured a prima facie exclusionary rule founded on a rights-based rationale.[15]

Cooke P rejected as too problematic the Canadian disrepute approach, which aims to preserve systemic integrity by balancing the disrepute caused by the admission of evidence with the disrepute that would result from its exclusion.[16] He observed that decisions which have displaced the prima facie rule have been made on appropriate grounds,[17] but that in the case before him no such reason applied and he would have excluded the incriminating statement.

Similarly, Richardson J, after considering three possible approaches to exclusion, concluded that a rights-based rationale which gave primacy to the vindication of individual rights was the appropriate basis for exclusion. This goal could be adequately achieved through a prima facie exclusionary rule. However, his Honour then suggested some factors which might displace this prima facie rule, among them good faith by the police.[18] With respect, it is difficult to see how the good faith of the police can be relevant to a rights-based exclusionary rationale. Where the emphasis is on the protection of the individual's rights, the reason the right was breached must be irrelevant to whether a remedy will be granted.

In contrast to Richardson J, Hardie Boys J noted:[19]

> First, good faith can rarely be relevant; otherwise a premium would be put on ignorance of the law.

However, Hardie Boys J went on to state that he would not have excluded the statement because the denial of rights was unintentional or accidental. If his Honour meant to distinguish this from a situation where the police act in good faith, the distinction seems illusionary.

The exclusionary rationale adopted by the Court and manifested in the prima facie exclusionary rule is appropriate for a Bill of Rights. However, the observation that good faith can displace the prima facie rule indicates that the Court may take an expansive approach to developing exceptions to the prima facie rule. This would greatly undermine the protection of the Act.[20]

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14 See Corlett, Case Note (1992) 7 AULR 216.

15 Neither Casey nor Gault JJ examined the remedy point in detail, although Casey J agreed with the observations of Cooke P and Richardson J; supra at note 4, at 198.

16 This approach appeared to be favoured by Holland J in *R v Butcher*; supra at note 11, at 274.

17 Supra at note 4, at 202. One of the grounds given by Cooke P was waiver. It must be questionable whether waiver is an appropriate reason for displacing the prima facie rule. If a suspect is informed of the right to counsel and waives that right, then no breach has occurred and no issue of remedy arises. If the suspect has not been informed of the right to counsel then it is difficult to see how the right can be validly waived.

18 Ibid, 194.

19 Ibid, 202.

20 This would be similar to the American experience under *Miranda v Arizona* 384 US 436 (1966). Although that case established a strong prima facie exclusionary principle, subsequent cases have eroded its protection by developing exceptions, for example, where the evidence is used for impeachment purposes.

Section 22

As a result of observations by the Court, a further appeal was made under s 22.[21] In a single judgment delivered by the President, the Court held that there had been an "arbitrary detention", and that the evidence obtained as a result should be excluded. The appeal was therefore allowed, and the defendant's conviction quashed.[22]

On the issue of whether there had been a "detention", their Honours agreed, with some differences in approach, that the police had failed to discharge their onus of proof in establishing that Goodwin had not been detained.

The second issue to be considered was the meaning of "arbitrary". The Court held that generally any unlawful detention would be arbitrary. Cooke P justified this conclusion in part by reference to the Canadian case *R v Duguay*,[23] which considered the equivalent provision under the Canadian Charter. His Honour explained that the Ontario Court of Appeal had concluded that detention for the purpose of questioning or further investigation is arbitrary, and when the case was appealed to the Canadian Supreme Court[24] they did not interfere with this finding. However, Cooke P failed to point out that the Supreme Court was only asked to reconsider the lower Court's decision on the basis of s 24, which is the remedies section of the Charter. Madame Justice L'Heureaux-Dube dissented on this point, but did consider arbitrary detention in a full and reasoned decision. She concluded:[25]

> A detention is arbitrary if it is the result of an untrammelled discretion.

On her Honour's approach, an arbitrary detention is one made without rational criteria rather than one made without legal justification. Where there is some logical reason for suspecting a person and therefore detaining him or her for questioning, the detention will not be arbitrary though it might be illegal.

Cooke P did not consider this reasoning and simply concluded that as there is no power in New Zealand to detain for questioning, the detention was arbitrary and in breach of s 22.

On the issue of exclusion, the Court held that the Crown had failed to disprove a causal connection between the breach and the evidence obtained as a result. Accordingly, the prima facie rule applied and the evidence was excluded.

The effect of the Court's interpretation of s 22 is dramatic. Whenever a suspect is detained for questioning there will be an unlawful, and therefore almost inevitably, an arbitrary detention. Although the decision does not expressly state

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21 Section 22 provides, "[e]veryone has the right not to be arbitrarily arrested or detained."

22 Independent of the Bill of Rights ground, it was also held that there was insufficient evidence to maintain the conviction; *R v Goodwin (No 2)* [1993] 2 NZLR 390, 396.

23 (1985) 18 DLR (4th) 32 (Ont CA).

24 (1989) 56 DLR (4th) 46.

25 Ibid, 67. This was in turn based on the judgment of Le Dain J in *Hufsky v The Queen* [1988] 1 SCR 621, 633 where he concluded that: "A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."

that this would include a subjective detention on reasonable grounds, it is implicit in the judgment, since the finding of a detention seems based in part on the direction to the suspect prior to the second interview that he was not allowed to leave. In these circumstances, the gap created by the strict interpretation of s 23 is not only avoided by reference to s 22, but the protection of the Act is greatly increased, as any detention not under a specific statutory power will be a breach of s 22.

Furthermore, the somewhat confusing conclusion by the Court in the first case that the prima facie exclusionary rule may not apply where there has been a waiver[26] should not prevent exclusion under s 22, since waiver in this context relates to waiver of the right to be free from arbitrary (that is, illegal) detention. As it is unlikely that a suspect would appreciate that the detention was illegal, it is difficult to see how waiver could ever displace prima facie exclusion when there has been a breach of s 22.

In this second decision, the Court appears to have recognised the difficulty of the suspect who is neither arrested nor detained under a specific statutory authority. Its decision under s 23 deprives this suspect of protection from abuses by the police of his or her fundamental rights. Now such a suspect will be protected by the right under s 22. To a certain extent, this finding removes the justification for Cooke P's dissent in the first decision. However, the Court may have to reconsider this very broad interpretation of s 22 in future cases.

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Downsview Nominees Ltd v First City Corporation Ltd [1993] 1 NZLR 513; [1993] AC 295. Privy Council. Lords Templeman, Lane, Goff, Mustill, and Slynn.

Downsview Nominees Ltd v First City Corporation Ltd[1] required a consideration of the duties, if any, owed by a first debenture holder, and a receiver and manager appointed by it, to a second debenture holder. The case involved the receivership of Glen Eden Motors Ltd. Glen Eden was placed in receivership on 10 March 1987 by the holders of a second debenture, First City Corporation Ltd. At that time, Glen Eden was also encumbered by a prior debenture issued to Westpac Banking Corporation Ltd. On 23 March 1987, the Westpac debenture was assigned to Downsview Nominees Ltd, who appointed Russell, the second appellant,

26 Supra at note 4, at 202; also see supra at note 17.

1 [1993] 1 NZLR 513.

as receiver. Since the Westpac debenture had priority, the receivers appointed by First City relinquished control of the receivership to Russell. Instead of liquidating the company, Russell decided to continue trading under the same management. First City wrote to Downsview expressing concern at this decision, and offered to purchase the Westpac debenture. This offer was declined by Russell. When the debenture was finally assigned by court order, the value of the company was insufficient to cover the First City debt. Each of the Courts that heard the case accepted that the loss suffered by the First City group[2] was caused by the way Russell had conducted the receivership.

In the High Court, Gault J held that a debenture holder and a receiver owe a duty of care to the mortgagor company and, through the company, to a subsequent debenture holder.[3] On the facts, his Honour held that the conduct of Russell as receiver had breached this duty. Downsview was also found to be negligent on the ground that it was no more than the alter ego of Russell. In addition, Gault J disqualified Russell from in any way taking part in the management of a company for five years, pursuant to s 189 of the Companies Act 1955.

The Court of Appeal agreed that a duty of care was owed, and that Russell had breached it.[4] The liability of Downsview, however, was not upheld, as it was the conduct of Russell as receiver which was complained of and not that of Russell as the alter ego of Downsview; the two have a separate legal status.[5] The disqualification of Russell under s 189 was also overturned.[6]

When the case came before the Privy Council, the Board was so troubled by the approach of the Courts below that it took the unusual step of granting the respondents leave to raise issues which had not been argued in the Court of Appeal. Both sides were asked to reconsider the "foundation and extent" of the duties owed.[7]

In its decision, the Board rejected the submission that a debenture holder or receiver could be liable in negligence to the mortgagor company or subsequent debenture holders, at least until a decision to sell the company is made. Until then, the only duties owed are the equitable duties to act in good faith and for the purpose of obtaining repayment of the debt. These duties are owed to both the mortgagor and subsequent encumbrancers. The conduct of Russell had breached these duties as his predominant purpose was preventing enforcement of the First City debenture, and not enforcement of the Westpac debenture.

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2 In the Court of Appeal, it was argued that as First City had assigned its debenture to its subsidary First City Finance, it had not suffered loss. This argument was rejected by the Court of Appeal, and was not mentioned in the decision of the Privy Council.

3 [1989] 3 NZLR 710, 743; following *National Westminster Finance New Zealand Ltd v United Finance & Securities Ltd* [1988] 1 NZLR 226.

4 [1990] 3 NZLR 265.

5 Ibid, 278.

6 Ibid, 282-284. A receiver was not a "manager" within the wording of s 189.

7 Supra at note 1, at 521.

Their Lordships did not decide whether Downsview had breached its duty of good faith to First City. Such a breach would require knowledge by Downsview when it appointed Russell as receiver that he would act for improper purposes. That question had not been argued. However, Downsview was liable for the loss occasioned by its refusal to assign the Westpac debenture to First City when First City so requested. Like anyone liable to pay a mortgage debt, First City had the right to redeem.[8] On the question of the Court's jurisdiction to disqualify Russell under s 189 of the Companies Act, the Board agreed with the Court of Appeal.

The decision affirms that a debenture holder is in a unique position for which equity has developed special rules. When a secured creditor exercises its power to take control of assets given as security, it is acting in its own interest. The principal task of a receiver appointed by it is to recover the debt owed, whatever the effect may be on the mortgagor company or a subsequent debenture holder. A duty of care owed to either of these two parties would be inconsistent with this self interest:[9]

> Their Lordships consider that it is not possible to measure a duty of care in relation to a primary objective which is quite inconsistent with that duty of care.

The only duties which it is fair to impose are those which equity has developed to prevent fraud or *mala fides.* To replace or supplement these duties with liability in negligence would lead to "confusion and injustice."[10]

It has been argued that this view is overstated, as it is unlikely a court would impose a standard of care which created injustice.[11] Indeed, both the judgment of Gault J and those of the Court of Appeal indicate that the Courts were well aware of the special position of receivers:[12]

> The existence, nature and extent of the receiver's duty of care must be measured in relation to the primary objective of the receivership which is to enforce the security by recouping the moneys which it secures....

It is submitted, however, that even if the courts are unlikely to impose a duty of care that would create injustice, it is unnecessary to take that risk. When recognised principles have evolved specifically to deal with the enforcement of mortgages and the protection of borrowers, there is no reason to introduce the uncertainty of a tortious duty of care. Indeed, if the primary objective of receivership is properly taken into account, the nature and extent of a duty in negligence should be identical to the equitable duties owed by a receiver.

It has also been argued[13] that the decision of the Board is contrary to the authority established in *Cuckmere Brick Co Ltd v Mutual Finance Ltd.*[14] Such an argument fails to recognise the crucial distinction between that case and the

8 Ibid, 526.
9 Ibid, 524.
10 Ibid, 525.
11 Milroy, Case Note [1993] NZLJ 88.
12 Supra at note 4, at 276.
13 Supra at note 11.
14 [1971] Ch D 949 (CA).

situation in *Downsview Nominees. Cuckmere Brick* and the cases that follow it deal with the position of a mortgagee after the decision to sell the secured assets has been made. *Downsview Nominees* was concerned with the duties a mortgagee owes before that decision is made. This distinction was recognised by the Privy Council when they confined the decision of *Cuckmere Brick* to:[15]

> Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price ....

In *Cuckmere Brick*, Salmond LJ made it clear that once the power of sale has arisen, the mortgagee is under no duty to sell the particular property at a time when the market price is high, or to refuse to sell to the highest bidder at auction merely because the turn out was low.[16] If the interests of the mortgagee conflict with those of the mortgagor, the mortgagee may prefer his or her own interests. It is only when the mortgagee chooses to sell the property that a duty to take reasonable care to obtain a proper price arises. This distinction was rejected by Gault J in the High Court, at least in relation to receivers:[17]

> It would be absurd if a receiver selling up were bound to take reasonable care, but a receiver trading on were not.

This writer would argue that the distinction is not absurd.[18] When a receiver decides to continue trading the mortgagor company, it may be in the long term interests of the appointing debenture holder for the company to be managed in a fashion contrary to its short term interests. For example, a debenture holder may benefit from a short term profit which prejudices the company's long term performance. Any duty owed by the receiver to the company which is more onerous than the duty to act in good faith and for the purpose of enforcing the debenture would compromise this primary task. As equity already imposes this duty, only the possibility of injustice can be gained by adding an additional duty in negligence.

When the decision to sell is made, however, there can no longer be a conflict of interest. There is no lawful reason why it would be in the best interests of a debenture holder to obtain less than a proper price. Therefore it is appropriate that the receiver owe a duty of care to the mortgagor company, and those who claim through it.

The decision in *Downsview Nominees* is to be welcomed for recognising this distinction and reasserting the true nature of the relationship between a debenture holder, its receiver, and the mortgagor company. The disappointment with the case

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15 Supra at note 1, at 524.

16 Supra at note 14, at 965.

17 Supra at note 3, at 744. The authority Gault J relies on is *R A Price Securities Ltd v Henderson* [1989] 2 NZLR 257 (CA). However, that case concerned the duties owed by a receiver to the appointing debenture holder, not those owed to the mortgagor or a subsequent encumbrancer.

18 This distinction is implicitly recognised by the legislature in s 345B of the Companies Act 1955. This section imposes a duty to take reasonable care on the receiver selling up, but does not consider the position of the receiver trading on.

is that the Board did not take the opportunity to examine critically the approach New Zealand Courts have taken to finding a duty of care in novel situations. With regard to the current trend of allowing a cause of action in negligence where rights and duties already exist, the Board restricted itself to this statement:[19]

> The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss....

The limited impact *Downsview Nominees* is likely to have on the general approach to negligence in New Zealand has been illustrated by the recent Court of Appeal decision in *Connell v Odlum.*[20] There, Thomas J reaffirmed the *Anns v Merton London Borough Council*[21] two-stage test, and cited *Downsview Nominees* as an example of policy considerations that may negate a prima facie duty of care.[22]

It is hoped that *Downsview Nominees* will not be confined to the nebulous realm of policy considerations in stage two of the *Anns* test. The decision shows that the *Anns* test is too blunt an instrument to recognise distinctions such as those between a receiver's duties before the decision to sell is made, and those owed after the decision. It should bring to the Court's attention the possibility of "confusion and injustice" when the law of negligence is extended to smother clear and precise duties that have developed for a particular commercial relationship.

Simon R. G. Judd

Cossey v Bach [1992] 3 NZLR 612. High Court. Auckland. Fisher J.

At a time when equity and the constructive trust are increasingly being used to affect property distribution on the failure of a de facto relationship, the decision in *Cossey v Bach*[1] is valuable for its statement of the principles on which courts will intervene to effect justice between the parties. The facts of the case can be briefly stated. The plaintiff had obtained a divorce from the defendant in late 1980 without resolving issues of matrimonial property. In March 1989, the plaintiff received $660,000 in Lotto winnings, and on the day he collected this sum the couple resumed cohabitation. As well as the Lotto winnings, the plaintiff brought to the relationship $36,000 received from his ex-employer by way of accumulated superannuation entitlement. For her part, the defendant had an interest in a home unit worth $5000.

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19 Supra at note 1, at 525.

20 [1993] 2 NZLR 257.

21 [1978] AC 728.

22 Supra at note 20, at 265.

1 [1992] 3 NZLR 612.

In the first months of the renewed relationship the parties purchased substantial assets, including a new house, a Ford van, chattels and investments. Although the funds for these purchases came from the proceeds of the Lotto win and the plaintiff's superannuation, the ownership of the chattels was recorded in their joint names. In the time they were together, the defendant made domestic contributions to the relationship, including the provision of child care services. After fourteen months, the couple again separated.

Two main issues were addressed in the case. First, the classification of the parties' property under the Matrimonial Property Act 1976, and secondly, the principles governing the division of property at the termination of a de facto relationship. With regard to the first of these, the problem was whether property acquired during a de facto relationship, but after the dissolution of a prior legal marriage, could be matrimonial property for the purpose of an outstanding matrimonial settlement. Fisher J concluded that:[2]

> [T]he Act rests on the general assumption that the matrimonial property falling for division under the Act will be directly or indirectly traceable to property created or used during the legal marriage partnership itself. On that view, a subsequent partnership in the nature of de facto marriage could not qualify as a "marriage partnership" and could not give rise to fresh matrimonial property calling for division under the Act.

As no issue of matrimonial property arose, his Honour examined the relevant principles of the common law.

Fisher J discussed at some length the decision of the Court of Appeal in *Gillies v Keogh*.[3] His Honour considered that the main focus of *Gillies v Keogh* was the situation where legal title to the property was vested in one partner, while the other made domestic contributions in the course of their relationship. It was thought that the present facts were radically different, as the legal ownership was vested in both parties, and his Honour attempted to set the core principles of *Gillies v Keogh* into a wider context to deal with this new situation.

The major decisions from New Zealand and other Commonwealth jurisdictions, dealing with de facto unions and the constructive trust, were examined. From these cases, Fisher J advanced ten principles.[4] The writer has attempted to reduce these to seven basic rules:

(i) prima facie, the legal title is taken to reflect beneficial interests;
(ii) unequivocally expressed intentions as to beneficial interests either made by the party holding the legal title, or that are common to both parties, will continue to be determinative, as long as they are still pertinent to the circumstances currently before the court;
(iii) in the absence of a governing expression of intention, a convenient starting point may be to ascertain ownership according to traditional proprietary principles;

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2 Ibid, 622.
3 [1989] 2 NZLR 327.
4 Supra at note 1, at 631-633.

(iv) ownership determined provisionally under principles (ii) or (iii) will then be subject to any reasonable expectations by one party that she or he would receive an interest or greater interest in the property of the other;

(v) for the purpose of reasonable expectations, contributions may be of an intangible nature and have little measurable value. They need not be traceable to the property in dispute;

(vi) the quantum of a successful claim will be determined first by giving priority to any overriding expression of intention, secondly by reference to the parties' respective proprietary contributions to the property, and thirdly by reference to any reasonable expectations; and

(vii) once the quantum of the claim has been determined, the remedy may take the form of an interest in the disputed property or a monetary award in lieu thereof.

On the facts, his Honour found the plaintiff had exclusive ownership of the investments, while the defendant retained a ring gifted to her and the chattels she brought to the home. She was also entitled to a fifteen percent interest in the house, the Ford van and the purchased chattels.

The value of this judgment is in the structure it attempts to give to an often confused area of the law. In general, the conclusions reached are both accurate and insightful. However, the writer would question his Honour's contention in the fifth principle that the domestic contibutions made need not be traceable to the property in dispute.

Fisher J draws a distinction between "proprietary contributions" to the acquisition of property and "marital contributions". It was considered that the former were relevant for the purpose of establishing prima facie interests under a resulting trust, and the latter as "likely to provide the principal basis for a reasonable expectation."[5] Relying on Canadian authority[6] his Honour concluded that:[7]

> [F]or the purpose of reasonable expectatons, it will not be necessary to show any causative link between the domestic activities or other contribution of the claimant on the one hand and the acquisition or enhancement of the property in dispute on the other.

It is doubtful whether the Canadian authorities relied upon can be used to support this view. Although Canadian courts have adopted a more relaxed approach to the requirement of a factual connection, it could not be said that they have abandoned completely the requirement of a "causative link". In fact, the

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5 Supra at note 1, at 630; see also *Lanyon v Fuller* (1988) 4 FRNZ 134; *Edwards v Prewett* (1988) 4 FRNZ 351; *Partridge v Moller* (1990) 6 FRNZ 147. It was accepted in these cases that domestic services are capable of constituting indirect contributions to property.

6 His Honour refers to the authorites mentioned in *Gillies v Keogh*, supra at note 3, which included; *Pettkus v Becker* (1980) 117 DLR (3d) 257 (SCC); *Sorochan v Sorochan* (1986) 29 DLR (4th) 1 (SCC); *Everson v Rich* (1988) 53 DLR (4th) 470 (Sask CA).

7 Supra at note 1, at 630.

leading case of *Sorochan v Sorochan*[8] expressly affirms that the services provided must have a "clear proprietary relationship" to particular assets.[9]

To further support his position, Fisher J relies on the acceptance by Canadian courts that spousal services per se constitute enrichment. This observation is correct but, with respect, the inference that unjust enrichment equates with the constructive trust cannot be justified. Dickson CJ in *Sorochan v Sorochan* noted that the restitutionary constructive trust is an important remedy for the substantive wrong of unjust enrichment, but not the only remedy; "[o]ther remedies, such as monetary damages, may also be available".[10]

This point was developed by the Saskatchewan Court of Appeal in *Everson v Rich.*[11] In that case, the Court held that there was an insufficient link between the plaintiff's provision of domestic services and the property in dispute to support the imposition of a constructive trust. However, the plaintiff was granted the alternative remedy of monetary damages, which could be measured by the market price of the services provided or the increased value of the defendant's assets.[12]

Some support for the position of Fisher J can be found in the wider context of restitutionary actions. It has been suggested that the requirement that contributions have some causative link to the property may no longer be applicable to the restitutionary proprietary action.[13] This view is premised on a belief that the defendant is equally enriched whether or not the enrichment, namely the plaintiff's contribution, can be identified *in specie*. Any enrichment will have swollen the general value of the defendant's asset pool. This approach received some support in the case *Liggett v Kensington; Re Goldcorp Exchange Ltd.*[14] There, the majority of the Court of Appeal granted the claimants a proprietary interest in the property notwithstanding the lack of a causal connection between their contributions and the property. However, it does not follow that the causal connection requirement ought to be waived as a condition precedent to constructive trust relief in the domestic situation.[15]

A contrary view to that offered by Fisher J was given in the recent case *Nash v Nash.*[16] Distinguishing the commercial situation, where a purer tracing process

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8 Supra at note 6.

9 Ibid, 10. In that case, a proprietary relationship was established on the basis that the contributions of the plaintiff prevented the property in question from diminishing in value.

10 Ibid, 7.

11 Supra at note 6.

12 Ibid, 475.

13 See Goff & Jones, *The Law of Restitution* (4th ed 1986) 77-81; see also Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust" (1988) 26 Alberta LR 407, 457.

14 [1993] 1 NZLR 257 (CA).

15 See Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989) 68 Can Bar Rev 315, 334 n100.

16 High Court, Auckland. 3 September 1992 CP 2900/88 Thorp J.

ought to be required to confer proprietary relief,[17] Thorp J emphasised that although a relatively loose factual connection between the domestic services provided and the disputed property will be sufficient, there must still be some connection established. It is submitted that this is the preferable view.[18]

It is acknowledged that the equitable rules of tracing, and other requirements of causation, are unlikely to advance justice in the area of property disputes on the failure of a de facto relationship. Fisher J's proposition that contributions need not be traceable to the property in dispute must, however, be treated with caution. In the interests of those partners who seek to preserve property ownership, it is submitted that a requirement of some loose factual connection is to be preferred. This would afford the legal owner at least some measure of control over the ownership of his or her property.

Jane M. Scott

Television New Zealand Ltd v Prebble, Court of Appeal. 14 May 1993, CA 161/92. Cooke P, Richardson, Casey, Gault and McKay (dissenting) JJ.

On 29 April 1990 Television New Zealand Ltd ("TVNZ") in its "Frontline" programme screened a documentary entitled "For the Public Good", which dealt with the sale of New Zealand State-Owned Enterprises. Mr Prebble alleged that the programme suggested that as Minister of State-Owned Enterprises he conspired to sell state assets to business leaders on unduly favourable terms and with the motive of securing donations to the New Zealand Labour Party. In defamation proceedings Mr Prebble claimed $1,350,000 in general and punitive damages.

TVNZ pleaded several defences. It denied that the programme conveyed the meaning alleged, but that if it did it was true and was fair comment on a matter of public interest. To support its plea of fair comment, TVNZ wished to produce transcripts of Mr Prebble's speeches within Parliament, to show he was "saying one thing inside the House and doing another", and evidence that he aided the speedy enactment of legislation to implement this conspiracy. The case arose by

17 In this respect, Thorp J would appear to be repeating the view he expressed at first instance in *Liggett v Kensington*, supra at note 14. It is doubtful that his interpretation of the commercial situation survives the appeal in that case.

18 In *Phillips v Phillips* (Court of Appeal, 26 Februrary 1993 CA 369/91) the Court of Appeal had the opportunity to resolve this divergence in opinion. No substantial review of the case law since *Gillies v Keogh* was attempted, although Cooke P did conclude that "the reasonable expectations test appears to be working reasonably well", (at pp16-20).

way of an interlocutory application by Mr Prebble to strike out defence pleadings based on this evidence, claiming that it was protected by parliamentary privilege.

In the High Court, Smellie J held that the production of such evidence would breach parliamentary privilege.[1] He therefore excluded the evidence from trial. He recognised that this might work an injustice on the defendant, but considered that the public interest at stake outweighed the interests of the private citizen, and allowed Mr Prebble to continue his action.

The Court of Appeal agreed[2] that the evidence at issue was protected by parliamentary privilege, but by a majority (McKay J dissenting) held that to exclude the evidence would deny the defendant a fair trial. Mr Prebble's action was therefore stayed for a period of three months, allowing him time to attempt to gain a waiver of the House's privilege.

Parliamentary Privilege

The question at issue was novel in the area of defamation law: can a member of Parliament sue in defamation yet still rely on parliamentary privilege to deny the defendant evidence to support its case? In tackling this problem, the Court looked first to the origins of the freedom of speech enjoyed by members of Parliament. Typically, this privilege is said to derive from article 9 of the Bill of Rights 1688.[3] It provides that:

> [T]he freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

However, Cooke P considered that the source of this privilege could also be traced to two other sources; namely, the intrinsic necessity for the effective functioning of any legislative assembly that it be free to discuss matters and conduct its business as it sees fit, and a principle of mutual restraint exercised by Parliament and the Courts in respect of their separate spheres of activity.[4]

There was agreement within the judgments as to the application and meaning of this privilege. The privilege was recognised as having a very wide basis, it having been said:[5]

> [W]hatever is done within the walls of a House of Parliament must pass without question in the Courts.

However, the privilege is not a blanket ban on the admission of evidence, and the Court noted the movement towards a narrowing of the privilege.[6] For there to be a breach, there must be a "questioning" of parliamentary material or the actions of its

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1 *Prebble v Television New Zealand Ltd*, High Court, Auckland. 24 July 1992 A 785/90 Smellie J.

2 *Television New Zealand Ltd v Prebble*, Court of Appeal. 14 May 1993 CA 161/92.

3 In New Zealand, this has the force and effect of statute. See the First Schedule to the Imperial Laws Application Act 1988.

4 Supra at note 2, at p5.

5 Ibid, p5, quoting from *Bradlaugh v Gossett* (1884) 12 QB 271; *Stockdale v Hansard* (1839) 9 Ad & E 1; 112 ER 1112.

6 For example; *Hyams v Peterson* [1991] 3 NZLR 648 (CA); *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 (HL); First Schedule to the Defamation Act 1954, and the new Defamation Act 1992.

members, and in the cases where evidence of parliamentary origin had been admitted there was no such questioning.

Although the element of questioning is vital to a breach of privilege, the Court found it difficult to give a precise definition to this term. However, it is clear that the motives of a member for speaking or voting in a particular way cannot be scrutinised, even if it is suggested that the member's motives were proper.[7]

The Court then considered the nature of the privilege in terms of who enjoys it, and can enforce its protection. It was held that the privilege exists on two distinct levels: there is the right of the House in its corporate capacity to be free from any questioning of its debates and proceedings, and there is a correlative privilege inherent in each member as an individual.

In terms of ensuring that the purposes of parliamentary privilege are met, this ruling is of fundamental importance. It means that the House does not have exclusive control of the privilege and therefore cannot deprive an individual member of his or her immunity by electing to waive it in a particular case. This is vital, as to hold otherwise would undermine the very purpose of the privilege, namely to keep members free from any civil or criminal penalties for what they say in the House.[8]

Applying these conclusions to the facts, the Court was of the opinion that:[9]

> By alleging inconsistency between what was said in the House and what was said and done outside Parliament TVNZ necessarily questions whether Mr Prebble acted properly in Parliament in saying what he is alleged to have said.

Therefore, there was a questioning of Mr Prebble's behaviour in the House, and to admit such evidence at trial would breach his personal privilege.

The Court also recognised that the material was of a highly contentious nature. It would be used to impugn not only the activities of the plaintiff, but also other members of the Fourth Labour Government. It therefore bore on the activities of the House as a whole and its production at trial would breach the privilege of the House in its corporate capacity.[10]

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7 Supra at note 2, at p9 per Cooke J. This is contrary to Popplewell J's dictum in *Rost v Edwards* [1990] 2 QB 460, 475.

8 Ibid, p8. His Honour relies on the recent case of *Pepper (Inspector of Taxes) v Hart*, supra at note 6. Another method of achieving this result would be to hold that the corporate privilege of the House cannot be waived, but the Court rejected this approach; ibid, p12.

9 Ibid, p6 per Gault J.

10 It was also recognised that this case could amount to an inquisition into the policies of the Fourth Labour Government. Sir Ivor Richardson was of the view that this would be more appropriately traversed by a Commission of Inquiry than in adversarial proceedings in a court of law; ibid, p14 per Richardson J.

Waiver of Parliamentary Privilege

The above conclusions are not surprising, involving the application of well recognised principle. A point of greater interest arises in the Court's treatment of the issue of waiver.

Although the Court does not analyse the issue in this way, the practical relevance of the parties' ability to obtain a waiver depends on the view the Court takes of the importance of the privileged evidence to the defendant's case. If exclusion of the evidence will prejudice the defendant's ability to gain a fair trial, the action might be stayed. It would therefore be incumbent on Mr Prebble to obtain a waiver to enable TVNZ to mount a reasonable defence to his action. However, if exclusion of the evidence will not deny TVNZ a fair trial, the issue of waiver is largely irrelevant. TVNZ may desire a waiver to strengthen its case, but it is not necessary for the action to proceed, and no party will be substantially disadvantaged by a failure to obtain one.

With regard to the effect exclusion of the evidence would have on the trial, the Court concluded:[11]

> [I]t is impossible to be confident that justice can be done if the Court is precluded from any close examination of Parliamentary debates or proceedings.

Therefore, they considered that a waiver of the privilege by the affected parties would be needed for the action to continue.

McKay J dissented from this ruling, reasoning that:[12]

> An experienced publisher should be aware of the danger of making defamatory statements or seeking to justify them in circumstances where it cannot prove that its statements are true.

As such, it was not obvious to his Honour that to allow the case to continue would result in an injustice. However, with the majority, he did examine the issue of waiver.

Cooke P and Casey J considered that where a member initiates proceedings and pursues the action in the face of a defence reasonably relying on statements made in the House, the member "must be held to waive his personal privilege."[13] Sir Ivor Richardson and McKay J reached the same conclusion, but on the basis of *Wright & Advertiser Newspapers Ltd v Lewis*.[14] They decided that a defendant in a defamation action brought by a member of Parliament can plead matters apparently in breach of parliamentary privilege, because in so doing a defendant cannot be regarded as questioning in any real sense the proceedings of Parliament. Therefore, the evidence could not be excluded on the basis of Mr Prebble's own personal privilege.

With respect, the reasoning of Cooke P seems preferable. It is artificial to say that there is no questioning of the member when he or she initiates the action, but

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11 Ibid, p16 per Cooke P.
12 Ibid, p13 per McKay J.
13 Ibid, p12 per Cooke P.
14 (1990) 53 SASR 416.

where the member is being sued by another party the evidence does question the member's actions. The fact of who brings the proceedings is not relevant to whether the evidence questions actions in Parliament. It is only relevant to whether the privilege has been waived.

With regard to the corporate privilege of the House, the Court found that it had not been waived. In the absence of an express waiver, the Court was not prepared to admit the material as evidence and it was thus decided that Mr Prebble's suit should be stayed for a period of three months. This would allow a waiver to be obtained from the House and any individual members who might be affected by the material.[15]

Both of these conclusions necessarily involved a determination of whether waiver of the privilege is possible at all. This issue was considered in the context of the corporate privilege, but logically it is also relevant to the personal privilege.

Cooke P was firmly of the opinion that the House is competent to waive its own privilege. In Cooke P's discussion of parliamentary privilege he describes the source of immunity as a tripartite combination of logical necessity, article 9 of the Bill of Rights 1688,[16] and judicial restraint. Using these sources, the President decreases the significance of article 9 as a source of the privilege, and thereby circumvents (albeit *sub silentio*) a possible argument based on *Fitzgerald v Muldoon*[17] that waiver by a resolution of the House, a mere executive act, would not be competent to waive the statutory effect of article 9.

McKay J doubted that waiver was possible, giving no reasons but presumably his Honour had *Fitzgerald v Muldoon* in mind. Richardson and Casey JJ argued that it is for the House to decide whether waiver is possible, not a court. Therefore, the conclusion of the majority is that waiver might be possible, but Cooke P is the only judge to positively decide that the privilege is capable of being waived. Cooke P must be seen as dissenting on this point.

The New Zealand Bill of Rights Act 1990

Cooke P, in an enigmatically concise passage, considered the effect of the New Zealand Bill of Rights Act 1990 on the privilege and the question of waiver. Essentially, the President recognised the problem that if article 9 of the Bill of Rights 1688 were given a strict interpretation it would be a breach of parliamentary privilege to make fair comment on anything that occurred inside the House. There would then be a restriction on the right to freedom of speech under s 14 of the New

15 It was recognised that Mr Prebble might have difficulty in obtaining these waivers. This proved to be correct, as the House Privileges Committee refused to waive its privilege. It seems that the Committee considered itself incapable of waiving the privilege, which is contrary to Cooke P's decision. This has apparently spurred Mr Prebble to lodge an appeal with the Privy Council. See "House Privilege Stays", *New Zealand Herald*, 23 June 1993, section 1, 2.

16 Article 9 of the Bill of Rights 1688 "has not infrequently been given as the ground *also* of the immunity." Emphasis added. Supra at note 2, at p5 per Cooke P.

17 [1976] 2 NZLR 615 (CA).

Zealand Bill of Rights Act.[18] Cooke P avoids this result by reading article 9 consistently with this right. Where a member sues in defamation, the member is deemed to have waived his or her individual privilege. This is a reasonable interpretation of article 9 and would therefore be preferred under s 6 of the New Zealand Bill of Rights Act:[19]

> Article 9 need not be interpreted in a way leaving a member of Parliament free to sue a person in circumstances which would severely limit that person's rights under s 14.

However, when the member of Parliament is the defendant in the defamation action, the privilege will not be waived unless the member positively decides to do so. The protection here can be justified as a reasonable limit on the right in s 14,[20] or it can be said that article 9 prevails by virtue of its status as an enactment.[21]

Waiver and Non-assertion

Some comment is made by the Court, most notably in the decision of Cooke P, on whether a failure to assert the privilege can be equated with a waiver of that privilege.

The mandatory rule laid down in article 9 of the Bill of Rights 1688 that a Court is not to admit evidence if so doing will question proceedings of Parliament would seem to place the burden of enforcement on the courts rather than the House. As such, it should not depend on the potential breach of privilege being brought to the court's attention by the parties involved.

It would also follow that there is a presumption in the absence of a positive waiver from the House, or an affected member, that such evidence will be excluded. A mere failure to assert the privilege cannot be equated with a positive waiver. This would accord with the decision of the Court that a waiver of the House is needed before the evidence could be admitted.

If this is correct, then it would seem that the apparent questioning of the House in *Adam v Ward*[22] and *News Media Ownership Ltd v Finlay*[23] should not be justified on the basis of there having been no assertion of the privilege, as Cooke P suggests. Perhaps these cases must be considered as having been decided *per incuriam*.

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18 Section 14 provides, "[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinion of any kind in any form."

19 Supra at note 2, at p18 per Cooke P.

20 See Rishworth, "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZRLR 337, 339; Cooke P would disagree, *Ministry of Transport v Noort* [1992] 3 NZLR 260, 271 (CA).

21 Section 4 New Zealand Bill of Rights Act 1990.

22 [1917] AC 309.

23 [1970] NZLR 1089 (CA).

Conclusion

Finally, it is important to consider the general effect the decision will have on the ability of members of Parliament to sue for defamation, and on the media's ability to publish fair comment on material of parliamentary origin.

The Court was faced with the possibility that by excluding the evidence a publisher might well lose its defence to a defamation action, and as such could not make fair comment on material originating in the House. To avoid this harsh conclusion, the Court decided to stay the proceedings unless and until the privilege is waived by the House and any individual members affected. The practical difficulty in obtaining such a waiver leads to the equally harsh position that members of Parliament may often effectively be stripped of the ability enjoyed by other citizens to protect their reputation and character. It would seem that:[24]

> In a democracy a price has to be paid for freedom of speech both in and out of Parliament ....

Matthew D. J. Conaglen

24 Supra at note 2, at p17 per Cooke P.