

CASE NOTES

Kensington v Unrepresented Non-allocated Claimants (1994) 5 NZBLC 103,453; *Re Goldcorp Exchange Ltd (in receivership)* [1994] 2 All ER 806. Privy Council. Lords Templeman, Mustill, Lloyd of Berwick, and Sir Thomas Eichelbaum.

Goldcorp Exchange Ltd (“Goldcorp”) dealt in bullion. By virtue of written and oral statements, Goldcorp encouraged the public to purchase gold and leave it with the company where it would be stored on their behalf. In fact, in respect of most purchases, an appropriation of gold to each contract was never made. The company only maintained stocks sufficient to satisfy customers’ demands for delivery.

In 1988 under the terms of its debenture, the Bank of New Zealand Ltd (“the Bank”) caused Goldcorp to be placed into receivership. On discovering the huge shortfall in bullion, the receivers applied to the High Court under s 345 of the Companies Act 1955 for directions as to how the remaining bullion was to be disbursed. The customers claimed that they held proprietary interests in the bullion. Thorp J rejected the claims of the non-allocated customers.¹ However, his Honour upheld the claims of the Walker & Hall customers as Walker & Hall Commodities Ltd had evinced an intention to part with property in the bullion and to appropriate it to the contract of sale or to hold it on trust for the purchaser.

In the Court of Appeal² the non-allocated claimants claimed proprietary remedies in respect of the purchase money paid under each contract. Goldcorp was declared a fiduciary on the basis that the business was “a system in which the client was totally dependent” on the company which had “practical independence ... from control or supervision by its clients”.³ The Court held that the purchase moneys could be traced into the general assets of the company. As a result, the customers were entitled to charges over the remaining bullion in priority to the Bank’s charge.

In the Privy Council four issues arose for consideration:⁴

- (i) whether the property in any bullion passed to the customers immediately upon the making of the purchases (a) simply by virtue of the contract of purchase itself, or (b) by virtue of the written and oral statements made by Goldcorp termed “the collateral promises”;
- (ii) whether the property in any bullion subsequently acquired by Goldcorp passed to the customer upon acquisition by Goldcorp;
- (iii) whether, when paying over the purchase money under the contract of sale, the customers retained a beneficial interest in them by virtue of an express or constructive trust;
- (iv) whether the court should grant a restitutionary remedy of a proprietary character in respect of the purchase money.

¹ *Re Goldcorp (in Receivership)* High Court, Auckland. 17 October 1990 M 1450/88 M 1332/89 M 1572/89 CP 498/89 CP 21/88 Thorp J.

² *Liggett v Kensington* [1993] 1 NZLR 257.

³ *Ibid*, 267.

⁴ *Kensington v Unrepresented Non-allocated Claimants* (1994) 5 NZBLC 103,453, 103,458.

Were any of these issues resolved in the affirmative, issues of tracing would arise.

The first two issues were answered in the negative, on the basis that the non-allocated claimants' purchases were contracts for the sale of unascertained goods⁵ under which title cannot pass until the goods have been ascertained.⁶

It was decided that although the purchase moneys were subject matter to which a beneficial interest might relate, the realities of the scheme denied the existence of such an interest. Similarly, no foundation for the grant of remedial restitutionary rights existed. However, the Privy Council expressed the view that remedial restitutionary rights might prove to be valuable means of attaining justice in the future.

Issues of tracing in respect of the non-allocated claimants were not discussed as no proprietary interests were found to exist. Nevertheless, *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd*⁷ was distinguished on the basis that it concerned a mixed fund. The fund in this case was non-existent.

The decision in *Kensington v Unrepresented Non-allocated Claimants*⁸ raises several questions. During the interval between purchase and delivery, the purchaser faces the risk of the seller's insolvency. Given that "the life-blood of commerce is the free flow of goods and intangibles in the stream of trade"⁹ unfettered by the conferring of real rights on purchasers, blanket protection of all purchasers in this period is undesirable and probably unattainable. Does the result in this case mean that a purchaser will only ever have personal rights against a seller? Is there anything a purchaser facing the risk of a seller's insolvency can do?

Proprietary rights do not pass under contracts for the sale of wholly unascertained goods until the goods are ascertained. This was the hurdle that proved insurmountable for the non-allocated claimants.¹⁰ It was referred to as "the very nature of things"¹¹ rather than some arid technicality upon which the claimants might have been defeated.

In respect of contracts for the sale of specific goods, *Kensington* illustrates that it is not enough to rely on the seller's representations that the goods have been ascertained. Despite such representations, ascertainment may not in fact have occurred. In the absence of grounds for equitable intervention, the purchaser will have a personal action in breach of contract only. Purchasers should therefore be advised to satisfy for themselves that actual ascertainment has been made.

Co-ownership of Goods in Bulk

An alternative which may provide protection for purchasers less inclined to take the risk of their seller's insolvency, is a contract for the purchase of an unidentified *proportion* or *percentage* of a bulk. Assuming title is intended to pass without delay on payment of the purchase price, the effect of such a contract is to create co-ownership of the bulk in the form of a tenancy in common.¹²

However, problems exist in relation to this alternative for which no satisfactory

5 Specifically, contracts for the sale of "generic goods". *Supra* at note 4, at 103,459-103,460.

6 Goode, *Proprietary Rights and Insolvency in Sales Transactions* (2nd ed 1989) 2; s 18 Sale of Goods Act 1908.

7 [1986] 1 WLR 1072.

8 *Supra* at note 4.

9 Goode, "The Right to Trace and Its Impact in Commercial Transactions - II" (1976) 92 LQR 528, 565.

10 *Supra* at note 4, at 103,459.

11 *Ibid.*

12 *Re London Wine Co (Shippers) Ltd* [1986] PCC 121; full text of judgment cited in Goode, *supra* at note 6, at 111.

answers have yet been proposed.¹³ These problems relate to the determination of the rights and liabilities of the respective parties where the bulk is smaller than the parties intended or supposed; where, after delivery of one or more proportions, it is discovered that part of the bulk has been damaged or has deteriorated, and where accretions to the bulk have occurred.

It may be possible for the rights and liabilities of the parties to be resolved by reference to one basic principle. A suggested principle is that prima facie, proportionate ownership of goods in bulk gives rise to proportionate shares in damage, depletion, or accretion to the bulk. This principle could be defeated or modified where its application would lead to results that would be manifestly unjust or where a contrary intention on the part of the parties could be shown.

This solution acknowledges that it is unlikely that a general rule which will achieve justice in all situations exists. Accordingly, a number of guiding principles should be developed.¹⁴ A principled response to the circumstances of each case would resolve the rights and liabilities of the parties.

A restricted approach to conceptualism has illicitly varying responses. In the United States the conceptual question whether title has passed has been considered "a silly issue" which cannot govern the modern commercial scene.¹⁵ Davies concludes that "[w]hat is needed is a comprehensive examination of the effect of each individual link in a commercial transaction".¹⁶ Narrow conceptualism is at least part of the reason why relief in the present case was denied. Whether or not the result in this case would have been any different, an approach to contracts for the sale of goods in bulk that reflects comprehensive examination, as opposed to narrow conceptualism, is to be preferred. The adoption of a basic prima facie principle is one way in which this might be achieved.

The Creation of Proprietary Interests: Remedial Constructive Trusts, Remedial Restitutionary Rights and Equitable Liens

When might the court create a proprietary interest in the purchaser's favour? In *Kensington* three possibilities were considered:

- (i) the granting of a remedial constructive trust over the bullion remaining on liquidation;¹⁷ or
- (ii) the creation of a remedial restitutionary right in the purchase moneys or their fruits superior to the security created by the Bank's charge;¹⁸ or
- (iii) the granting of an equitable lien in favour of the Walker & Hall claimants over all of the property of Goldcorp at the date of receivership to the value of the bullion unlawfully misappropriated by Goldcorp.¹⁹

Remedial constructive trusts were said to be created by a court as a measure of justice after the event. Principles of unjust enrichment appeared to affect their

13 *Rights to Goods in Bulk*, English Law Commission Working Paper No 112 (1989) 46. Davies, "Continuing Dilemmas with Passing of Property in Part of a Bulk" (1991) *Jo of Bus Law* 111 comments on this paper. See also *Section 16 of the Sale of Goods Act 1979 and Section 1 of the Bills of Lading Act 1855*, Scottish Law Commission Discussion Paper No. 83, as cited in Hudson, "Sales from Bulk" [1989] *LMCLQ* 420 n2.

14 These could be derived from the suggestions that have been advanced in the works *ibid*.

15 Davies, *supra* at note 13, at 130 n41.

16 *Ibid*, 131.

17 *Supra* at note 4, at 103,465.

18 *Ibid*, 103,469.

19 *Ibid*, 103,472.

creation, as a remedial constructive trust was declined on the basis that Goldcorp could not be enriched by the use of property it already owned.²⁰ As an alternative, the Court appeared to accept that a remedial constructive trust may be granted on the basis of some wrongdoing or injurious dealing in respect of the subject matter of the alleged trust. The wrongdoing in this case was considered a breach of contract only and thus an insufficient foundation for the creation of a remedial constructive trust.

The Court saw two possibilities for the creation of remedial restitutionary rights. The first possibility exists where there is “such an imbalance between the positions of the parties that if orthodox methods fail a new equity should intervene to put the matter right”.²¹ Their Lordships declined to allow this “new equity” to intervene on the ground that “[t]he fact that the claimants are private citizens whereas their opponent is a commercial bank could not justify the Court in simply disapplying the bank’s valid security”.²² This reasoning gives the impression that it is not the position of the plaintiff vis à vis the defendant that is to be considered, but the position of the plaintiff vis à vis the other creditors of the defendant.²³

If so, two points seem to follow. First, the requisite imbalance must be something more than a difference in commercial standing or ability to absorb loss. Presumably the knowledge or conduct of the other creditors will be relevant at this point.²⁴ Second, it seems that the creation of a remedial restitutionary right depends upon the positions of the parties that will be affected by the creation of such rights, whereas the creation of a remedial constructive trust appears to depend upon principles of unjust enrichment and the conduct of the defendant. However, earlier in the judgment no such distinction was made, for the Privy Council described “restitutionary proprietary interest” as “another name” for a remedial constructive trust.²⁵ The judgment is slightly unclear on this point.

The second possibility was to retrospectively create a situation in which the moneys were never part of the assets to which the Bank’s charge attached: “the claimants must be deemed to have a retained equitable title”.²⁶ The Court saw no scope for this possibility on the facts of this case. The reasoning suggests that the Court considered it necessary that the right arise prior to the fixing of the security. If so, it is difficult to see how the right can accurately be described remedial, for remedial rights do not exist until they are declared as a means of affording relief.²⁷ Accordingly, the real issue becomes whether, and upon what basis, remedial restitutionary rights may be given priority over the rights of other creditors. The factors relevant to this issue will be similar to those relevant to gauging the imbalance between the positions of the parties referred to above.

The Walker & Hall claimants sought an equitable lien over Goldcorp’s assets on the authority of *Space Investments*. The Privy Council stated that it would be inequitable to impose such a lien when these claimants had received the same certificates and trusted the company in the same way as the other claimants. There was no evidence that the other creditors at the date of receivership benefitted

20 A party may be enriched by its misrepresentations. However, it seems the Privy Council was not prepared to view the facts in this way.

21 *Supra* at note 4, at 103,469.

22 *Ibid.*

23 This seems appropriate in the context of an insolvency. Where the defendant is solvent however, will the issue of remedial restitutionary rights ever arise?

24 Waters has suggested that where a secured creditor has given the plaintiff the impression the defendant is solvent while knowing this to be untrue, the plaintiff should be given priority over the rights of the secured creditor: *Law of Trusts in Canada* (2nd ed 1984) 745.

25 *Supra* at note 4, at 103,465.

26 *Ibid.*, 103,469.

27 It is on this basis that these rights are generally thought to be unable to displace the rights of secured creditors. Goff & Jones, *The Law of Restitution* (4th ed 1994) 97.

directly or indirectly from the breaches of trust committed by Goldcorp, or that the claimants' bullion continued to exist as a latent fund in the property vested in the receivers.

This reasoning suggests that for an equitable lien to be imposed, not only must there be a breach of trust on the part of the defendant, but the parties that will be affected by the lien must have benefitted directly or indirectly from the grounds upon which it is said to arise. It is assumed that the court will look at all the circumstances of the case when deciding whether or not to impose an equitable lien. However, as is the case elsewhere in the judgment, the actual principles upon which the circumstances of each case are to be evaluated are not specified. The Court merely directed that when the time comes for consideration of *Space Investments*, the foundations, in principle, of the creation and tracing of equitable proprietary interests and the works of commentators dealing with the relevant issues²⁸ will require examination.

In conclusion, the Privy Council has left open the possibility of the creation of proprietary rights. Although the principles upon which such rights will be created remain obscure, some indications have been given as to the bases for future arguments.

Jacqueline Bryant

Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd [1994] 1 WLR 521. Privy Council. Lords Templeman, Goff, Mustill, Slynn, and Woolf.

*Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*¹ raised the important question whether commercial decisions of state-owned enterprises governed by the State-Owned Enterprises Act 1986 ("the SOE Act") are subject to judicial review. The Privy Council was provided with an opportunity to address this issue, and to resolve conflicting New Zealand authority in this area.

Electricity Corporation of New Zealand Ltd ("Electricorp") is a state-owned enterprise ("SOE") distributing bulk electricity to regional supply authorities, the largest of which is Mercury Energy Ltd ("Mercury"). Electricorp's contract to supply electricity to Mercury expired in 1988. The parties entered into an interim arrangement until a full substantive agreement could be negotiated. No such agreement had been reached by March 1992 when Electricorp gave 12 months notice of its intention to terminate the interim agreement.

Mercury commenced proceedings in the High Court to invalidate the notice of termination under private law (contract) and under public law. Mercury pleaded three public law causes of action. First, breach of statutory duty, alleging that Electricorp had failed to act in a "socially responsible manner" as required by s 4(1)(c) of the SOE Act. Second, abuse of monopoly position as a supplier of an essential commodity under the common law. Third, a claim for judicial review under the Judicature Amendment Act 1972 ("the JAA") alleging unreasonable or improper use of statutory power.

Barker J in the High Court² struck out the allegations of breach of statutory

²⁸ Particularly Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) 68 Can Bar Rev 315; Maddaugh and McCamus, *The Law of Restitution* (1990).

¹ [1994] 1 WLR 521.

² *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1993] 3 NZLR 53.

duty and abuse of monopoly position. Although his Honour held that the application for judicial review was not untenable, he noted that this cause of action was inappropriate in a commercial list case. Accordingly, it was also struck out until the case could be heard on the contractual causes of action.

In a detailed judgment,³ the Court of Appeal viewed Electriccorp's termination as a commercial decision by a company no different to any other incorporated and operating under the Companies Act 1955. They held that although Electriccorp was created by statute, it was not exercising any particular statutory power. Section 4(1)(c) of the SOE Act was held to state an objective rather than to confer a power. In general, the Court of Appeal reasoned that actionable duties do not arise with respect to particular acts of SOEs. Furthermore, the courts' "transaction focus" is inappropriate as a means of review where the statute envisages political and private law accountability based on overall performance. As a result, the Court of Appeal struck out all the public law causes of action unconditionally, including the application for judicial review under the JAA.

The Reviewability of a State-Owned Enterprise's Decision

The Privy Council addressed itself primarily to the question whether judicial review can be maintained against a state-owned enterprise. Their Lordships outlined the nature of SOEs as public bodies acting commercially and exercising power under contract, within a statutory framework. While the Court of Appeal had noted that Electriccorp's decision was no different in nature from any other made by a private body, the Privy Council pointed out that Electriccorp could make decisions in the public interest that could adversely affect the rights of individuals who had no redress.⁴

[I]n these circumstances the decisions of the [corporation] are amenable in principle to judicial review both under the Act of 1972 as amended and under the common law.

That Electriccorp is a public body, with ministerial shareholders who are politically accountable, reinforced this finding. This implicitly dismissed any suggestion that may have followed from the Court of Appeal's judgment that judicial review of the exercise of statutory power in the public sphere depends on the source of the power in statute.⁵ Instead, their Lordships looked at the public nature of the body and power in question.⁶ Rather than requiring the power to be sourced from a particular statute, they implicitly accepted that "publicness" may follow from mere statutory recognition or from acting under a general empowering provision.

A "statutory power of decision" is required for judicial review under the JAA.⁷ There are two conflicting lines of authority on this point in New Zealand. In

3 *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551.

4 *Supra* at note 1, at 526.

5 See, for example, Chen, "Judicial review of state-owned enterprises at the crossroads" (1994) 24 VUWLR 51, 61.

6 See, for example, *R v Panel on Takeovers and Mergers, ex parte Datafin PLC* [1987] QB 815 (CA).

7 In its reference to the possibility of review under the common law the Court also accepts that the JAA may be procedural only, co-existing with the original common law remedies which do not require the existence of a "statutory power" to attract judicial review. See Taggart, "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] NZ Recent Law Review 343.

Webster v Auckland Harbour Board,⁸ Cooke J (as he was then) held that an exercise of contractual powers pursuant to a general empowering provision by a body with statutory recognition or origins is within the scope of the JAA. By contrast, in *New Zealand Stock Exchange v Listed Companies Association Inc*,⁹ the Court of Appeal held that the particular power must be conferred explicitly by statute. This acts to limit the application of the JAA.

In *Mercury*, Richardson J had applied the *Stock Exchange* approach. However, in allowing reviewability in principle, the Privy Council seems to have preferred the *Webster* approach, as did Barker J in the High Court. The *Webster* rationale is that more is expected of public bodies than private commercial bodies in the exercise of power and that accordingly these bodies, even when acting in a private commercial capacity, should still be subject to judicial review.

Having decided that SOEs are, in theory, reviewable, the Privy Council moved to consider the situation in this case.

Section 4 of the State-Owned Enterprises Act 1986

Section 4 states that:

- (1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be —
- (a) As profitable and efficient as comparable businesses that are not owned by the Crown; and
 - (b) A good employer; and
 - (c) An organisation that exhibits a sense of social responsibility ...

In the Court of Appeal, Richardson J took a “large picture approach”¹⁰ to the interpretation of s 4.¹¹

[T]he legislature intended a broader approach to accountability rather than the transaction focus of the Courts.

His Honour found that s 4 was not “directed to specific acts or omissions”¹² and that s 4(1)(a), (b) and (c) were not to be considered independently of one another. None in isolation gave rise to a specific duty upon the SOE. He further highlighted the subjectivity of “social responsibility” in s 4(1)(c) and the unsuitability of the Court to assess what this entailed, leaving the assessment and balancing of these considerations to the SOE in question.

The Privy Council made only fleeting reference to the provisions of s 4(1)(c). Furthermore, their Lordships did not address Richardson J’s detailed statutory interpretation, merely stating that:¹³

The express statutory duty of the [corporation] is to pursue its principal objective of operating as a

8 [1987] 2 NZLR 129.

9 [1984] 1 NZLR 699.

10 *Supra* at note 3, at 558.

11 *Ibid*, 559.

12 *Ibid*, 560.

13 *Supra* at note 1, at 528.

successful business, by being profitable and efficient, by being a good employer and by exhibiting a sense of social responsibility.

These considerations were for the corporation to balance in each case. The Privy Council ignored the possibility that subparagraphs (a) to (c) might be relevant (or even mandatory) considerations to be met “when [the SOE] is able to do so”.¹⁴

This suggests an approach to s 4 whereby “successful business” is interpreted in light of subparagraphs (a) to (c). Their Lordships did not state whether each clause will give rise to an actionable duty, but because balancing is left to the corporation, balancing the existence of an enforceable duty is unlikely. The Privy Council’s failure to deal with the detailed analysis of the Court of Appeal results in uncertainty. The Court of Appeal’s reasoning was neither directly rejected nor indeed addressed.

This failure to look at the statutory provisions can be contrasted with the Privy Council’s detailed analysis of s 4 in *New Zealand Maori Council v Attorney-General*¹⁵ where it was found that s 4(1)(a), (b) and (c) were to be treated as having the same weight. The profit objective has been seen as no more important than the objective for social responsibility - “successful business” is to be interpreted on the criteria of (a) to (c).¹⁶ This finding was not referred to in the *Mercury* judgment.

Limits on Judicial Review: the Return to and Confinement of *Wednesbury*¹⁷

Despite the Privy Council’s finding that SOEs are theoretically reviewable, their Lordships severely confined the situations in which this will be possible.¹⁸

It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract ... will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.

This confinement is clearly the result of the Privy Council’s view that SOEs should be politically accountable rather than accountable through the courts. The judgment outlined the measures of accountability or “retribution” which exist through Ministers as shareholders. The efficacy of these measures was not questioned.

The Privy Council quoted at length from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*¹⁹ which set the limits on the scope of judicial review. Under these limits, a judicial review is as to process, and not to merits, nor is it an appeal. The court can intervene when a decision is based on irrelevant considerations, ignores relevant considerations, or is so unreasonable that no reasonable decision-maker could have come to it.²⁰

However, their Lordships took a restricted view of *Wednesbury*. They confined judicial review of SOEs to cases of fraud, corruption, and bad faith. This places a heavy onus on the applicant for judicial review. The Privy Council stated:²¹

14 See Taggart, “Recent Developments in Administrative Law”, unpublished seminar, Legal Update Series, University of Auckland (1994).

15 [1994] 1 NZLR 513, 519 (PC).

16 *Wellington Regional Council v Post Office Bank Ltd* High Court, Wellington. 22 December 1987 CP 720/87 Greig J.

17 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

18 *Supra* at note 1, at 529.

19 *Supra* at note 17, at 228-230.

20 *Ibid*, 230.

21 *Supra* at note 1, at 528.

The court can only interfere if [Mercury] alleges and proves that the decision was not made according to the law.

The allegations of administrative impropriety remained unsupported. Given the restricted *Wednesbury* approach applied to “the law”, it is not surprising that a case was not made out. Such an approach seems inconsistent with the New Zealand context which has seen recent shifts away from the old and limited *Wednesbury* concept of unreasonableness.²² Clearly, despite the Privy Council’s initial assertion of reviewability in principle, their Lordships in effect put SOEs beyond the reach of judicial review except in the most blatant cases of irrationality.

Conclusion

The Privy Council thus found that the claim for judicial review had to fail, that there was no statutory duty to continue the arrangement,²³ and that the lawful termination of the contract was not an abuse of the duties of a monopoly supplier.²⁴ Their Lordships saw that if the contract actions failed, these public law allegations would merely:²⁵

[C]onstitute attempts to obtain, by the declaration sought, specific performance of a non-existing contract. The exploitation and extension of remedies such as judicial review beyond their proper sphere should not be encouraged.

The Privy Council’s assertion of strict limits effectively precludes judicial review of public bodies acting in the commercial sphere. This seems inconsistent with its earlier and coherent affirmation of reviewability in principle of SOEs and only creates uncertainty from our highest court.²⁶ Adding to this uncertainty is the failure to address the conflicting lines of New Zealand authority and the Court of Appeal’s reasoning. This case constitutes a lost opportunity to deal conclusively with these issues.

Kent N. Phillips

McKnight v NZ Biogas Industries Ltd [1994] NZRMA 258. Court of Appeal. Cooke P, Casey, Gault, McKay and Fisher JJ.

In *McKnight v NZ Biogas Industries Ltd*¹ the Court of Appeal was called upon to consider the mental element involved in an offence under s 338 of the Resource Management Act 1991 (“the RMA”) arising out of a contravention of s 15(1)(b).²

²² See *New Zealand Fishing Industry v Minister of Fisheries* [1988] 1 NZLR 544; *Webster v Auckland Harbour Board*, supra at note 8.

²³ On their Lordships’ cursory analysis of s 4.

²⁴ The only duty was to supply at a fair and reasonable price and disconnection had not been threatened.

²⁵ Supra at note 1, at 529.

²⁶ Cf the Privy Council’s analysis in *New Zealand Maori Council*, supra at note 15, of s 4 and SOEs.

¹ [1994] NZRMA 258

² Section 15 provides that:

(1) No person may discharge any—

(b) Contaminant onto or into land in any circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water ...

The significance of this case lies in the Court's exploration of the effectiveness of enforcement mechanisms under the RMA.

NZ Biogas Industries Ltd ("Biogas") had the responsibility of installing and operating a waste treatment plant for a factory in East Tamaki. The treatment involved the reduction of the biological oxygen demand of waste in a digester: a 450,000 litre capacity bladder of elastic rubber material. It was contained in an excavation in the factory grounds. After complete treatment, the waste generated was to be passed into a sewer. During excavation, the Managing Director of Biogas³ had a trench dug and a drain installed for any water that might seep into the excavation outside the bladder.

The bladder ruptured and discharged 300 cubic metres of waste which entered a stream, transporting backfilled earth in the process. The failure of the bladder was attributable to bladder distension beyond the limits of elasticity. The insufficient compacting of the backfilled earth had contributed to this failure.

Temm J in the High Court⁴ had upheld the District Court's decision⁵ that the interpretation of the phrase "allow to escape",⁶ being an extended meaning of the word "discharge", required an element of awareness. He found that Biogas lacked awareness of the defect, and therefore did not "allow" the contaminant to escape.

Gault J, after setting out the relevant portions of the RMA, delivered the unanimous judgment of the Court of Appeal. His Honour examined the meaning to be given to "discharge" in s 15(1). "Discharge" is defined in s 2(1) to include "emit, deposit and allow to escape". Gault J construed the inclusion of "emit" as evidence that "discharge" was intended to cover the consequences of activities carried out by a person. The inclusion of "allow to escape" was construed to further broaden the meaning of discharge beyond direct action by a person. In addition, s 341(1), creating a strict liability offence, states that intention is not required to be proved by the prosecution. It followed from this that a person may discharge a contaminant within s 15(1) without intending to do so. Further support for such an interpretation of s 15(1) could be gained through an examination of the statutory defences.⁷ These defences extend to situations where clearly the person had no intention to discharge the contaminant.

Gault J found the decision of the Supreme Court of Canada in *R v City of Sault Ste Marie*⁸ unhelpful in the interpretation of "discharge". His Honour distinguished the case on the basis of the different wording of the statutes: s 32 of the Ontario Water Resources Act 1970 included the alternative of "causing to discharge". However, Gault J accorded "discharge" in s 15(1) its ordinary and natural meaning. Clarified by the definition in s 2(1), it clearly extended to "causing to discharge". Such an approach is consistent with the rationale for public welfare regulatory offences and the focus in the RMA on the effects of activities. Policy considerations were also relevant in this interpretation of the strict liability offence. His Honour stated "[i]n the context of an environmental protection statute there is everything to be said for adopting [this] meaning".⁹

The Court of Appeal placed considerable reliance on the House of Lords'

3 Biogas was being prosecuted directly under s 341 without recourse to the vicarious liability available under s 340 if the Managing Director had been prosecuted. See Grinlinton, "Enforcement Mechanisms Under the RMA" (1992) 105 PQ 15, 19, regarding corporate liability and the possible availability of the defence of due diligence.

4 *McKnight v NZ Biogas Industries Ltd* (1993) 2 NZRMA 681.

5 *McKnight v NZ Biogas Industries Ltd* District Court, Auckland. 5 July 1993 CRN2048024848 Judge Sheppard.

6 Contained in s 2(1) of the RMA.

7 Section 341(2).

8 (1978) 85 DLR (3d) 161 (SC).

9 *Supra* at note 1, at 265.

decision in *Alphacell Ltd v Woodward*.¹⁰ Having established the definition of discharge, Gault J focused on the causation issue between the person and the discharge. In *Alphacell* their Lordships adopted a common sense approach to the interpretation of the word “causing”. The facts of that case led the House of Lords to conclude that conduct by a person, of a deliberate operation or activity which leads to the prohibited result, even if arising from a defect, will prevent that person from claiming that they did not cause the prohibited result. Gault J concluded:¹¹

The causal link between the person charged and the discharge will be an issue of fact in each case. Decisions on different statutory provisions must be considered with care.

His Honour surveyed a number of cases to illustrate this,¹² showing the divergence in results possible when the principles of *Alphacell* were applied to various fact situations. He placed great emphasis on the common sense approach adopted by the House of Lords in *Alphacell*. With regard to the mental element, Lord Salmon stated:¹³

It seems to me that, giving the word ‘cause’ its ordinary and natural meaning, anyone may cause something to happen, intentionally or negligently or inadvertently without negligence and without intention.

Gault J chose to return briefly to *R v City of Sault Ste Marie* to further support this argument regarding causation, despite having already distinguished this case. His Honour then reached the conclusion that:¹⁴

Once it is accepted that to discharge in s 15(1) includes to cause to be discharged, the present case is indistinguishable from the *Alphacell Ltd* case.

It is submitted that his Honour went too far in this conclusion. Gault J distinguished *R v City of Sault Ste Marie* due to the inclusion of “causing the discharge” in the Canadian statute. In *Alphacell* the House of Lords was called upon to consider the words “if he causes or knowingly permits to enter a stream”.¹⁵ To be consistent, his Honour should have distinguished both cases or neither. *McKnight* was only indistinguishable from *Alphacell* in that both accused parties were engaged in an activity, which resulted in a prohibited discharge of contaminant flowing by way of the drain into the stream. Thus the application of the general principles in *Alphacell* would have established, on the particular facts here, the causal link necessary to establish the discharge. Substantively, this would have achieved the same result.

Gault J believed that even if a restrictive interpretation had been placed on “discharge”, limiting it to “allow to escape”, the awareness implicit in this interpretation would still not have permitted Biogas to escape liability. The test of awareness adopted was that of a reasonably prudent person in the circumstances. Failure to investigate and adopt appropriate preventative measures in the face of

10 [1972] 2 All ER 475 (HL).

11 *Supra* at note 1, at 266.

12 *Ibid.*

13 *Supra* at note 10, at 490.

14 *Supra* at note 1, at 267.

15 Section 2(1) Rivers (Prevention of Pollution) Act 1951, repealed by s 108 Sch 4 Control of Pollution Act 1974 (Eng).

facts from which a reasonable person would conclude that escape could occur, would amount to "allowing" an escape to occur. The findings of fact in the District Court established that the respondent had failed to seek advice from an engineer regarding the design, installation, and operation of the digester. The conclusion was that the respondent had allowed the contaminant to escape, facilitating a discharge.

Gault J rightly considered it unnecessary to dwell on the issue of public welfare offences of strict liability. The issue of strict liability and defences is governed by s 341. His Honour noted:¹⁶

Indeed the section may be seen as, in the environmental field, an adoption and codification by Parliament of the principles evolved in [the] cases.

This is perhaps a simplification of the actual state of affairs. Section 341, with its narrow defences of due diligence or total absence of fault, appears to be more stringent than a mere codification of the strict liability public welfare regulatory offence.

The statutory codification of any common law principle necessitates a more rigorous analysis and application than that taken by the Court. Also, an examination of the statutory defences in the RMA indicates the imposition of a considerable onus upon the defendant. Rather than proving absence of fault beyond reasonable doubt, the defendant must establish the cumulative requirements of s 341(2) and (3). Thus, under s 341(2)(a) the defendant must prove that the discharge arose from necessity, and that the conduct was reasonable, and that the defendant took adequate steps to mitigate the effects of the discharge. Even in situations where the events were beyond the control of the defendant, she or he must prove that the event was not reasonably foreseeable and that adequate countermeasures were taken after the discharge occurred.¹⁷

These stringent requirements are consistent with the effects-based focus of the RMA. Furthermore, if a defendant wishes to rely on s 341(2), he or she must first satisfy s 341(3) which requires notification, within seven days, of reliance on this subsection. These requirements certainly reinforce the view that s 341 displaces the common law defence of total absence of fault, and is more demanding than that common law defence.

This judgment is noteworthy for more than the enunciation of the inapplicability of the common law principles and of the lack of any mental requirement under s 15(1)(b). It embodies the philosophy behind the RMA, especially the importance of the protection of natural and physical resources.¹⁸ The Court of Appeal directed that the matter be remitted to the District Court for further consideration. Obviously the District Court, having made the initial findings of fact, was in a better position to exercise the judicial discretion available in sentencing, and thus meet the demands of the RMA.¹⁹ A short time before this decision, Barker and Williams JJ in *Machinery Movers Ltd v Auckland Regional Council*²⁰ had considered

¹⁶ Supra at note 1, at 264. The cases include: *Civil Aviation Dept v MacKenzie* [1983] NZLR 78 (CA); *Millar v Ministry of Transport* [1980] 1 NZLR 660 (CA).

¹⁷ Section 341(2)(b).

¹⁸ For a discussion of the principles underlying the Act, see, for example, Kerkin, "Sustainability and the Resource Management Act 1991" (1993) 7 AULR 290.

¹⁹ *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492, 501 per Barker and Williams JJ: "[T]he much wider sentencing powers given by the RMA ... was a deliberate move to encourage a flexible and innovative approach to sentencing, which seeks not only to punish offenders but also to achieve economic and educative goals." Emphasis added.

²⁰ *Ibid.*

sentencing criteria for an offence under s 15(1)(b).²¹ Any harshness occurring through the imposition of strict liability may be ameliorated at the sentencing stage.²²

It would appear that in *McKnight*, the Court of Appeal has firmly established the absence of a mental element under ss 15(1)(b), 338 and 341. The common law principles of strict liability have been superseded by the RMA in this area. It is possible that the codification has resulted in something harsher than the traditional strict liability offences. Some uncertainty still remains as to s 340 and also in the choice here to prosecute directly under s 341. Certainly the imposition of the strict liability under s 341 will promote the internalisation of the external effects of commercial activities, increasing economic efficiency and protecting the natural and physical resources of New Zealand. The courts will have a significant role to play in balancing the competing demands of the RMA. The apparent inflexibility of ss 15(1)(b) and 341 will demand innovation in sentencing from the courts to ensure that the potential of the legislation is attained.

Alastair Jewell

R v Crime Appeal 406/92 Court of Appeal. 14 March 1994, CA 406/92. Cooke P, Casey, Hardie Boys, McKay, and Thomas JJ.

This was an appeal against an imprisonment of two and a half years. The appellant had pleaded guilty to charges of indecent assault upon a girl between the ages of 12 and 16¹ and incest.² In the High Court, Ellis J held that the sentencing guidelines bound him to impose imprisonment, but considered that a non-custodial sentence was in the interests of victim and family.³

Psychological reports indicated the appellant was unlikely to reoffend and was suitable for treatment. It was said that the offending arose out of "naive and inappropriate beliefs" about helping the victim gain sexual experience, rather than "malicious and erotic intent". The psychologist concluded that the victim experienced a deep sense of guilt and felt responsibility for her father. Accordingly, the probation report recommended a non-custodial sentence.

The Court of Appeal undertook a comprehensive review of the guidelines, analysing a considerable amount of research data and opinion. The Court then introduced new sentencing guidelines for incest offenders, allowing non-custodial sentences conditional on treatment. The court is clearly moving towards a model of criminal justice similar to that of therapeutic jurisprudence.⁴ The new approach

21 The severity of the sentence would depend on the nature of the environment affected; the extent of the damage; the deliberateness of the offence; and the attitude of the accused.

22 See Grinlinton, *supra* at note 3, at 18: "In practice it is likely that the courts will hesitate to impose the most serious penalties available, unless some element of culpability is proven by the prosecution, even though proof of intention is not necessary to establish the offence."

1 Crimes Act 1961, s 134(2)(a).

2 Crimes Act 1961, s 130.

3 As cited in *R v Crime Appeal 406/92* Court of Appeal. 14 March 1994 CA 406/92 Cooke P, Casey, Hardie Boys, McKay, and Thomas JJ, p4.

4 "Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. This approach suggests that the law itself can function as a therapist. Legal rules, legal procedures and the roles of legal actors, principally lawyers and judges, may be viewed as social forces that can produce therapeutic or anti-therapeutic consequences. The prescriptive focus of therapeutic jurisprudence is that, within important limits set by principles of justice, the law ought to be designed to serve more effectively as a therapeutic agent." Wexler, "Therapeutic Jurisprudence and the Criminal Courts" (1993) 35 *William and Mary Law Review* 279, 280.

is orientated towards the victim's interests and rehabilitation of the offender and family, stressing that the victim's interests can militate against imprisonment where she or he feels bonded to or responsible for the offender, overturning the previous emphasis on deterrence, denunciation, and expiation.

Case Law

The Court, in particular McKay J, considered case law from New Zealand and overseas. New Zealand's leading case, *R v B*,⁵ listed the aims of sentencing as prevention and denunciation, explicitly rejecting deterrence, and rejecting non-custodial sentences as inadequate. The courts have held that the victim's and family's interests are no more relevant than in any other case, and do not constitute special circumstances under s 5 of the Criminal Justice Act 1985.⁶ However, the courts have commented that this area was open to change either by legislative reform or significant social research.⁷

The English courts have also recognised that very long custodial sentences have no deterrent effect. Instead, very detailed sentencing guidelines for incest have been set.⁸ The Australian courts are currently imposing non-custodial and mixed sentences where the circumstances merit, as well as custodial sentences. When sentencing, the rehabilitation of the family, and of the offender, has become an important consideration.⁹ In Canada, the courts have significantly altered their stance. Previously, sentencing was seen in terms of balancing denunciation with the competing interest of restoring the family. Now the courts stress denunciation and deterrence.¹⁰

It is submitted that in New Zealand the reduction in the length of sentences for child sexual abuse should be considered in comparison to sentences for sexual assault against adults, a point made by the Canadian courts.¹¹ Sentences given in incest cases should surely bear comparison with the sentences given in crimes regarded as similarly serious. While the Court states that incest is commensurate with adult rape,¹² it has now instituted a sentencing regime for all incest cases within certain parameters which differs widely from those considered appropriate in rape.

Psychiatric Opinion and Overseas Experiments

The framework for the Court's approach is its understanding of the etiology of incest and offender treatment. Two divergent perspectives on the causes and treatment of incest were identified. The "family systems" model perceives incest as symptomatic of a dysfunctional family, with all members sharing responsibility for the offender's behaviour. The aim is to preserve and rehabilitate the family. By contrast, the "child advocate" model sees the offender as solely responsible, due to an immature need to dominate and control. Therapy focuses primarily on the victim.

The Court saw validity in both views. A new "multi-modal" etiology was outlined, recognising incest as symptomatic of a dysfunctional family and incorpo-

5 [1984] 1 NZLR 261.

6 See, for example, *R v T & T* (1982) CRNZ 503.

7 See, for example, *R v Matenga* Court of Appeal. 3 March 1986 CA 315/84.

8 *Attorney-General's Reference (No. 1 of 1989)* (1990) 90 Cr App R 141.

9 See, for example, *R v J* (1982) 45 ALR 331.

10 See, for example, *R v WBS, R v MP* (1992) 73 CCC (3d) 530, 551.

11 *Ibid.*

12 *Supra* at note 3, at p39.

rating areas of agreement between both models. This is a complex analysis which demands careful reading. Failure to do so may well attract adverse comment from therapists working in the area of sexual abuse. For example, modern therapists might draw a distinction between the understanding that incest may be perpetuated and supported by dysfunctional patterns of behaviour within the family, including inter-generational patterns, and the apportionment of blame for the abuse.

This case is a paradigm of the pressure that courts are now under to use scientific data as the basis for their factual findings. Cooke P described the Court as "saturated with data and opinion".¹³ American academic writers have commented critically upon the American courts' use of scientific data. Some of those criticisms arguably apply here.

Sperlich's major criticisms of US Supreme Court decisions are the use of opinion evidence unsupported by research data, and the use of data from studies utilising inadequate methodology and analysis.¹⁴ Sperlich asserts that these flaws render the judgments of fact made in reliance upon them constitutionally invalid. In *R v Crime Appeal 406/92*,¹⁵ the efficacy or otherwise of current sentencing policy with regard to incest offenders was at issue. The Court of Appeal largely based its decision upon data which can only be classed as unsubstantiated opinion, and would be invalid according to Sperlich. Indeed, the Court notes that there is very little hard data on what treatments are effective, and the data that exists is purely preliminary, as treatment worldwide is still in its early stages. In view of this, the Court calls several times for research to be undertaken. Jones makes significant criticisms of data released by the Giarretto programme, on which Court and counsel placed much reliance.¹⁶ There is certainly reason to query whether the Court of Appeal should have developed a new approach to sentencing incest offenders when the evidence available was inconclusive. Arguably, the Court's own criteria for changing sentencing policy¹⁷ has not been met.

Sperlich is also critical of the wisdom of allowing counsel to select and present data to the Court.¹⁸ Rosen argues that:¹⁹

The adversary system almost induces opposing counsel to misrepresent and manipulate facts before the Court. The primary goal of the advocate is, after all, to achieve a favourable legal decision even at the expense of empirical truth.

The Court should perhaps in future consider appointing an *amicus curiae*.

The New Approach

A non-custodial sentence conditional on supervision, good behaviour, and counselling is now possible. The offender must accept responsibility, plead guilty and be assessed as suitable for treatment and unlikely to reoffend. The sentence must be in the victim's best interests. The family's prospects of rehabilitation are also important. Setting sentences on the grounds of exceptional circumstances or rules and presumptions is inadequate, as is close comparison between cases.

¹³ Ibid, p8.

¹⁴ Sperlich, "And then there were six: the decline of the American jury" (1980) 63 *Judicature* 262, 268-271.

¹⁵ *Supra* at note 3.

¹⁶ Jones, "The Untreatable Family" (1987) 11 *Child Abuse & Neglect* 409, 411.

¹⁷ This criteria is "significant social research", *supra* at note 3, at p26.

¹⁸ Sperlich, "Social Science evidence and the courts: reaching beyond the adversary process" (1980) 63 *Judicature* 280, 285-288.

¹⁹ Rosen, *The Supreme Court and Social Science* (1972) 202, as cited by Sperlich, *ibid*, 286.

The Court emphasised that this approach comes within the wide range of sentencing options already available and gave guidance on the appropriate choices. A suspended sentence²⁰ is particularly appropriate for an incest case where there is contrition, a long delay before prosecution, and no risk of reoffending.

Outcome

The Court allowed the appeal, substituting a sentence of eight months periodic detention and two years supervision on conditions. A breach will render the offender liable for resentencing.

It is submitted that the Court's approach fails to give the requisite message to society as a whole. Punishment and retribution have a place in sentencing as they serve to mark and reinforce basic, yet important, social values. The condemnation of child sexual abuse upholds both the taboo which is placed upon incest and which is integral to most societies, and the basic right of children to protection from abuse.

The fact remains that society reads long sentences as signalling the severity of the crime and the court's condemnation. By shortening sentences, the Court runs the risk of minimising the seriousness of the offence. This judgment could be read as supporting a message that a relatively low value should be placed on children's rights to safety and respect.

There are several points at which the Court of Appeal's characterisation of the abuse in question raises doubts about its understanding of sexual abuse and conflicts with its own statements on etiology. First, the Court clearly accepts that the incest arose out of a poor relationship between the offender and his wife, so that the offender turned to his daughter to supply the "lack of warmth"²¹ in his marriage. It appears that this is regarded, in some way, as a mitigating feature.

This is a dangerous view for a court to take when sentencing an offender. The offender is absolved of much of the responsibility for his behaviour by the implication that the abuse is the mother's fault for neglecting her marital "duty" to him, and is the direct, and in some way understandable, consequence of a bad marriage.

Second, the offender's claim that he was "actually helping his daughter in some way through sexual intimacy" was accepted by the psychiatrist in his report.²² Again, the Court seems to regard this as lessening the offender's culpability. However, it is interesting to note that later the Court expressly recognises that offenders commonly rationalise or minimalise the offending, indicating that the offender has not genuinely accepted responsibility for his or her actions.²³

Both the above characterisations stand in sharp contrast to the necessity that the offender fully accepts responsibility for his or her behaviour before being able to respond to the treatment. This casts doubt on the extent to which the Court's confidence in the offender having accepted responsibility is justified.

Third, the Court characterises sexual assault as not inherently "violence" in the ordinary sense of the word.²⁴ This absence of physical violence is implicitly a mitigating feature. It reflects the adoption of Dr Zelas' suggestions that criteria for inclusion in a treatment programme be that the offender "had not used force or violence in the offences".²⁵ However, as the Canadian courts now recognise, intra-

20 Section 21A Criminal Justice Act 1985, as inserted by s 7 Criminal Justice Amendment Act 1993.

21 *Supra* at note 3, at p3.

22 *Ibid.*

23 *Ibid.*, p43.

24 *Ibid.*, p4.

25 *Ibid.*, p13.

familial abuse is inherently violent in the sense of coercion through the abuse of parental authority.²⁶ In *R v Tremblay*²⁷ LeBel JA identified the abuse by the mother's companion as violent:²⁸

[T]his act was submitted to by means of moral sausion, at the very least In the absence of physical violence, moral violence emanated from the relationship in which [the defendant] found himself vis à vis the victim.

This case signals a significant shift in the objectives of sentencing, in particular a move to victim-based sentencing and to rehabilitating the offender. While there is a strong need to increase the consideration given to the victim, and an equally pressing need to find more effective ways in which to deal with child sex offenders, it is questionable whether the older objectives of denunciation, expiation, and deterrence should be completely abandoned. Anecdotal reports from other therapists, and parts of the evidence of the expert witnesses²⁹ suggest that these objectives, embodied in a sentence of imprisonment, are vitally important to the offender's full realisation of his or her crime. The scientific evidence is not yet clear enough to justify such a radical development as non-custodial sentences. Consequently, a less innovative approach might have been more appropriate until the necessary information is available. The "extraordinary circumstances" provision of the Criminal Justice Act might have been relied upon in the meantime.³⁰

Emily Henderson

Tavita v Minister of Immigration [1994] 2 NZLR 257. Court of Appeal. Cooke P, Richardson and Hardie Boys JJ.

This emerges as a case of possibly far reaching implications.¹

These are notable words from a Court which avoided deciding whether international obligations must be taken into account by the Executive when exercising a discretionary power. Despite this avoidance, the Court of Appeal in *Tavita v Minister of Immigration*² has implied that if required, it would answer that question in the affirmative.

Viliamu Tavita had been issued with a removal warrant³ under s 54 of the Immigration Act 1987 ("the Act"). He appealed to the Minister under s 63 of the Act seeking a cancellation of the warrant or a reduction of the five year prohibition on returning to New Zealand on humanitarian grounds. Tavita argued that returning to Samoa would cause undue hardship for him as he had no means of financial support. This appeal was unsuccessful.

26 Renaud, "Suffer the Little Children: Judicial Notice of the Harmful Sequelae of Sexual Assault" (1993) 35 Crim L Q 388, 395.

27 (1988) 18 QAC 263 (CA) as cited in Renaud, *ibid*, 394 n21.

28 *Ibid*, n22.

29 See, for example, *supra* at note 3, at p17.

30 Section 5, Criminal Justice Act 1985, as substituted by s 2 of Criminal Justice Amendment Act 1987.

1 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266.

2 *Ibid*.

3 Now termed a removal order.

Judicial review proceedings were brought in the High Court seeking, *inter alia*, an interim order quashing the removal order and directing a rehearing of the applicant's appeals to the Minister. McGechan J refused the application for review.⁴

In the Court of Appeal reliance was placed on New Zealand's international obligations under the International Covenant on Civil and Political Rights, its Optional Protocol, and the Convention on the Rights of the Child 1989, all of which have been ratified by New Zealand. Those parts of the instruments relied upon related to the rights of family and child.

Tavita's circumstances had radically altered from the time of his appeal to the Minister. He now had a daughter, born three months after the Minister's decision. He had married the child's mother, who was applying for permanent residency herself. Despite this, the Minister, for the purposes of the Court of Appeal hearing, declared in sworn affidavit that his decision would have been no different. It was not uncommon for persons unlawfully in New Zealand to have children born here and to marry in this country. Tavita's circumstances were not considered exceptional. However, no mention was made of the international instruments in this affidavit, and the Crown accepted that the Minister had not taken them into account.

The Court of Appeal defined the major question in the proceedings as being:⁵

[A]gainst the background of such powers as are available under the Immigration Act, should the Minister and the Department have regard to the international obligations concerning the child and the family, in considering whether now to enforce the removal order?

After reviewing two decisions of the European Court of Human Rights (*Berreghals v Netherlands*⁶ and *Beldjoudi v France*⁷) the Court concluded that the basic rights of the family and the child are the starting point when applying the international instruments, stating that "[c]onsideration from [this] point of view could produce a different result"⁸ from that arrived at by the Minister and McGechan J. The Crown conceded that this case had never been considered from that point of view.

The case involved some technical questions regarding the ability of the Minister to now review Tavita's case and give specific directions. However, the main point in the Crown's submissions was that, in any event, the Minister and the Department of Immigration are entitled to ignore the international instruments. The Court found that to be an unattractive argument, and without deciding the point, stated that "there must at least be hesitation about accepting it".⁹

As a result, the present case falls short of considering whether, when an Act is silent as to relevant considerations, international objectives are required to be taken into account. The Court merely stated:¹⁰

The Minister or Associate Minister ... had no opportunity to consider [the case] in light of the rights of the child It may be thought that the appropriate Minister would welcome the opportunity of reviewing the case in light of an up-to-date investigation and assessment The opportunity of reconsideration should be given.

4 *Tavita v Minister of Immigration* High Court, Wellington. November 1993 CP 422/93. Noted [1993] BCL 2173; 16 TCL 48/5.

5 *Supra* at note 1, at 262.

6 (1988) 11 EHRR 322.

7 (1992) 14 EHRR 801.

8 *Supra* at note 1, at 265.

9 *Ibid*, 266.

10 *Ibid*

No new application had been made by Tavita after his circumstances had changed. Consequently, the Court adjourned the appeal to enable the appropriate application to be made in light of the changed circumstances and to enable the Minister to consider any such application.

Therefore, in effect, the Court did grant a remedy: reconsideration by the Minister in the light of the changed circumstances. Reconsideration is outside the normal procedure set out in the Act. However, the Court expressly refrained from deciding exactly what the Minister must take into account. Their Honours certainly give no indication of the weight to be accorded to international obligations.

Accordingly, the case is not authority for the proposition that international obligations must be taken into account in administrative decision making. Still less is it authority for the proposition that such obligations would be determinative. The Court cited *Ashby v Minister of Immigration*¹¹ as recognising that "some international obligations are so manifestly important that no reasonable Minister could fail to take them into account".¹² However, those comments by Cooke J (as he then was) were expressly obiter, as he said in *Ashby* that he would "express no concluded opinion on that point, as the Minister did have [the Gleneagles Agreements] in mind".¹³

Thus the question whether international obligations need to be taken into account remains unanswered, although the Court in *Tavita* seems to have given strong indication that it might not follow the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Brind*,¹⁴ noting that case as being "in some respects a controversial decision".¹⁵

Their Lordships in *Ex parte Brind* rejected the argument that there is a presumption that Parliament, when legislating, intends to comply with existing Treaty obligations. Such obligations could only be applied to a statute where there is a real ambiguity, that is, where the words are capable of bearing more than one meaning. This was in part based on the view that it was not for judges to incorporate a Convention which Parliament had so far declined to incorporate into domestic law.

There is the suggestion in *Tavita* that where a discretionary power is silent as to relevant considerations, the presumption is that international obligations are actually relevant and perhaps mandatory considerations. This suggestion is supported by the following:

- (i) The judgment indicates that in a future case the Court might be receptive to the argument that the Optional Protocol incorporates the United Nations Human Rights Committee into New Zealand's judicial structure and that "[l]egitimate criticism could extend to the New Zealand Courts"¹⁶ if they were to allow the Executive to ignore International obligations in exercising discretionary powers. However, this argument would possibly extend only to the provisions of the International Covenant to which the Optional Protocol attaches.
- (ii) The Court poses the question for future cases of how far *Ex parte Brind* might be followed. This implies that the Court would require the Crown to convince it that *Ex parte Brind* should be followed.

11 [1981] 2 NZLR 222.

12 Supra at note 1, at 266.

13 Supra at note 11, at 226.

14 [1991] 1 AC 696.

15 Supra at note 1, at 266.

16 Ibid.

- (iii) The Court further suggests that *Ex parte Brind* is not persuasive authority. Their Honours point out, inter alia, that in *Ex parte Brind* the Secretary of State did have regard to the relevant Convention.¹⁷ Their Honours also point to comments from Lords Templeman and Bridge regarding the effect of international obligations.¹⁸

Tavita is a very strong indication that if the appropriate case comes before it, the New Zealand Court of Appeal is likely to hold that in the absence of any express direction to the contrary the Executive must take into account relevant international obligations in exercising a discretionary power. Such an indication is consistent with jurisprudence on Treaty of Waitangi considerations and New Zealand Bill of Rights Act 1990 considerations, where a statute is otherwise silent.

In *Huakina Development Trust v Waikato Valley Authority*,¹⁹ Chilwell J held that Maori spiritual and cultural values were a relevant consideration for the Planning Tribunal. His Honour relied upon the Treaty of Waitangi as being “part of the fabric of New Zealand society”.²⁰

The Bill of Rights itself provides a mode of interpretation through s 6. Under this provision, a meaning consistent with the rights and freedoms contained in the Bill of Rights must be given, if possible, to ambiguous legislation. *Tavita* is yet further confirmation that powers vested by statute do not exist in a vacuum.

Brent O'Callahan

17 *Supra* at note 14, at 761 per Lord Ackner.

18 *Supra* at note 1, at 266.

19 [1987] 2 NZLR 188.

20 *Ibid*, 210.

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