Case Notes

Equiticorp: Judgment Day

Equiticorp Industries Group Ltd (In Statutory Management) v Attorney-General; Glenbrook Steel Holdings Ltd v Attorney-General, CP 2455/89 and CP 111/94, Smellie J, High Court, Auckland, 12 July 1996.

In *Equiticorp Industries Group (Limited) v Attorney-General*, Smellie J found the Crown liable to pay $189,774,013 to the statutory managers of the Equiticorp Group. His Honour found that the Crown knew that roughly two-thirds of the settlement figure for the sale of New Zealand Steel to Equiticorp in 1987 was to be funded from the Equiticorp Group in breach of s 62 of the Companies Act 1955 ("the 1955 Act"). The Court sat between November 1994 and June 1996 for a total of 204 days in what was, in the Judge's words, "the longest, largest and most complex piece of civil litigation ever to be conducted in the High Court of New Zealand."[1] The unreported judgment is divided into four volumes and is some 672 pages long.

Recognising that the judgment must of necessity be "long, complex and tedious", Smellie J summarised its salient features in Volume III (49 pages). However, the decision raises many questions and it is into the substantive judgment, where the Judge meticulously sets out his findings, that the more curious reader must delve.

The Facts

New Zealand Steel ("NZS") was incorporated in 1965. In 1987, the Government decided to sell its interest in the venture, which by 1 October of that year was some 90%. At that time the Crown had invested over $2.6 billion without reaping any return. Equiticorp Holdings Ltd ("EHL") ultimately acquired NZS for $327 million. The sale was effected by two contracts, the first being the sale of the Crown's NZS shares to Equiticorp by an exchange of EHL shares for NZS shares, and the second, an agreement between the Crown and Buttle Wilson Ltd ("BWL") whereby BWL agreed to underwrite a buyback of the Crown's EHL shares some five months later for a fixed price of $3.52 per share. Both agreements were entered into on 19 October 1987, the day before the sharemarket crash. The second of the two contracts gave rise to these proceedings.

Prior to the execution of the two agreements, the Crown was advised that EHL, the parent company of the Equiticorp Group, was the financier of last resort for BWL's sub-underwriters. This raised the possibility of breaches of s 62 of the 1955 Act, which prohibits a company providing financial assistance for the purchase of its shares. The Crown required these arrangements to be undone, and

1 HC, 12/7/1996, Smellie J, Auckland, CP 2455/89, Volume I(A), 1.

its solicitor, Mr Ratner, certified that this had been done. However, BWL had refused to relinquish EHL as financier of last resort. The Judge held that this fact was known not only to Mr Ratner but also to two senior Treasury officials, the Crown's selling agents, and its financial advisers.

It was always understood that BWL would enter into sub-underwriting arrangements, but the sharemarket crash scuttled plans to find an international financier to fund the purchase. In response to this situation, Allan Hawkins, Managing Director of the Equiticorp Group, and Paul Darvell, a solicitor, positioned a shelf company, Ararimu Investments Four Ltd ("AI4"), to purchase the shares. By the date of settlement on 17 March 1988, EHL shares had fallen from $3.52 to less than $1, a price itself supported by an illegal scheme. Of the $327 million settlement price which AI4 paid, $222 million was provided from the Equiticorp group.[2] Before reaching AI4, the Equiticorp money was laundered through Hong Kong, the Turks and Caicos Islands, and Vanuatu before payment on to the Crown by assignment of 13 deposits on the day of settlement.

A little over a year after settlement, AI4 and the New Zealand companies in the Equiticorp Group were placed in statutory management.[3] Eight months later, in November 1989, the statutory managers commenced these proceedings against the Crown and 16 other defendants. The plaintiffs settled with all except the Crown for a total of $64 million.

Central Findings of Fact

The Crown was held to have received the settlement monies with both actual and constructive knowledge [4] of two matters. The first of these matters was that the transaction was grossly improvident for AI4, which was paying $327 million for shares worth less than $90 million. Secondly, a letter from Equiticorp to the Crown seen by Treasury officials Andrew and Kwok, and by Ratner, was held to have put the Crown on notice that in all probability $222 million of the $327 settlement price was to be provided in breach of s 62 of the 1955 Act, and of the fiduciary duties owed by the directors of the Equiticorp companies. Justice Smellie described this as the most significant finding of fact in the whole case.

Other important findings were, first, that the Equiticorp subsidiaries were the owners of the money advanced or at least had "relative title" to it; second, that those advances were contractual so that the Illegal Contracts Act 1970 applied; third, that the contributions of Equiticorp's Australian subsidiaries were repaid by AI4 with funding from EIGL;[5] and fourth, that AI4 was the only plaintiff that could meet the requirements for common law tracing necessary to establish an action for money had and received.

2 The remaining $105 million was raised from Elders Merchant Bank Volume I(A), 14.

3 The Group's Australian subsidiaries were placed in liquidation at about this time, pursuant to State and Commonwealth legislation.

4 In the *Baden* (iii) sense of "wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make" *Baden v SG pour Developpement du Commerce SA* (1983) [1992] 4 All ER 161, 235, per Peter Gibson J.

5 These repayments were the basis of subrogation claims. The Judge held that in order to allow AI4 to recover and account to EIGL, recovery under this head would be stayed.

Causes of Action

The three principal claimants were AI4, EHL and Equiticorp Industries Group Ltd ("EIGL"). They advanced five main causes of action:

(I) "constructive trust: knowing receipt";
(ii) "constructive trust: knowing (dishonest) assistance";
(iii) illegality;
(iv) money had and received;
(v) Statutory Trust.

In all five causes of action, AI4 claimed in its own right and as constructive trustee for the companies which provided the original funding. In the Judge's words, "what the Plaintiffs are saying in all five [causes of action] is that the Crown wrongly had become possessed of their money and in one way or another should be obliged to return it." [6]

"Unclean hands" defence

The Crown argued that the plaintiff companies were parties to the breaches of trust and illegality by virtue of their directors' actions. If this were accepted, the Crown argued the plaintiffs were barred from obtaining any remedy, either because they could not come to equity with clean hands, or on the basis of the common law equivalent, ex turpi causa oritur non actio. The Judge had little difficulty dismissing this defence. His Honour relied on knowing receipt and knowing assistance authorities[7] to support his finding that the actions of the delinquent directors could not be attributed to the companies, which were the intended victims of their directors' machinations. [8]

Recipient and Accessory Claims

The plaintiffs based the equitable knowing receipt and knowing assistance claims on the same factual matrix. They first had to establish an unauthorised disposal of their property in breach of fiduciary duty. The Crown challenged the title to sue of both the original funding companies and AI4.

The Judge was in no doubt that "it was more probable than not" [9] that the original funders did have title to the settlement moneys. In each case the money was under the original funder's control immediately before the advance. Any moneys which those companies had borrowed, belonged in law to the borrowing companies.[10]

6 Volume III, 5.
7 *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1656; *Belmont Finance Corporation v Williams Furniture Ltd (No 1)* [1979] 1 Ch 250, 261.
8 Volume I(A), 50.
9 Volume I(A), 79.
10 Ibid.

In challenging AI4's title to sue, the Crown argued that the original advances in breach of s 62 of the 1955 Act were illegal so that no title passed to AI4. Justice Smellie relied on Lord Goff's speech in *Lipkin Gorman (a firm) v Karpnale Ltd* [11] to support his conclusion that AI4 had "relative title" to the money and, accordingly, title to sue. The basis of AI4's title was held to be its possession of the bank deposits (choses in action) *and* acquisition of original title created by the contracts with the relevant banks when the deposits were made. Further, his Honour held that AI4 had standing to bring an action against the Crown as constructive trustee for the original funders. In doing so, his Honour rejected the Crown's argument that the plaintiffs had to choose between suing through the original funders or through AI4, but that they could not sue through both, even on an alternative basis. The Court's rejection of this argument is, with respect, difficult to reconcile with the findings in respect of the claims based on illegality and money had and received, discussed below. There was no dispute that the payment to the Crown in breach of s 62 was unauthorised and in breach of fiduciary duty. Rather the Crown claimed that it had no knowledge of such breaches.

The next hurdle for the plaintiffs, therefore, was to establish that the Crown had the requisite level of knowledge. After an exhaustive examination of the evidence, Smellie J concluded that all the Crown's servants and agents had some degree of knowledge except the two Ministers of the Crown. Applying principles of agency law Justice Smellie held that the knowledge of the Crown's agents should be imputed to the Crown. His Honour saw no basis for invoking the fraud exception, nor any factor which rebutted the presumption of imputation. The next question was whether the sum of the knowledge of each individual agent could be aggregated to make a composite whole, a total pool of knowledge residing in the Crown by which its position as an alleged dishonest assister or knowing recipient could be judged.[12] His Honour was satisfied that it could.

After reviewing the authorities, Smellie J held that knowing assistance liability requires a finding of dishonesty.[13] In respect of knowing receipt, knowledge to a level of *Baden* category (iii) sufficed. The Crown was held either to have wilfully shut its eyes to the obvious (*Baden* (ii)) or, at least to have wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make (Baden (iii)). Judged objectively, that was dishonest. Both claims were established.

Though based on the same facts, remedies for recipient and accessory liability are separate. Recipient liability was held to be restitution-based,[14] not compensatory. AI4 was prima facie entitled to restitution of the entire purchase price. This amount, $327 million, was accordingly not subject to mitigation principles. Various deductions were made (including an allowance for the value of what AI4 actually received, and for the $64 million received from the parties which settled) to arrive at an award of $189,774,013. The remedy for dishonest assistance is compensatory, and is thus concerned with losses caused by the

11 [1991] 2 AC 548, 572-573.

12 Volume I(A), 226.

13 *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

14 Volume I(A), 237.

breach. For this claim, mitigating factors were relevant, as was AI4's contribution to its own loss, being the failure by its shareholders to take care to ensure that they knew what Hawkins and Darvell were up to.[15] $112,047, 918 was awarded under this head.

Illegality

The Crown's argument that the funding of AI4 was not made pursuant to contracts was rejected. Therefore the funding contracts, being in breach of s 62 of the 1955 Act, were illegal. Likewise the sale of the shares to AI4, which was held to be an Equiticorp subsidiary,[16] breached s 40 of the 1955 Act. This rendered the Deed of Assignment of the deposits void and illegal. Pursuant to s 6 of the Illegal Contracts Act 1970, no property passed to the Crown; therefore the original funders never lost ownership of the money which AI4 then paid to the Crown. The plaintiffs claimed restitution or compensation pursuant to s 7(1)(a) and (c) of the Illegal Contracts Act. The Judge held that neither the Crown nor AI4 could resist a claim for restitution since the Crown did not get title to the purchase moneys and AI4 did not get good title to the NZS shares. The Crown's knowledge of the illegality made it inappropriate for the Judge to exercise his discretion under s 7 of that Act to validate the contracts. Accordingly, after deductions, the award was $189,744,013. Thus the claims based on both knowing receipt and illegality yielded the same restitutionary measure.

Money had and received

Since the effect of s 6 of the Illegal Contracts Act 1970 was to prevent title to the money passing to the Crown, there was a total absence of consideration for the payment. This raised the possibility of an action for money had and received.

The inability of the original funding companies to meet the requirements of common law tracing was fatal to their claim for money had and received. It is not possible to trace at common law through a mixed fund, or to trace payments through a clearing house or otherwise effected by electronic settlement, or payments made by book entry. The equitable tracing rules, though not as strict, were held to be inapplicable to the common law action for money had and received. Justice Smellie rejected the argument that the distinction between common law and equitable tracing should be abolished as being without authority and inappropriate to a cause of action which does not require proof of fault.[17]

Since AI4 could meet the requirements of common law tracing, it could recover $189,774,013, which was the same as the award for the knowing receipt and illegality claims.

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15 Volume I(A), 282.

16 Volume I(A), Section 1.6, 51-62.

17 Volume I(B), 355; Volume III, 30. His Honour was strengthened in his conclusion by the recent House of Lords decision in *Westdeutsche Landesbank v Council of the London Borough of Islington* [1996] 2 WLR 802, in which the distinction between common law and equitable tracing was referred to without a re-examination of those rules.

Statutory Trust

EIGL, EHL and AI4 all applied for orders under s 54 of the Corporations (Investigation and Management) Act 1989. This section empowers the Court to make orders for the transfer of property or payment of money where property has been improperly disposed of or acquired in circumstances which make it just and equitable that it be held on trust for the corporation in statutory management. Giving the provision a "fair, large and liberal construction and interpretation" as mandated by the Acts Interpretation Act 1924, his Honour held that the money and the assignment of bank deposits, which are choses in action, were both "property" within the meaning of s 54. Prima facie, all $222 million received from the original funding companies was acquired in circumstances which made it appropriate for the Court to impose a trust. From this amount deductions for the value of the shares, the dividend received, and the $64 million recovered from the parties which settled, were made. Total recovery for AI4 under this head was $84,774,013, to be held on constructive trust for the original funding subsidiaries.

Unjust enrichment

Only EIGL pleaded a cause of action in autonomous unjust enrichment. Notwithstanding the recognition of that principle by the House of Lords in *Lipkin Gorman (a firm) v Karpnale*[18] the Judge was not satisfied that it is yet a cause of action. EIGL, therefore, had no basis on which to advance this claim.

Defences

It has already been noted that the Crown's attempt to meet the plaintiffs' claims in limine with the clean hands defence, and its common law equivalent, ex turpi causa oritur non actio, failed. The Crown's estoppel defence failed because the Court held that any representations which the Crown had relied on were made not by the plaintiff companies, but by their delinquent directors. In any event, the Crown could not rely on these representations because it would have been aware of the true facts if it had undertaken the proper inquiries. An argument by the Crown that the companies had ratified the acts of their directors was also rejected. The defence that the Crown was a bona fide purchaser for value without notice was defeated by the Court's findings as to the knowledge of the Crown's agents.

Results of the plaintiffs' claims

The top award for which judgment could be entered was $189,774,013. AI4 could recover this amount under knowing receipt, illegality or money had and received. Upon judgment being entered for that amount all other claims would be merged in that one judgment. AI4 must hold the amount recovered as trustee for the original funding companies. Findings on costs and interest have been the subject of separate judgments.

18 Supra at note 11.

Conclusion

Having reached the end of his judgment, his Honour remarked that the Crown's knowledge of the unauthorised, illegal and improvident nature of the transaction permeated every claim in one way or another.[19] It was the foundation of the Crown's liability on three of the five causes of action and the downfall of several of its defences. Yet one of the most striking features of the case is the plaintiff companies' success in pinning responsibility for the illegal transactions they entered into onto their delinquent directors, whilst the Crown could not do as much in its defence. Why could not the actions of the Crown's delinquent agents and officials be separated from those of the Crown itself? After all, the Minister who held the Crown's shares was considered to have no knowldege of the illegal transaction.

In support of his finding that the plaintiff companies were victims of their directors' machinations, Smellie J could point to an abundance of authority on knowing assistance and knowing receipt liability, including the New Zealand Court of Appeal's decision which supported this finding.[20] But the question remains why the sense of justice and pragmatism which drives those cases should not operate equally to the Crown's benefit. It is suggested that there is still much work to be done on the extent to which principles developed for corporations may appropriately be applied to a modern contracting state.[21] It is not apparent, to this reviewer at any rate, that the Crown should not have been able to call in aid of its defence the same principles the plaintiffs relied on to establish their right to sue. This is one matter to which the Crown's advisers may direct their attention as they consider whether to appeal.

Matthew Harris

19 Volume III, 49.

20 *Attorney-General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528.

21 See for example, Boston (ed), *The State Under Contract*, (1995).

Post-Formation Duties of Good Faith in Insurance Law

UEB Packaging Ltd v QBE Insurance (International) Ltd
[1996] 2 NZLR 467. High Court, Auckland. Baragwanath J.

Facts

This case concerned an application under s 9 of the Law Reform Act 1936 ("the Act") to bring a proceeding directly against the insurer of an insolvent company against which the applicants had already obtained judgment.

The applicants had stored goods at the storage facilities of Kirby Removals Ltd ("Kirby") until these goods were destroyed by fire on 11 September 1987. Kirby reported the loss to its insurer, QBE Insurance Limited ("QBE").

On 14 December 1987, QBE's solicitors wrote to Kirby's holding company advising that QBE would indemnify Kirby for its "legal liability as bailee for losses suffered by third parties as a result of the fire", and that Kirby "must notify QBE immediate upon receipt of any notice or notices of claim or demand: similarly if any proceedings are issued by any third party that they be forwarded immediately to QBE".[1] Kirby went into receivership on 21 October 1988.

Five years later, on 9 September 1993, the applicants issued proceedings against Kirby, which resulted in a judgment by default on 25 October 1994. QBE was not notified of the existence of the proceedings until two days after judgment, on 27 October 1994. The present application was filed on 6 November 1995.

Statutory Framework

The applicants sought to take advantage of the provisions of s 9 of the Act which deems, inter alia, the amount of an insured's liability to a third party to be a charge on insurance moneys payable under certain contracts of insurance. The provision applies only to insurance policies which indemnify the insured against "liability to pay any damages or compensation".[2] An important aspect of the s 9 scheme is that the charge will attach to "all insurance money that is or may become payable in respect of that liability." [3]

Section 9(4) allows this charge to be enforced directly against the insurer; in such an action, "the parties shall ... have the same rights and liabilities ... as if the action were against the insured".[4] Leave of the court is required to commence such an action, unless s 9(2) applies. Section 9(2) concerns cases where prior to the loss the insured has died insolvent, is bankrupt, or, if the insured is a company, is being wound up.

1 *UEB Packaging Ltd v QBE Insurance (International) Ltd* [1996] 2 NZLR 467, 469.
2 Law Reform Act 1936, s 9(1).
3 Ibid.
4 Ibid, s 9(4).

The enforcement of the charge against the insurer is limited by ss 9(6) and 9(7). Section 9(6) provides that any payment by the insurer under an insurance policy without actual notice of the charge shall be a valid discharge to the extent of that payment. Section 9(7) limits the insurer's liability to the amount fixed by the contract of insurance.

The Judgment

The following of QBE's defences will be discussed:

(i) That the policy was not within the terms of s 9(1) of the Act;
(ii) That Kirby Ltd had disentitled itself to indemnity under the policy;
(iii) That the applicants' claim was statute-barred.

(1) The Application of s 9(1) to the Policy

The first defence was that the policy was not liability insurance within the meaning of s 9(1) of the Act so that the applicants were not entitled to the s 9 remedy of suing the insurer directly. Justice Baragwanath dismissed QBE's argument that the section refers to a particular type of policy, instead preferring the applicants' submission that it is the effect of the policy which is important.

His Honour concluded that the "property insured" clause which provided cover for "[g]oods held by the insured as a Bailee but only for which they are legally liable in the event of loss or damage as indemnified by this policy" was conclusive in favour of the policy falling within the terms of s 9(1). Since legal liability can only be to a third party, the s 9(1) requirement of a contract of insurance whereby an insured is indemnified against "liability to pay damages or compensation" was clearly fulfilled.

(2) Entitlement to Indemnity

QBE argued that Kirby had disentitled itself to indemnity on two grounds, both of which concerned Kirby's failure to notify QBE of the proceedings. QBE claimed that Kirby was required either by the claims clause of the policy itself, or by the overriding obligation of utmost good faith inherent in the insurance relationship, to notify QBE of proceedings which would affect the insurer.

(a) The claims clause

The claims clause required the insured to do a number of things upon becoming aware "of any event giving rise, or likely to give rise, to a claim" under the policy, one of which was to immediately notify the insurer. While the clause did not specifically require the insured to alert the insurer to the receipt of proceedings, the question was whether the clause "bit twice", once when the original loss became

known, and again when a proceeding was served.[5] Justice Baragwanath concluded that the "event" referred to by the claims clause must be the original occurrence, and the steps required by the clause relate to that event only.

(b) Utmost Good Faith

QBE alternatively proposed that the duty of utmost good faith required the insured to notify the insurer of any proceedings, and that a failure to do so meant that the insurer could avoid the claim. The applicants countered this argument by proposing that there was no room for the operation of the utmost good faith doctrine once the insured had complied with the terms of the policy.

Justice Baragwanath looked at the extent of the uberrima fides doctrine. His Honour concluded that the duty of disclosure, which is one aspect of the duty of good faith, ceases upon formation of the contract. However, his Honour accepted the weight of authority that "[a]s regards insurance contracts, the duty of good faith continues throughout the contractual relationship at a level appropriate to the moment."[6] Thus, the duty of utmost good faith applies to the duration of the relationship, including claims and the issue of proceedings.

His Honour then pointed out that "[n]othing could be more important to the insurer [than receiving] due notice of proceedings issued against the insured in respect of which insurance indemnity is sought." [7] The result of this determination is that Kirby was considered to have disentitled itself from indemnity by its failure to notify the insurer of the proceeding. However, if this information is of such importance, the insurer should have inserted a clause to that effect. The pre-formation duty of disclosure aside, the duty of utmost good faith generally applies only to the discharge by the insured of its contractual obligations, and does not normally impose obligations to act upon the insured.[8] Justice Baragwanath is thus allowing the insurer to utilise the duty of good faith to impose an obligation on the insured that is not within the written terms of the contract. This leaves the insured in the difficult position of not knowing exactly what is required, and not being able to refer to the terms of the policy for the answer.

Justice Baragwanath then considered what this disentitlement means to the applicants in the present case. His Honour relied on the wording of s 9(4) that the parties to the action under s 9 "shall ... have the same rights and liabilities ... as if the action were against the insured". His Honour considered that this phrase indicated that the applicants cannot pursue a claim against the insurer that is not available to the insured, citing *State Insurance General Manager v Maaka* [9] and *FAI (NZ) General Insurance Co Ltd v Blundell and Brown Ltd* [10] in support.

5 Supra at note 1, at 474.

6 Clarke, *Law of Insurance Contract* (2nd ed 1994) 708.

7 Supra at note 1, at 480.

8 See for instance *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1985) 4 NSWLR 107, 112, where the NSW Supreme Court refuses to extend the duty of utmost good faith beyond requiring the insured to fulfil the terms of the contract. Justice Rogers recognises that the duty of disclosure beyond what is required by the terms of the policy ceases to operate once the contract is entered into.

9 (1989) 5 ANZIC 60, 943.

10 [1994] 1 NZLR 11.

However, in *FAI*, the New Zealand Court of Appeal relied on the closing words of s 9(1) of the Act[11] as indicating that an applicant cannot rely on a claim not available to the insured. Justice Hardie Boys in *FAI* pointed out that if there is no liability, or if the insurer is not liable to indemnify, then there is no charge, and the applicant has nothing to pursue. His Honour considered that the effect of s 9(4) is to put the insurer "in the shoes of the insured".[12]

With respect, the analysis of Hardie Boys J is to be preferred. Section 9(1) clearly creates a precondition to the existence of the charge, that there must be money payable in respect of the insured's liability. Section 9(4) is relevant to the proceeding between the applicant and the insurer in the position of the insured and should be confined to the analysis of the relevant limitation period.

Both analyses produce the same result: that the applicant cannot have recourse to a claim that is not available to an insured. In this case because Kirby was considered to have breached its duty of good faith, it is not entitled to indemnity. Therefore the applicants are not entitled to proceed against the insurer, because there is no money payable in respect of the claim.

(3) The Limitation Act 1950

The decision in favour of the insurer on the above point meant that any discussion of the relevance of the limitation defence was strictly obiter. Justice Baragwanath however, considered the issue, "[i]n case the matter goes further".[13]

This third defence is that the applicants' claim is statute barred by s 4(1) of the Limitation Act 1950 which provides that claims in tort or contract must be brought within six years of the event giving rise to the claim. This area is problematic in respect of applications under s 9 of the Law Reform Act 1936, as an applicant may not appreciate the need to pursue the insurer until years after the event giving rise to the claim. The interpretation debate centres around what action is required to stop time running against the applicant. One argument is that an action commenced against the insured, to which the insurer is later substituted or added, stops time running. Some courts have favoured an alternative analysis, that the proceedings against the insurer must be commenced within the relevant time period. If this latter interpretation is applied to the present case, the application was brought out of time, eight years after the event. However, the proceedings against Kirby were commenced within the limitation period; if this stopped time running, then the present application was not statute-barred.

Justice Baragwanath referred to *FAI v Blundell*, where the New Zealand Court of Appeal indicated a preference for the view that "time ceases to run once an action has been commenced in respect of the happening from which the liability of them both arises".[14] In *FAI*, Hardie Boys J considered that any injustice arising from this reading of the section can be remedied by the court refusing to grant

11 That section concludes with the statement that the charge will attach to "insurance money that is or may become payable" to the insured.

12 Supra at note 10, at 19.

13 Supra at note 1, at 480.

14 *FAI v Blundell*, supra at note 9, at 20, per Hardie Boys J.

leave to pursue the insurer. Justice Hardie Boys rejected the view of the majority of the New South Wales Court of Appeal in *Grimson v Aviation and General (Underwriting) Agents Pty Ltd* [15] which treated the claim against the insurer as a separate action from the claim against the insured. In *FAI*, Richardson and Robertson JJ also refused to treat the action against the insurer as separate to the action against the insured. The result of this approach is that commencing an action against the insured within the limitation period prevents the action against the insurer from becoming statute-barred. However, it must be noted that this point was obiter in *FAI*, since the action could not be statute-barred, as it was in relation to a breach of fiduciary duties.

Justice Baragwanath chose not to follow the New Zealand Court of Appeal, preferring instead the view of the majority in *Grimson*. In that case, two-thirds of the New South Wales Court of Appeal decided that the phrase that the applicant "shall ... have the same rights and liabilities ... as if the action were against the insured"[16] meant that the court must decide the application as if it were the primary action against the insured commencing at that date. Thus, if the primary action would be statute-barred if commenced at that date, then the s 9 application should be as well, even if the applicant had already commenced proceedings against the insured which were not statute-barred.

Justice Baragwanath found this reasoning "irresistible",[17] concluding that any other result would depart from the clear language of s 9(4) of the Act. This departure would not be adequately remedied by the court's residual discretion to refuse to grant leave. With respect, the reasoning of Hardie Boys J in *FAI* is preferable. The need to proceed against the insurer may not become apparent until the primary action against the insured is well underway, or even until judgment issues. Not allowing the claimant to follow the claim through to the party that should properly indemnify their loss would deny the applicant its remedy. In effect, the result would be to allow the insurer to avoid payment of a claim that should legally be honoured. There is no danger of the insurer being held liable twice, given that s 9(6) discharges the insurer to the extent of payments made without actual notice of the charge. Further, Baragwanath J should be confident of the ability of the court to assess the relevant equities and weigh up any undue delay on the part of the applicant in deciding whether to exercise its discretion to grant leave.

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15 (1991) 25 NSWLR 422, Hope A-JA and Meagher JA, Kirby P dissenting.

16 This provision is the equivalent to s 9(4) of the New Zealand Law Reform Act 1936, under which the present application is brought.

17 Supra at note 1, at 481.

Fishing for Fundamental Rights

***Cooper v Attorney-General & Ors*, High Court, Auckland, 7 May 1996, CP 1400/92 Baragwanath J, 33pp.**

Cooper v Attorney-General & Ors[1] is a test case in which three plaintiffs sought judicial review of Quota Appeal Authority decisions refusing them fishing quotas under the Fisheries Act 1983. The plaintiffs attempted to challenge the authority of Parliament to legislate against a previous decision of the Court of Appeal which would otherwise have entitled them to receive the quota in question. The case is unusual in that, lacking any constitutional protection of property rights beyond the Magna Carta, the plaintiffs based their case on well-known and controversial dicta of Lord Cooke of Thorndon concerning common law limits to parliamentary sovereignty.

Although the plaintiffs' cases differed in detail, the Crown conceded that Cooper at least was in an identical position to the plaintiff in the previous case of *Jenssen v Director-General of Agriculture and Fisheries and the Quota Appeal Authority*,[2] which is discussed below. In the present case, Cooper applied for an increase in his provisional quota for snapper, arguing that the original allocation failed to take into account his preparations to increase his catch. The Fisheries Act 1983, as amended in 1986, empowered the Minister of Fisheries (under s 28B) to declare a species of fish subject to a quota management system. Under s 28E, an individual had to hold a statutory permit to fish that species in order to qualify for a provisional maximum individual transferable quota. The quota allocation was then based on the fishing returns of the individual in previous years.

A month before the date of the s 28B declaration (18 September 1986), Cooper had purchased a 28 foot pleasure craft which was not equipped for fishing. Cooper argued that, but for the declaration, the boat would have been converted to long-lining for snapper, and that this would have increased his catch significantly. He also argued that his returns for previous years did not adequately represent his reliance on the snapper fishery, as poor health had restricted his fishing during 1985 and 1986. Accordingly he applied for an increase of his provisional quota for snapper, based on his expected future catch rather than his previous returns. This application was declined by the Quota Appeal Authority.

Background: *Jenssen* and the Fisheries Amendment Act (No. 3) 1992

The plaintiffs case in *Jenssen* was materially identical to *Cooper*'s case. Jenssen was denied quota for orange roughy, despite having invested a considerable amount of money on equipment, on the grounds that he had not caught any orange roughy in the years prior to the s 28B declaration, and did not hold the relevant permit. The Court of Appeal upheld a judicial review of the

1 Noted in [1996] BCL 556, 557.

2 Noted in [1992] NZRLR 350.

Quota Appeal Authority decision on the grounds that the Authority had failed to consider s 28E(3). This section allows the Director-General of Agriculture and Fisheries to allocate a different provisional quota if the initial allocation was unfair, having regard to the applicant's commitment to, and dependence on, the quota species. This was interpreted by the Court as including anyone who had "taken practical steps to enable fishing for that species in the event of his being granted quota."[3] The decision of the Authority was therefore set aside, and the Court directed the Authority to reconsider Jenssen's application. Jenssen was subsequently allocated quota for orange roughy.

The parliamentary response to *Jenssen* was swift. The Fisheries Amendment Act (No. 3) 1992 added s 28ZGA to the 1983 Act. The effect of the new section is to close the loophole opened by the Court of Appeal. Under s 28ZGA(1)(a), new quotas are only to be allocated to applicants who have previously held permits to fish the species in question. Section 28ZGA(1)(b) contains a privative clause, removing from the courts the authority to review, quash, or call into question decisions of the Director-General or the Quota Appeal Authority.

The Decision

The application for judicial review in *Cooper* contended that:[4]

(i) the amendment effected by the Fisheries Amendment Act (No. 3) 1992 has purported to deprive [the applicants] of access to the Court to secure a declaration or decision concerning claimed substantive rights and infringes a fundamental constitutional principle;

(ii) they retain such rights under the original quota management scheme ... which as interpreted by the Court of Appeal in *Jenssen* entitles them to the allocation of quota;

(iii) Parliament lacks power to deprive the Court of its authority to hear a citizen's claim to enforcement of a legal right;

(iv) the High Court should so declare.

Justice Baragwanath observed that the constitutional protection of property rights is contained in Article 29 of the Magna Carta, but that this contains an exception to the extent that rights can be removed by the "law of the land." [5] Section 28ZGA could not be challenged on that basis. The plaintiff was therefore obliged to disinter the obiter dicta and extrajudicial writings of Lord Cooke regarding the power of the common law to limit the scope of parliamentary sovereignty. The

3 See the unreported judgment, Court of Appeal, 16 September 1992, CA 313/91 (Cooke p, Richardson, Gault JJ), 11 per Cooke P.

4 See the unreported judgment, High Court, Auckland, 7 May 1996, CP 1400/92 Baragwanath J, 3-4.

5 Ibid, 4.

most helpful of these came from *New Zealand Drivers Association v New Zealand Road Carriers*:[6]

> [W]e have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights[;]

and from *Taylor v New Zealand Poultry Board* :[7]

> Some common law rights presumably lie so deep that even Parliament could not override them.

The Court was thus invited to at least comment on the validity of these dicta. Justice Baragwanath however declined to do so. Instead, his Honour stated that: [8]

> I am satisfied ... [that] Parliament's intention ... was not to deprive parties of access to the Court to secure enforcement of legal rights but rather to remove the rights themselves.

In other words, the true purpose of the Act is to extinguish statutory fishing rights granted prior to the introduction of the quota management scheme, and replace them with the new system of provisional maximum individual transferable quotas:[9]

> Lord Cooke does not ... suggest that property rights conferred on a citizen by statute may not be taken away by another statute; nor in my view is such a proposition arguable.... [D]espite the language in which the amendment is expressed the dominant purpose of the measure is to extinguish the rights: not just bar a remedy.

This conclusion meant that his Honour was: [10]

> [R]elieved from venturing into what happily remains in New Zealand an extra judicial debate, which the good sense of parliamentarians and judges has kept theoretical, as to whether in any circumstances the judiciary could or should seek to impose limits on the exercise of Parliament's legislative authority to remove more fundamental kinds of substantive rights.

The final result was therefore an exercise in orthodox statutory interpretation rather than a review of fundamental constitutional principles. This effectively undermined the first of the plaintiff's contentions and rendered the rest irrelevant.

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6 [1982] 1 NZLR 374, 390.

7 [1984] 1 NZLR 394, 398.

8 Supra at note 4, at 4.

9 Ibid, 6.

10 Ibid.

Conclusion

The clear purpose of the Fisheries Amendment Act (No. 3) 1992 is to prevent people who did not hold fishing permits from acquiring provisional quotas other than on the open market.[11] The *Jenssen* loophole has been firmly closed. As regards the deeper questions of fundamental constitutional principle, the dicta of Lord Cooke clearly remain arguable in the event of an attempt by Parliament to legislate against such principles. The ultimate nature of fundamental rights and the lengths to which the courts may resort to protect them remains a matter for further debate. The decision in *Cooper* has neither contributed to the debate nor detracted from it.

Nicholas Russell

Privy Council Update: Local Authorities Duty of Care

***Invercargill City Council v Hamlin* [1996] 1 NZLR 513**

In *Invercargill City Council v Hamlin*[1] the Judicial Committee of the Privy Council[2] confirmed the duty of New Zealand Local Authorities to carefully inspect houses and to ensure that they comply with building standards. The submissions before the Privy Council took five and a half days. The hearing coincided with escalating debate in New Zealand over the future of appeals to the Privy Council. At this same time a Bill was presented to the New Zealand Parliament which proposed to abolish reliance on the foreign court of last resort. The Privy Council's decision in *Hamlin* affirmed the view taken by the Court of Appeal,[3] and upheld New Zealand development of the duty of care owed by Local Authorities to homeowners.

This comment provides an update to the casenote on the Court of Appeal decision in *Hamlin*, which is contained in the 1995 edition of the Auckland University Law Review. Accordingly, the facts will only be outlined. Hamlin built a house on land that had been the subject of the Invercargill City Council's landfill scheme. During the construction of the house, a council inspector made a

11 In drawing this conclusion, Baragwanath J relied on parliamentary statements from the Minister of Fisheries and the Chairman of the Internal Affairs and Local Government Committee; Ibid, 17-20.

1 [1996] 1 NZLR 513.

2 Consisting of Lords Keith of Kinkel, Browne-Wilkinson, Mustill, Lloyd of Berwick, and Sir Michael Hardie Boys

3 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

number of inspections of the proerty. In the following years, the house developed a number of defects, and in 1989 Hamlin sought professional advice. After discovering that the foundations were faulty, Hamlin sued the council and the building contractor. However, the contractor was insolvent. The Council was held liable for the cost of repairs in both the High Court and the Court of Appeal. The Council appealed to the Privy Council, raising two issues. First, the Council invited the Privy Council to bring New Zealand in line with recent English decisions limiting the duties owed by local authorities to owners of defective buildings. The second issue concerned when the limitation period begins to run in cases of latent damage to buildings, and at what point loss is suffered by the owner.

The Decision

The Separate Development of New Zealand Law

After reviewing the relevant caselaw,[4] The Privy Council held that the Court of Appeal decision in *Hamlin* was in line with twenty years of New Zealand Authority. The Privy Council considered this authority to be important because the duty was extended to situations where there was no physical damage as such, and because they recognised the importance of reliance in establishing a duty of care in cases of economic loss.

The Privy Council noted that the Court of Appeal had deliberately departed from the recent English case of *Murphy v Brentwood District Council* [5] on the basis that New Zealand social conditions were different from those in the United Kingdom. The Privy Council concluded that the Court of Appeal was entitled to depart from English caselaw in this manner, adding that "[t]he ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root is not a weakness, but one of its great strengths." [6] The reliance that New Zelanders place on their local authorities in building situations weighed heavily in favour of a duty of care, and was rightly taken into account. The Privy Council beleieved that New Zealand judges were in a better position to assess building practices and community expectations. This broad-based policy approach resulted in the rejection of the council's attempt to bring New Zealand in line with English authority.

Limitation

The second issue consided by the Privy Council was the limitation period in cases of latent damage in respect of the Limitation Act 1950 and the Building Act

4 The Privy Council's review began with *Bowen v Paramount Builderst* [1975] 2 NZLR 546 and culminated with the group of 1986 building negligence cases, *Brown v Heathcote County Council* [1986] 1 NZLR 76, *Stieller v Porirua City Council* [1986] 1 NZLR 84, and *Williams v Mountain Borough Council* (1986) NZBLC 102,544. These latter cases extend the duty to include defects other than faulty foundations.

5 [1991] 1 AC 398.

6 Supra at note 1, at 519-520.

1991. In Hamlin's case, signs of weakness in the foundations were visible more than six years before proceedings issued. The issue turned on when the damage was "discoverable". Both the High Court and the Court of Appeal found that the cause of action accrued when a reasonably prudent homeowner would have discovered the damage.[7] This entailed the rejection of the approach of House of Lords in *Pirelli General Cable Works v Oscar Faber & Partners*.[8] That case had decided that the cause of action arose when the defeect became apparent or when it ought to have been discovered. If *Pirelli* had been applied, Hamlin's claim would have been statute-barred, since cracks in the walls appeared as early as 1979. However, the Court of Appeal considered that the damage had become reasonably discoverable when Hamlin sought professional advice about the problem in 1989. Thus the limitation period started running in 1989, well within the limitation period. Therefore, Hamlin could recover in negligence for economic loss, as long as that loss was associated with physical damage.[9] The Privy Council affirmed this finding.

Loss

The Privy Council found that the loss suffered by Hamlin was financial. This loss occurred when the house depreciated in value by reason of the defective foundations. This depreciation in value occurred when the cracks became so bad that any reasonable homeowner would seek professional advice, and this is when the cause of action accrued. It followed from this that the measure of the loss was the potential cost of repairs if it was reasonable to repair the damage, or the depreciation in market value if it was not possible to repair.

Conclusion

Hamlin turned on New Zealand's reliance on local authorities, which has twenty years of judicial authority behind it. The decision itself affirms the right of New Zealand courts to apply principles which diverge from English law in the area of local authority negligence. In addition, the case raises the issue of the right to appeal to the Privy Council. The need for independence is frequently cited as a compelling reason for abolishing the right of appeal to the Privy Council. The decision in *Hamlin* is a timely example of the Privy Council's recognition that its function is not to force English law on New Zealand. This recognition of the separate development of New Zealand negligence law affirms the ability of the New Zealand Courts to decide law in a unique context.

Kavita Deobhakta BA / LLB (Hons)
**Sarah Macky BA / LLB (Hons)*

7 This approach was based on *Mount Albert Borough Council v Johnson* [1963] AC 758.
8 [1983] 1 All ER 65.
9 Supra at note 2, at 532.
* Sarah Macky was also the co-author of the case note on the Court of Appeal judgment at (1995) 7 Auckland U L Rev 1103, 1103-1106. The current Editors regret her omission.

Future Earnings as Matrimonial Property

_B v B_, Family Court, Auckland, 18 June 1996, FP 004/204/95 Judge Robinson.

The question I must determine is whether the law in New Zealand requires an interpretation of the Matrimonial Property Act 1976 which will have the effect of enabling the husband to use that Act as a "handy vehicle for the summary disposal of old and used wives". [1]

This was how Judge M D Robinson summed up his task in the recent matrimonial property case *B v B*.[2] The case attempts to remedy a gap in the provisions of the Matrimonial Property Act 1976 ("the Act") which disadvantages spouses who sacrifice their careers in order to care for their families. The case is significant because Judge Robinson ruled that a spouse's future earnings could be considered matrimonial property for the purposes of division.

The case involved the division of matrimonial property after the break-up of a twenty-eight year marriage. At the date of separation the three children were no longer dependent. Both parties were employed full time when they married. At that time, the wife's income was greater than that of the husband. The wife stopped working after two years in order to have children. She did not return to work and devoted her time to caring for the family. Meanwhile, the husband advanced in his career, and by the date of separation had become a partner in a large professional firm. At the time of the trial, the wife was 54 years old and unemployed, her sole income being a Social Welfare benefit of $7,000 per annum. The husband's income was expected to remain at over $300,000 per annum. At trial, the parties agreed which items were matrimonial property, however their valuations differed. The wife also wanted to claim a share of the husband's future earnings.

Five of the disputed issues were:[3]

(i) The effect of an agreement to purchase adjoining land on the value of the matrimonial home.

(ii) The value of the husband's superannuation.

(iii) The entitlement of the wife to an interest in the husband's future earnings.

(iv) A claim by the husband for unequal distribution of matrimonial property.

(v) The post-separation contributions of the parties.

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1 *B v B*, Family Court, Auckland, 18 June 1996, FP 004/204/95 Judge Robinson, 28.

2 Ibid.

3 A sixth disputed issue concerned the valuation of a collection of wine.

1. The Matrimonial Home and Superannuation Entitlement

Disagreement about the matrimonial home concerned not the valuation of the matrimonial home itself, but the effect, if any, of an agreement to acquire an adjoining property from the New Zealand Railways Corporation. The wife wished to purchase the husband's half share in the matrimonial home and therefore wanted to reduce the value of the agreement as much as possible. Counsel for the wife argued that although the agreement fell within the s 2 definition of property, this interest had little or no value at the date of hearing. The Judge disagreed,[4] referring to *Bevin v Smith*[5] which held that such an agreement created an equitable interest capable of supporting a caveat under the Land Transfer Act 1952.

In the present case it was unlikely that the Railways Corporation would sell to another party as the section was landlocked. Therefore, when the matrimonial home was sold it should also be possible for the interest under the agreement to be transferred. An assessment of the corresponding increase in value would have to take account of the costs involved in completing the agreement. Judge Robinson decided that the best method was to estimate what a "willing but not anxious purchaser"[6] would pay for both the matrimonial home and the agreement to purchase the railway land. The Judge stated his preference for the method of valuation adopted by the wife's valuer, and adopted that figure.[7]

The value of the husband's superannuation was also at issue. The superannuation scheme, part of the partnership deed between the husband and other partners in the firm, entitled the husband to an additional allocation of the profits of partnership in the year of retirement. The difference between the assessments of the respective spouses' valuers amounted to $34,564. Judge Robinson applied the four step valuation approach stated by Somers J in the Court of Appeal decision of *Haldane v Haldane*,[8] settling on a final valuation of $76,000. This was $30,400 greater than the figure proposed by the husband's valuer.

2. Future Earnings

The most controversial part of the judgment was the decision to uphold the wife's claim to a share of the husband's future earnings. Arguments raised by counsel for the wife were as follows:

(i) The husband's increased earning capacity was matrimonial property.

(ii) Section 9(4) of the Act allowed the court to treat part or all of the future income of the husband as matrimonial property.

(iii) Section 15 of the Act could be applied to grant the wife an increased portion of matrimonial property in recognition of her contribution to the husband's future earning ability.

4 Supra at note 1, at 10.
5 [1994] 3 NZLR 648 (CA).
6 Supra at note 1, at 10.
7 Ibid, 11.
8 [1981] 1 NZLR 554, 570-571.

(iv) Section 14 of the Act could apply as it would be repugnant to justice to enforce equal sharing if the court decided that the wife had no interest in the future earning capacity of the husband.

(v) Alternatively, the wife could bring a common law claim based on the equitable principal of unjust enrichment.

Submissions on the first argument were based on several American and Canadian authoritieswhich hold that a university degree can be matrimonial property.[9] This provides a basis for the remedy to reflect the husband's future earning capacity. However, Judge Robinson was wary of overseas cases which interpreted different statutes. In the New Zealand decisions of *Godfrey v Godfrey*[10] and *Coombes v Heycoop*[11] it was held that professional qualifications are not matrimonial property. Following these authorities Judge Robinson held that the s 2 definition did not include university degrees, distinguishing between qualifications and the ability to earn income.[12] However, his Honour held that neither was of value for the purposes of matrimonial property division.

Judge Robinson then considered the second argument, that s 9(4) of the Act gives the Court discretion to treat all or part of the property acquired after separation as matrimonial property. Section 9(4) states that:

> All property acquired by either the husband or the wife while they are not living together as husband and wife shall be separate property unless the Court considers that it is just in the circumstances to treat such property or any part thereof as matrimonial property.

In considering the exercise of this discretion, Judge Robinson had regard to the purposes of the Act. His Honour considered that the preamble to the Act and parliamentary debate suggested underlying principles which recognise equal contributions by spouses to a marriage partnership and provide for a just division. Citing a report of the Royal Commission on Social Policy,[13] Judge Robinson concluded that these principles had not been achieved. He then considered the relevant case law. In *Godfrey*[14] the Supreme Court of New Zealand considered the s 9(4) argument, and although it was not accepted, Casey J was not prepared to fetter the discretion.

Counsel for the husband in the present case argued that future earnings could not be the subject of the discretion conferred by s 9(4) of the Act, as such earnings were not "in existence".[15] This argument was based on previous case law which

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9 *Woodworth v Woodworth* 337 NW 2nd 332 (Mich) 1983); *O'Brien v O'Brien* 489 NE 2nd 712 (NY 1985); *Caratun v Caratun* (1987) 28 ETR 59.

10 (1979) 3 MPC 64 (SC).

11 (1992) 9 FRNZ 559.

12 Supra at note 1, at 32.

13 *Report of the Royal Commission on Social Policy Tekomihana A Te Karauna Mo Nga Ahuatanga-A-Iwi* (1988).

14 Supra at note 10.

15 Supra at note 1, at 36.

held that the court cannot make an order regarding property which has ceased to exist.[16] Judge Robinson distinguished non-existent property from future earnings, referring to the case of *Hanna v Hanna*[17] which allowed future property to be the subject of a s 21(1) matrimonial property agreement in terms of the Act. His Honour then considered decisions on the s 9(4) discretion to treat redundancy pay as matrimonial property. In the *Banas v Banas*[18] and *Wharfe v Wharfe*[19] cases, it was said to be improper to treat redundancy pay received after separation as matrimonial property. Both cases operated on the assumption that future earnings were not matrimonial property. Judge Robinson distinguished these cases on the grounds that the husbands were earning relatively low incomes and that there was no consideration of the wives' contributions to the ability to earn.[20]

Judge Robinson acknowledged that courts had in the past tended to restrict the exercise of the s 9(4) discretion. However, his Honour concluded that in the light of Court of Appeal decisions such as *Morris v Morris*[21] and *Z v Z*[22] which emphasise that the s 9(4) discretion is conferred in the broadest terms, that there is no reason why the discretion should be restricted in such a manner. The Judge considered that the purpose of the legislation was to provide for just division of matrimonial property. His Honour stated that a property division resulting in an annual income of over $300,000 for the husband, but only $7,000 for the wife was hardly consistent with this purpose. Judge Robinson therefore considered that such part of the husband's future earnings as the court deems appropriate should be treated as matrimonial property.[23]

3. Claim for unequal division and post-separation contributions.

In response to the wife's arguments, the husband claimed the Court should grant unequal distribution of the matrimonial property in his favour as allowed by sections 14 and 15 of the Act. However, his Honour noted case law[24] which states that departure from the requirement of equal sharing is rarely justified, and held that in any event there was no justification for unequal sharing in this case.[25] Judge Robinson denied the husband's claim having regard to s 18(2) of the Act which provides that a contribution of a monetary nature is not presumed to be of greater value than a contribution of a non-monetary nature.

16 *Edwards v Edwards* Supreme Court, Auckland, 12 September 1975, M 803/75.
17 [1996] NZFLR 433 (HC).
18 (1987) 3 FRNZ 430.
19 (1988) 4 FRNZ 220.
20 Supra at note 1, at 38-39.
21 (1981) 5 MPC 99.
22 [1989] 3 NZLR 413.
23 As a result of finding for the wife on this basis, Judge Robinson felt it unnecessary to consider the remaining arguments.
24 *Wilson v Wilson* [1991] 1 NZLR 687, 697 (CA); and *Joseph v Johansen* (1993) 10 FRNZ 302, 315 (CA).
25 Supra at note 1, at 43.

Judge Robinson then quantified the wife's entitlement to the husband's future earnings, stating that the principles of the *Haldane*[26] decision should not be applied to the valuation of future income. Instead the following three factors governed the instant case: [27]

1. The wife's contribution towards the ability of the husband to achieve his existing earning capacity, which included the sacrifice of her career.

2. The husband's current earning capacity. Particular attention was paid to an assessment of the amount of income due to the husband's own efforts, and the amount resulting from his position in the business partnership. The Judge pointed out that this position could not have been achieved without the sacrifices made by the wife.

3. The fact that a significant proportion of the income earned after separation was earned without any contribution from the wife.

These factors indicated that thirty-three percent of the husband's annual income was an appropriate figure. From this amount was deducted tax and contingency allowances. His Honour found on the evidence that the husband was likely to work for a further six years but made a thirty-three percent allowance for contingencies such as early retirement or death. His Honour then stated that this amount (sixty-five percent of one-third of the husband's annual income multiplied by six years) should be considered when making appropriate adjustments for post-separation contributions.

Finally, Judge Robinson considered the post-separation contributions made by the parties.[28] The husband had raised a mortgage to finance the purchase of his own home with the inference that some of his income, now ruled to be matrimonial property, had been used for the repayments. Consequently, his Honour applied s 17(1)(b) of the Act, ordering the husband to pay the wife a sum by way of compensation.

Conclusion

This decision weakens what has previously been an underlying principle of making a "clean break" in matrimonial property claims. While this decision seems an appropriate result on these facts, it will have radical implications on future matrimonial property. Counsel for the wife, Deborah Hollings, contended that this result is no more than the Act originally intended. [29]

It is arguably desirable that the other spouse's future earnings should be part of the Court's calculus when matrimonial property is divided. Does an award of a one-third of future earnings represent adequate compensation for marital

26 Supra at note 8.
27 Supra at note 1, at 46-47.
28 Ibid, 48.
29 Listener, 17 August 1996, 30.

contributions? Perhaps a better solution would be for the wife to receive a greater share of the existing matrimonial property, rather than direct payments of the husband's salary as it is earned. However, this type of settlement could also lead to inequitable results. For example, if the husband were to lose part or all of that salary, then he would have been unfairly disadvantaged by the unequal settlement. One advantage that an award of part of future earning offers is its inherent flexibility in dealing with fluctuations in income. Perhaps, instead of trying to fit the Act around the principles of the case, the judge should have based his decision on the equitable argument raised by counsel for the wife. Basing the decision on the claim of unjust enrichment would have better suited the remedy awarded in this case. In this way, the case could have been more readily confined to its facts, and would not purport to change the law so radically. Certainly the decision clashes with the principles of the past. Counsel for both parties agreed that the case is so significant that it should go straight to the Court of Appeal for a more definitive ruling. Any decision by the Court of Appeal will have major social implications concerning the way we regard the marriage partnership and will be interesting given the changed composition of that Court.

Simon H. Wiklund