

CASE NOTES

The Demise of Barristerial Immunity in New Zealand?

Lai v Chamberlains (8 March 2005) unreported, Court of Appeal, CA 17/03.

Introduction and Background

A recent decision of the Court of Appeal in New Zealand allowed an application to strike out the defence of barristerial immunity to an action in negligence.

Generally lawyers are accountable for negligent performance of their professional responsibilities that results in loss to their clients. Until *Lai v Chamberlains* however, barristers in New Zealand were immune from negligence claims relating to work in court and to pre-trial work intimately connected with the conduct of a case.

In England the immunity attaching to work in court was upheld by the House of Lords in the case of *Rondel v Worsley* [1969] 1 AC 191. In that case the major public policy justifications advanced for the preservation of the immunity were:

1. A barrister must perform his duty to his client subject to his overriding duty to the court. Civil claims for negligence may affect the way an advocate performs his duty to the court where there is a conflict with his duty to his client.
2. Actions for negligence against advocates would prolong litigation and inevitably lead to the retrial of the original action.
3. The “cab rank” rule requires a barrister to undertake litigation on behalf of any client, no matter how difficult, if they pay his fee.
4. Barristers would not prune their cases of irrelevancies against their clients’ wishes if they could be held subject to negligence actions. This would prolong litigation, contrary to the public interest that justice be administered reasonably swiftly.

In *Rees v Sinclair* [1974] 1 NZLR 180 the Court of Appeal accepted the reasoning in *Rondel v Worsley* and held that the immunity should apply in New Zealand. Both McCarthy P (who was persuaded by all the aforementioned policy justifications) and McArthur J (who accepted the first two policy arguments) thought that immunity should apply in New Zealand. Beattie J concurred without writing a separate judgment. McCarthy P also held that in relation to pretrial work the protection of barristerial immunity only exists where the particular work is so intimately connected with the conduct of the cause in Court that it

can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. His Honour rationalised the introduction of this “intimate connection test” by noting that the protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice.

In 2000, however, the House of Lords held unanimously that barristerial immunity no longer had a place in English law and should be abolished (*Arthur J S Hall v Simons* [2002] 3 All ER 673). Their Lordships reached this decision in light of a number of changes in the functioning of the legal profession and the administration of justice in England since *Rondel v Worsley* was decided.

It was against this background that the New Zealand Courts re-evaluated the decision in *Rees v Sinclair*. Leave to appeal to the Supreme Court has been granted (SC 19/05, 13 June 2005), and the appeal is scheduled to be heard on 18 October 2005.

Facts

Mr and Mrs Lai were the directors of S and L Lai Ltd, a company which was involved in the horticulture industry. Two plaintiffs brought proceedings in the High Court against the Lais and their company in 1992, alleging breach of fiduciary duties owed to them by Mr and Mrs Lai as directors of the company.

The proceedings were tried in the High Court at Auckland before Blanchard J in November 1995. After three days of the trial, Blanchard J suggested that there would be judgment issued against the company, and asked whether the plaintiffs would agree to judgment also being entered against them personally if the Court entered judgment against the company. This would prevent the need for the Court to hear what could be complex, time-consuming arguments on the claims made against the Lais (as second defendants) and alleviate the need to write a judgment dealing with complicated areas of the law. If the company was solvent then such a guarantee would have no real effect on the Lais, as the company’s assets would cover the amount of the judgment in its entirety, without the need to call upon the Lais’ personal assets.

The Lais took advice from their counsel, Mr I M Hutcheson (a barrister and solicitor employed by the respondent in the current case). Subsequently, on 17 November 1995 Mr Hutcheson filed a memorandum advising the Court that the Lais were “willing to provide a guarantee to the effect that they will personally guarantee the payment by the first

defendant of the amount of any judgment (if any) resulting in the within proceedings”.

Judgment in the proceedings was entered against the company for a substantial amount. It was also entered against the Lais personally, allegedly as a consequence of the advice in Mr Hutcheson’s memorandum to the Court. The company was unable to meet the judgment with the result that it was executed against properties owned by the Lais personally.

The Lais alleged that Mr Hutcheson and the defendants (Chamberlains) were negligent when giving them advice. In response, Mr Hutcheson and Chamberlains raised the positive defence of barristerial immunity. The present case is the strike-out application to that defence.

In the High Court

A full bench of the High Court, comprised of Salmon and Laurenson JJ, recognised that they were bound by the precedent set by the Court of Appeal in *Rees v Sinclair*, and therefore were obliged to uphold the principle of barristerial immunity and dismiss the strike out application ([2003] 2 NZLR 374). Their Honours nonetheless provided opinions to assist the Court of Appeal.

Justice Salmon was in favour of retaining a limited barristerial immunity in respect of all civil and criminal proceedings. His Honour held that there were two good reasons for retaining such immunity in New Zealand today. The first is in order to foster the degree of independence necessary for advocates to fulfil the joint duties to client and to the Court. The second has to do with the effect of the “cab rank rule”: without immunity some practitioners might shirk their duty to avoid the risk of being sued vexatiously by a difficult litigant.

Justice Salmon recognised that in an adversarial system the proper fulfilment of an advocate’s duty to the Court is essential to the administration of justice. He noted that an advocate should not need the reward of immunity in order to comply with his ethical obligations, but in a trial situation it is in the public interest to alleviate even a subconscious concern that the proper performance of a duty to the Court might lead to an action for negligence.

Justice Laurenson favoured retention of barristerial immunity on a limited basis for family and criminal litigation. His Honour thought that the immunity was justified on the basis of the public interest in

maintaining a strong and independent bar. This interest requires the observance of counsel's duty to the court.

Justice Laurenson cited the retreat from the oral tradition in litigation (other than in criminal litigation), the implementation of case management (Court-supervised timetabling in civil matters), the impact of legal aid, the New Zealand Bill of Rights Act 1990, and an increase in family law and administrative law litigation as factors that have changed since the *Rees* decision.

Justice Salmon argued that the justification for barristerial immunity arose exclusively out of the pressures of the trial process during a Court hearing. Outside the Courtroom there is not the same requisite immediacy in decision making. His Honour agreed with Kirby J in *Boland v Yates*. In that case, Kirby J suggested that in the Courtroom the advocate is an actor in the public function of the state, and not (as is otherwise usually the case), just another professional person engaged in private practice for personal reward. The intimate connection test is impermissibly vague.

Justice Laurenson favoured abolition because it would do away with the difficulties in determining whether particular acts or omissions were covered by the immunity. Moreover, the remaining immunity would then be more acceptable to the community.

In the Court of Appeal

The Court of Appeal, in a four to one majority (McGrath, Glazebrook, O'Regan and Hammond JJ, with Anderson P dissenting), allowed the appeal to strike out the defence of barristerial immunity.

Delivering the leading judgment Hammond J held that "there is no compelling empirical evidence" ([2003] 2 NZLR 374, [64]) to support the perception that imposing liability for negligence on advocates is likely to affect advocates' execution of their duty to court. In Canada and the United States there is no such immunity and "the sky has not fallen" ([2003] 2 NZLR 374, [140]).

The immunities that other participants in court proceedings enjoy (judges and expert witnesses have a complete immunity from suit) have their own distinct and highly acceptable justifications. His Honour noted that these immunities exist so that litigation can be conducted fearlessly and without inhibition, but they have no real connection with the duty of a lawyer who is paid to take care in his actions.

Justice Hammond also thought that the appropriate way to look at the cab-rank rule is as one of the circumstances to consider in evaluating

whether a lawyer has acted prudently and reasonably in a particular case. Removal of the immunity was in his eyes not likely to interfere with the barrister's duty to accept any client.

Nor was Hammond J swayed by the concerns that abolishing barristerial immunity would lead to an increase in defensive advocacy. His Honour observed that litigation is often "sprawling and imprecise" ([2003] 2 NZLR 374, [153]) even with the immunity rule, and thought that it was unlikely that there would be a noticeable increase in defensive advocacy without immunity. In any case, in his Honour's view, counsel are already attempting to "make every single post a winning post, regardless of its strength" ([2003] 2 NZLR 374, [154]).

The more substantive considerations against abolishing barristerial immunity were, in Hammond J's opinion, those concerning re-litigation. These considerations encompass everything from collateral attacks and reduced efficiency in the justice system to problems with damages and limitation periods on the causes of action. His Honour recognised that the New Zealand legal system was already dealing with these concerns. The doctrine of abuse of process is one example of a mechanism that can be utilised to uphold the finality of litigation.

The argument that barristerial immunity in this regard is a statutory privilege (and therefore not within the powers of the Court of Appeal to abolish) was also rejected by Hammond J. His Honour held that immunity was not a privilege under section 61 of the Law Practitioners Act 1982. Even if it was, it could be changed by New Zealand courts if it was capable of being changed in England.

Justice Hammond put forward a strong case in favour of removing the immunity. First he noted that a situation where a victim of "egregious professional incompetence" ([2003] 2 NZLR 374, [175]) has no remedy for the loss caused to him is contrary to the requirements of justice.

His Honour found that section 27 of the New Zealand Bill of Rights Act 1990 clearly supported a right of access to the courts. Any "immunity" which would restrict that access would have to be strictly justified as "being proportionate to the necessity of the preservation and proper ordering of the justice system itself" ([2003] 2 NZLR 374, [176]).

Justice Hammond also mentioned the concern that by continuing to support barristerial immunity for negligence the bar and judiciary risk damaging public confidence in New Zealand's legal profession. He was adamant that there should be respect for the law, and an immunity of this nature did not encourage public respect.

On balance his Honour concluded that the arguments for barristerial immunity in the case at hand were heavily outweighed by the case against. He held that there should be no immunity in civil cases. Although his Honour was persuaded by the majority in *Arthur J S Hall v Simons* with regard to abolishing immunity in criminal cases as well, he thought it appropriate to leave that issue to be considered more fully in a later case.

In a short concurring judgment, McGrath, Glazebrook and O'Regan JJ agreed that the Lais' appeal should be allowed and that the policy factors that were set out in *Rees v Sinclair* no longer justified the retention of the immunity.

Dissenting, Anderson P felt that section 61 of the Law Practitioners Act 1982 was "an absolute answer in favour of the respondent" ([2003] 2 NZLR 374 at [115]). In his opinion barristerial immunity is now vested in New Zealand barristers as a matter of statute and therefore the Court is incapable of abolishing it. The reason for this is that the Law Practitioners Act 1982 and Law Practitioners Act 1955 retain the same wording for section 61, despite the decisions in *Rondel v Worsley* and *Rees v Sinclair* being handed down in the intervening time. If Parliament had not intended to empower advocates in New Zealand with barristerial immunity, Anderson P suggested they could have expressed that intention in the 1982 Act.

The President also dismissed the argument that an advocate's negligence is irremediable under an immunity rule. His Honour noted that just because negligence is irremediable by the payment of money, it is not completely irremediable. Both criminal and civil cases are governed by disciplinary remedies and costs revision procedures.

His Honour found that barristerial immunity needed to be retained to protect people intimately connected with the judicial process from civil actions. He found support for this view both in the common law and in legislation, which protects Judges and witnesses in court proceedings from civil suits.

The President further thought that if barristerial immunity were removed there would be a substantial increase in the number of vexatious claims by "querulous, vainly hopeful, desperate or vengeful litigants" ([2003] 2 NZLR 374, [101]). His Honour noted that although the High Court rules allow summary dismissal of an unmeritorious case, the power is only to be exercised sparingly, in clear cases.

Another justification for the immunity, in Anderson P's view, was that those people intimately connected with the judicial process must be seen to be free of such risk of influence, as well as simply not being

improperly influenced by fear of a civil action to maintain respect of the law and public confidence in the judicial system.

His Honour was also concerned that the “cab rank” rule would be eroded by the abolition of barristerial immunity. He felt that there was a public benefit in retaining immunity since the protection that the “cab rank” rule affords to unpopular litigants is valuable and needs to be safeguarded.

Australian Position

Two days after the decision in *Lai v Chamberlains* was handed down by the Court of Appeal, the High Court of Australia delivered its decision in *D’Orta-Ekenaike v Victoria Legal Aid* ([2005] HCA 12), coming to precisely the opposite conclusion and maintaining barristerial immunity in Australia. The 6:1 majority (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; Kirby J dissenting) held that there was no compelling reason to depart from the High Court’s earlier decision in the case of *Giannarelli v Wraith* (1988) 165 CLR 543, and regarded the need for finality of proceedings as a determinative justification for the continuation of barristerial immunity in Australian law.

The majority also saw re-litigation of controversies as an inevitable and essential step in proving that an advocate’s negligence in conducting litigation had caused damage to the client. However, Gleeson CJ, Gummow, Hayne and Heydon JJ dismissed the arguments concerning the erosion of the cab-rank rule and the issue of possible divided loyalties as irrelevancies.

McHugh J highlighted the practical difficulties in proving that “but for” an advocate’s negligence a different result would have occurred, especially without also abolishing the rule that judges and jurors could not be required to give evidence to explain their decisions.

Appraisal

The most obvious issue with the majority decision in *Lai* is the way Hammond J treated the argument that immunity is a statutory privilege provided for by section 61 of the Law Practitioners Act 1982, which states:

“Subject to this Act, barristers of the Court shall have all the powers, privileges, duties and responsibilities that barristers have in England.”

One of the fundamental maxims of statutory interpretation is that effect is to be given to Parliament's intention as expressed in the enactment. It is clear that Parliament intended a wholesale adoption of the status of barristers in England when this provision was enacted.

Justice Hammond held that the "immunity" enjoyed by advocates at common law was not a "privilege" under the scope of section 61, essentially by employing a purely semantic argument. Justice Anderson's treatment of s 61 is more acceptable, and should be preferred. His Honour noted that in *Rees v Sinclair* McCarthy P recognised that immunity could be argued to be a privilege. It is rather contrived to argue that Parliament intended to exclude a longstanding immunity enjoyed by barristers in England from New Zealand's adoption of their status by using such a tenuous linguistic distinction and the Appeal should probably have been dismissed on this point.

The policy arguments put forward in favour of retention of the immunity in *D'Orta-Ekenaike* are compelling. The certainty and finality of judicial proceedings is supremely important. It would be detrimental to the administration of justice and the legal process if matters could be re-litigated for a collateral purpose. The ability to challenge an advocate's conduct of litigation would also likely do substantially more damage to the public confidence in New Zealand's legal profession than the immunity that Hammond J was concerned about. These are all considerations which the Supreme Court should bear in mind when deciding this issue in the near future.

It remains to be seen whether this decision will withstand the scrutiny of the Supreme Court later this year. For now, barristerial immunity in civil cases is a thing of the past.

*Kyle Nevin**

* Winner of the Auckland University Law Review Commentary Competition, 2005.

Taione v Kingdom of Tonga

“no law shall ever be enacted to restrict [freedom of speech and of the Press]”

- Clause 7 of the Tongan Constitution

In 2003 the Tongan parliament enacted a tripartite of laws, attracting criticism from Western countries such as New Zealand which usually ignore this tiny Pacific nation. Pursuant to the Constitution of Tonga (Amendment) Act 2003, the Constitution’s protection of free expression was significantly restricted. Moreover, the new Newspaper Act 2003 and Media Operators Act 2003 provided for government officials to control media licensing, dictate appropriate newspaper content and prevent the importation of foreign newspapers.

During the month of January, 2004, newspaper stands stood empty while officials determined which newspapers were fit to hold operating licences. This led to the long-term banning of one newspaper, the Taimi o’ Tonga (the “Taimi”). The Taimi o Tonga is a newspaper published in Auckland, New Zealand by the Tongan expatriate Kalafi Moala. Even prior to the official banning, government officials raided village shops and confiscated papers. (Matangi Tonga, “Tonga police seize newspapers and cash from shops,” (14 January 2004) Matangi Tonga Online.) The Taimi promotes democratic reform in Tonga. This is regarded as a radical agenda in a country where the Tongan king still holds powers similar to the monarchs of medieval England. The Taimi’s situation was not unique. The newspaper Ko’e Kele’a and the magazine Matangi Tonga, which also support democratic reform in Tonga, were denied operating licences. The only licences initially granted were to Church and pro-government publications. (Matangi Tonga, “Tonga sets its clock back 20 years”, (11 February 2004), Matangi Tonga Online <http://www.matangitonga.to/article/tonganews/newsmedia/article_118.shtml> at 14 July 2005.)

In October 2004, however, the Supreme Court (equivalent to the New Zealand High Court) delivered a landmark decision for the legal history of Tonga, *Taione v Kingdom of Tonga* [2004] TOSC 48; CV 374 2004 (15 October 2004). This proceeding, brought by 173 plaintiffs, was the first ever proceeding to challenge the validity of an amendment to the Constitution since the Constitution was granted [Not sure this is the right word: is a Constitution granted or passed?] in 1875. The Supreme Court held that both the Newspaper Act 2003 and the Media Operators Act 2003 were void and invalid. In addition, the Court held that part of the

Constitution's amended freedom of speech clause was invalid, pursuant to the Supreme Court's jurisdiction to review legislation under clauses 82, 84 and 90 of the Constitution of Tonga. Further, the new constitutional clause restricting relief for breaches of the Constitution to a declaration was held to be invalid to the extent that it was inconsistent with the law of liberty.

Legislative History

The legislation's immediate history began in 2003, with five successive prohibitions over the importation of the *Taimi* newspaper. (For a more detailed historical interpretation, see, generally, Rosevear, *The Meaning of Freedom for the Tongan Media*, unpublished research paper.) In February, the first two bans were enforced on the basis that the paper was "seditious" or "advocated violence, lawlessness or disorder" pursuant to sections 34-35, clause 7, pt 1, schedule II, Customs and Excise Act (Cap 67). In early March, a third prohibition was imposed pursuant to the king's power, under the Prohibited Publications Act (Cap 54), section 3, to prohibit future publications that are contrary to the "public interest".

In April, the Supreme Court held that all three bans were void (*Lali Media Group Ltd & Akauola v Utoikamanu & The Kingdom of Tonga* [2003] TOSC 14, at paragraph [18]). On the afternoon of that same day, the Protection from Abuse of Press Freedom Ordinance 2003 was issued. This negated the effect of the Supreme Court decision, making it unlawful to commit acts ranging from publishing to possessing the *Taimi* and deeming the ordinance immune from judicial review. The fifth ban, which invalidated the *Taimi* licence to trade, followed in May.

On 26 May the Supreme Court held that the Abuse of Press Freedom Ordinance was ultra vires and that it violated the section 7 freedom of speech clause in the Constitution: *Lali Media v Lavaka Ata* [2003] TOSC 30. The Tongan Court of Appeal (an appellate Court of inherent jurisdiction) subsequently upheld all of the Supreme Court judgments noted above in *Utoikamanu v Lali Media Group Ltd* [2003] TOCA 6. In the month between these two decisions, the *Taimi* had continued to sit in customs while customs officers claimed ignorance of the court orders lifting the importation bans.

Meanwhile, three bills were tabled in Parliament, eventually becoming the Media Operators Act on 29 July and the Newspapers Act 2003 and the Constitution Amendment Act 2003 in October 2003. The King assented to them in November 2003. Once again, these Acts effectively overturned the courts' earlier decisions.

The Supreme Court Decision in relation to the Act tripartite

1 Interpreting the Constitution

To inform the meaning of the Constitution of Tonga's Freedom of Expression clause ("Clause 7"), the Supreme Court had to interpret the context surrounding the making of the Constitution. The principles the Court adopted were:

- (1) First pay proper attention to the words actually used in context;
 - (1A) Do not construe the Constitution as partly written and partly not;
 - (2) Avoid doing so literally or rigidly, especially for the protection of human rights
 - (2A) Any derogation is to be narrowly construed, but not so narrowly as to amount to misconstruction
 - (2B) Beware of imposing the judge's own values
- (3) Look also at the whole Constitution;
- (4) Consider further the background circumstances when the Constitution was granted in 1875;
- (5) Finally, be flexible to allow for changing circumstances.

Webster CJ adopted the accounts outlined by distinguished historians on Tongan history. This literature (for example, Latukefu *The Tongan Constitution: A Brief History to Celebrate its Centenary* (1975); Campbell, *Island Kingdom: Tonga Ancient and Modern* (2001) provided clear evidence that the King of Tonga adopted the Constitution to show Western powers Tonga's "civilised" nature and to prevent colonisation. On this basis, his Honour held that the freedoms in the Constitution must "be considered in a Western sense" rather than in relation to traditional Tongan culture. This was a crucial finding since the rest of the judgment rests on this assumption.

This view may not be altogether correct. According to Tongan traditionalists, Tongan culture requires commoners, such as journalists, to agree unconditionally with the opinions of higher-ranking people. (For traditionalist accounts of Tongan culture see, generally, Matangi Tonga interview with the Governor-General (who helped to draft the Acts), "We don't believe in individual rights" <<http://www.matangitonga.to/newsarch/mau03/indri.htm>> (at 12 July 2004); and Latukefu, "The definition of authentic Oceanic cultures with particular reference to Tongan culture" [1980] 4 *Pacific Studies* 64-66; E

Bott, *Tongan Society at the Time of Captain Cook's visits: discussions with Her Majesty Queen Salote Tupou* (1982); E Wood-Ellem *Queen Salote of Tonga* (1999)). Had the court taken this traditional view into account it would obviously have enforced the 2003 amendment's wide restrictions on freedom of speech. It is worth noting that whether even this more traditional view is entirely accurate is unclear. More modern historians argue that modern Tongan culture is a much more complex mixture of foreign and traditional influences (See for instance Campbell, *Island Kingdom* (2001)).

2 Amendments to Clause 7: Freedom of Speech and of the Press

Prior to the 2003 amendment, Clause 7 in the Constitution of Tonga read:

It shall be lawful for all people to speak write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press forever but nothing in this clause shall be held to outweigh the law of slander or the laws for the protection of the King and the Royal Family.

The Constitution of Tonga (Amendment) Act 2003 numbered the original clause as sub-clause (1) and added:

(2) It shall be lawful, in addition to the exceptions set out in sub-clause (1), to enact such laws as are considered necessary [or expedient] in [the public interest], national security, public order, morality, [cultural traditions of the Kingdom], privileges of the Legislative Assembly and to provide for contempt of Court and [the commission of any offence]....([] added).

(For legislative history around this provision, see Robie "The Public Right to Know" (2004) 10 *Pacific Journalism Review* 103, 114.)

Clause 7(2)

Chief Justice Ward held that the parts of the provision placed in square brackets above must be *removed* in order to validate clause 7(2). These void powers were inconsistent with common law implied exceptions to freedom of expression. The remaining valid restrictions "merely cover in fuller terms what has always been covered in the legal position on

freedom of expression". They are all listed in Article 10 of the European Convention of Human Rights and fall within common law implied exceptions. Both are applicable in Tonga under the Civil Law Act (Cap 25).

According to the valid clause 7(2), the Tongan parliament can only enact "necessary" laws to restrict free expression. This term provides a narrow breadth for lawmaking, mandating a "pressing social need" and "provided that they are no more than is proportionate to the legitimate aim being pursued and do not involve prior restraint of freedom of expression except in cases of clear and present danger". The bracketed term "expedient" was removed because that test was too low for creating exceptions and thus obstructed the liberties contained in Clause 7. The term was held to be inconsistent with Clause 7, as well as with Clause 79 of The Constitution of Tonga. Clause 79 allows the legislature to amend the Constitution, provided that the amendment *does not affect the law of liberty* and other expressed factors. His Honour held that Clause 79 could not have been impliedly repealed by the new legislation, since the "law of liberty is of such importance in the framework of the whole Constitution and the laws of Tonga as a whole" that the clauses in the Constitution which protect liberty cannot be amended by a side wind.

The valid parts of the sub-clause could be severed because what remained is not "so inextricably bound up with the part declared invalid that what remains cannot independently survive"; and "on a fair review of the whole matter it could be assumed that the legislature would have enacted what survives" without enacting the part that is void. Chief Justice Webster also considered that the presumption of constitutionality was revoked, since the void parts of the amended clause "inhibit[ed] the freedom of expression to too great an extent and it is not possible to read the language of those parts of the amendment as subject to implied terms".

3 Clause 7(3)

(3) It shall be lawful to enact laws to regulate the operation of any media.

Chief Justice Webster held that Clause 7(3) is valid because, subject to an implied term, it does not "inevitably and necessarily" restrict or affect freedom of expression and is therefore presumptively valid. This finding upheld the presumption of constitutional validity, which asserts that if an

implied term can be read into statutory language that avoids conflict with legislation, the court should construe the law as containing such an implication.

Clause 7(3) must be read subject to the implied term that media regulatory laws can only be made if they are “necessary”. Without this implied term Clause 7(3) could allow for unfettered media regulation, thus amounting to an unacceptable prior restraint on freedom of expression.

4 Clause 103A

The court briefly examined Clause 103A, which limits relief for breaches of the Constitution to declaratory relief. Although strictly obiter dicta, the court suggested that the clause is void to the extent that it is inconsistent with the law of liberty and any consequent right to constitutional damages. The potential removal of remedies that might otherwise be available, in the Court’s view, “significantly” violated the Constitution, particularly Clause 7.

5 Media Operators Act and Newspaper Act

Chief Justice Webster held that the Media Operators Act 2003 and the Newspaper Act 2003 were void in their entirety because they were inconsistent with Clause 7, even when Clause 7 was validly amended.

6 Media Operators Act

The core section of the Media Operators Act 2003 was titled “restriction on issuing of media licences”. This headnote showed that the Act’s sole purpose was to prohibit the granting of licences to foreign persons or corporations. This was “clearly”, “patently” and “so seriously” inconsistent with Clause 7 because it prevented these people from exercising their right to free speech and consequently prevented free public access to information and opinions. The Court held that the presumption of constitutional validity of legislation did not apply because the Act stole “the heart of freedom of expression”, making it impossible to read the statutory language as subject to an implied term. Nor could the core section (Section 3) be severed from the rest of the Act; the Act would lack substance without this central section.

7 Newspaper Act

The Court found that in “general the provisions...appear to consistently put hurdles in the way of a free press for newspapers”. In particular, the Minister of Communications was given vague powers (in sections 8 to 11) to determine content standards for newspapers, as well as to prevent publication without a licence, selling, distributing or importing a declared foreign newspaper. The wide nature of these powers and especially their effective prior restraints over newspapers made it impossible to reconcile them with recognised common law exceptions to freedom of the press.

Moreover, the “Censorship” section (section 12) imposed “heav[y]” prior restraints on press freedoms. Some of the prohibited content categories such as “not honest” (a question of law) or “not fair” were not covered by implied exceptions to freedom of the press, as upheld in cases such as *Hector v Attorney-General of Antigua* [1990] 2 AC 312. In addition, the section could potentially have created a double jeopardy situation, as some of the criminalised acts were independent offences. The unobjectionable parts of the Act could not be severed because the infringing parts of the Censorship section were “so extensive and would give the defendant such unlimited discretion” that all the other sections of the Act were inextricably tied to them.

Concluding Remarks

At present, the Tongan government seems to be respecting the Court’s role as the guardian of the Constitution and accepting this rather embarrassing Supreme Court ruling. Perhaps this signals that the government is acknowledging the Constitution of Tonga’s insistence that “There shall be freedom of speech and of the press forever,” in clause 7(1). If calls for greater democracy in Tonga intensify in the future, it will be interesting to see whether the government continues to respect this historic court ruling upholding freedom of the press.

Anna Rosevear

Life or Death in the Privy Council

In what may yet be looked back upon as the last throes of the Caribbean appeal to London, a nine-strong Privy Council delivered judgment on three death penalty cases and declined the invitation to bring about bill-of-rights-compliance by modifying statutes that provided: “Any person convicted of murder shall be sentenced to, and shall suffer, death”.

Boyce v The Queen [2005] 1 AC 400 (*Boyce*), *Matthew v State of Trinidad & Tobago* [2005] 1 AC 433 (*Matthew*) and *Watson v The Queen* [2005] 1 AC 472 (*Watson*) were appeals from Barbados, Trinidad and Tobago, and Jamaica, heard concurrently by a Judicial Committee comprising eight Law Lords and a former Chief Justice of Jamaica. In each case the Board had to consider the inter-relationship of a similar set of constitutional and statutory provisions.

All three states’ constitutions possessed some variation on the following three sections (here abstracted for the sake of simplicity from the Constitutions of Trinidad and Tobago, sections 5(2), 2 and 6(1); Barbados, sections 15(1), 1 and 26(1); and Jamaica, sections 17(1), 2 and 26(8)):

- (A) No person shall be subjected to cruel or unusual punishment.
- ...
- (B) This constitution shall be the supreme law, and any other law shall be void to the extent of inconsistency.
- (C) No law existing at the time of the creation of this Constitution shall be invalidated by the Constitution.

In addition, the Act or Order in Council that had given effect to each State’s Constitution, by incorporating the Constitution as a schedule, contained the following provision (compare Barbados Independence Order, article 4(1); Constitution of the Republic of Trinidad and Tobago Act, section 5(1); Jamaica (Constitution) Order, article 4(1)):

- (D) Existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

Finally, each state possessed a criminal statute (X) that mandated the death sentence for murder. This statute had been on the books at the time of the adoption of the Constitution. (Compare Offences against the Person Act 1994 (Barbados), section 2; Offences against the Person Act

(Trinidad and Tobago), section 4; Offences against the Person Act (Jamaica), section 3.)

The question on appeal was the validity of (X) in light of (A)-(D).

The Privy Council unanimously confirmed its previous case law (*Reyes v The Queen* [2002] 2 AC 235) holding that the mandatory death penalty is inconsistent with the right not to be subjected to cruel or unusual punishment (*Boyce*, 416, 428). However, on the question of what consequences this rights-inconsistency had for the death penalty statute, the Board divided five to four. The majority comprised Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, and Zacca J (a former Chief Justice of Jamaica). The minority Law Lords were Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn, and Lord Walker of Gestingthorpe.

The majority held that the death penalty provision (X) was saved from invalidity by the Constitution's existing law proviso (C), and that the judiciary had no power (under D) to modify the death penalty statute in order to make it rights-consistent. In so holding, the majority was willing to overrule a Privy Council decision barely a year old, *Roodal v State of Trinidad & Tobago* [2005] 1 AC 328 (*Roodal*).

The minority vigorously dissented from this approach, which it stigmatised as overly "legalistic" (*Matthew*, 453). The minority believed that the death penalty statute ought to be modified, so as to make death a discretionary rather than a mandatory sentence, therefore bringing the criminal statute into line with the constitutional bar on cruel and unusual punishment.

The *Boyce*, *Matthew*, and *Watson* trilogy is noteworthy, aside from the inherent gravity of its subject-matter, for a number of reasons. This note focuses on the Law Lords' contribution to two current controversies in interpretive method. The first concerns the limits of judicial powers to construe or modify statutes into rights-consistency: specifically, how can interpretation or modification powers be approached in order to ensure that rights-consistency is not produced in an arbitrary fashion? The second controversy concerns the limits of the "living tree" approach to constitutional interpretation.

Arbitrariness?

Counsel argued that the modification power (D) could be used to change the meaning of a statute so as to make it consistent with constitutional rights. Of course, (C) limited this modification power whenever the statute in question existed at the time of the adoption of the constitution.

But (C) merely disallowed the complete invalidation of a statute – anything short of this was permissible. Thus, counsel contended, the death penalty statute could be read as providing not “Any person convicted of murder shall be sentenced to, and shall suffer, death”, but “Any person convicted of murder *may* be sentenced to, and *may* suffer, death” (*Matthew*, 440).

The minority accepted this argument (*Matthew*, 467-468). “Invalidity” meant the “emasculating”, “avoidance” or rendering of the law in question nugatory (see *Boyce*, 430; *Matthew*, 460). Merely modifying the death penalty statute to provide for a discretionary rather than a mandatory death sentence would not make it invalid in that sense. The minority concluded: “there are limits to the power of modification, but the modification we favour falls well within these limits” (*Boyce*, 430).

It is worth noting that it is debatable whether “invalidity” can bear this meaning. If an enactment provides for a certain legal rule, and that rule is changed through modification by a court, the enactment has been, in a sense, “invalidated”, even though it has not been rendered entirely nugatory.

In any case, the majority found the minority’s approach “completely untenable” for other reasons (*Boyce*, 411). The framers of the various constitutions could not possibly have intended the modification power (D) to have the scope attributed to it by the minority. The framers did not expect large swathes of their existing law to be remodelled according to the demands of the new constitutional rights – in fact, this was exactly what the saving for existing laws (C) was designed to prevent. The modification power – which, notably, was contained in legislation that gave effect to the constitution, rather than the constitution itself – was designed to save valid parts of an enactment that were bound up with constitutionally invalid parts. The power therefore prevented the judiciary having to throw the baby out with the bath-water when it found part of an enactment invalid (*Boyce*, 421-422; see also the minority in *Roodal*, 371). But no invalidity could exist in respect of a statute that had been in force as at the adoption of the constitution, because (C) obviated the possibility of any part of such enactments being held invalid in the first place.

One interesting aspect of the majority’s reasoning was what it called the “Irrationality” or arbitrariness argument (*Boyce*, 419). The argument ran as follows: if the modification power did have the scope attributed to it by the minority, it would enable the courts to revise enactments to make them rights-consistent – but only in instances where (fortuitously)

some aspect of the enactment could sensibly be left standing. (Otherwise, the prohibition in (C) against holding an existing law invalid would be breached.) The majority thought that this would be an inexplicably arbitrary way to give effect to fundamental rights (*Boyce*, 419):

Their Lordships find it hard to imagine why the framers of the Constitution should have wished to install such an arbitrarily incomplete mechanism for securing conformity between existing laws and [rights]. That all existing laws should have to conform to principles of fundamental rights would have been understandable. That all existing laws should be exempt is explicable. But that the question should depend upon the mode of expression or conceptual unity of the particular law defies rational explanation. It would immunise only those laws which for linguistic or conceptual reasons could not be brought into conformity by anything which could be described as modification or adaptation.

Counsel for the appellants suggested that the modification power they contended for was not obviously any more arbitrary than the rules of construction mandated by section 3 of the Human Rights Act 1998 (UK) (“HRA”), and section 6 of the New Zealand Bill of Rights Act 1990 (“NZBORA”). The majority dismissed this argument: “there is no comparison” between a rule of construction, which assumes that the statute can be given a rights-consistent meaning, and a power of modification, which assumes that no such meaning is possible. “The second takes on where the first leaves off.” (*Boyce*, 420.)

Can the charge of arbitrariness, if accepted vis-à-vis the power of modification, really be so swiftly dismissed when levelled at the rule of construction? The minority certainly did not seem to think so, describing their own approach to the modification provision as “not dissimilar from the approach prescribed by sections 4 and 6 of the [NZBORA] and sections 3 and 4 of the [HRA]” (*Matthew*, 463).

Moreover, the arbitrariness criticism of the modification provision (as that provision was construed by the minority) looks very much like the criticism made by Richard Ekins of the HRA and NZBORA construction provisions (“A Critique of Radical Approaches to Rights Consistent Statutory Interpretation” (2003) 6 EHRLR 641). Ekins’ criticism is that if the construction provisions are taken to legitimate what he calls “semantic opportunism”, i.e. the adoption of “any literal meaning of an enactment that is rights-consistent, irrespective of whether

it is the legislature's intended meaning", then this seems to turn rights-consistency on happenstance. Ekins claims (649):

[T]his approach would be a particularly arbitrary means by which to ensure domestic law was rights-consistent. On this approach, legislation would be brought into conformity with the judicial view whenever an accident in legislative drafting left open a convenient semantic meaning. Thus, the law would be consistent with judicial views to the extent that Parliament failed scrupulously to avoid leaving open alternate semantic meanings.

Of course, the House of Lords has accepted the arbitrariness of semantic opportunism, and accordingly rejected that approach, in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. In *Ghaidan* their Lordships held (at 571, 574, 585, 596) that construction under the HRA is not constrained by semantic meaning. Interestingly, however, the effect of abandoning any semantic constraints is merely to make the "rule of construction" start to look almost indistinguishable from the power of modification that the majority in *Boyce, Matthew, and Watson* rejects as so arbitrary as to defy rational explanation.

The constitution as a "living tree"

The real source of the division in the Privy Council was a divergence of opinion concerning the nature and scope of the "living tree" approach to constitutional interpretation.

All of their Lordships accepted that constitutions are living organisms that evolve to reflect changing standards, and should be interpreted accordingly.

The text is a "living instrument" when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life. ... All this is trite constitutional doctrine. (*Boyce*, 416-417)

While this doctrine may be trite in Commonwealth countries that have only relatively recently adopted written bills of right, in the home of the modern bill of rights such a throwaway line would be highly imprudent. Recent decisions of the United States Supreme Court, such as the death penalty case of *Roper v Simmons*, 125 S Ct 1183 (2005), show that controversy continues to rage over the living tree approach to

constitutional interpretation. The “originalist” school of interpretation rejects the living tree approach and demands that the meaning of a given constitutional right be determined by ascertaining its scope at the time of enactment. As the most mordant proponent of originalism, Justice Antonin Scalia, has said extra-judicially (“God’s Justice and Ours” (2002) 123 *First Things* 17):

[T]he Constitution that I interpret and apply is not living but dead – or, as I prefer to put it, enduring.

The Privy Council reached nowhere near the level of division that has wracked the United States Supreme Court, but their Lordships did differ markedly regarding the lengths to which “living tree” interpretation can be taken. The minority thought that if a provision is now capable of bearing a meaning that reflects contemporary standards of rights-protection, it must be given that meaning (*Matthew*, 457-458, 469-471).

In contrast, the majority thought that not all constitutional provisions are equal: “concrete and specific” provisions, such as the Caribbean constitutions’ interpretative machinery, do not confer on judges “a vague and general power to modernise” their effect in accordance with changing standards. Judicial creation of such a power would not be “the democratic way to bring a constitution up to date” (*Boyce*, 417).

How, then, does the majority distinguish between a “living tree” provision and an ordinary, “enduring” one? Lord Hoffmann suggests that the distinction may be drawn simply by applying the intended meaning of the provision in question. Loose rights standards (e.g. “cruel and unusual punishment”) can maintain the same meaning yet lend themselves to different applications in different historical periods as circumstances change (*Boyce*, 416). (For example, since far fewer people believe in an after-life today, it may be that capital punishment is cruel in a way that it was not two centuries ago. Alternatively, it may just be that, due to improvements in our understanding of psychology, we now recognise that execution has always been cruel, even though our predecessors did not.)

Broad rights standards may be contrasted with machinery provisions such as (C) and (D). These provisions cannot have a different application today than they did when enacted, unless their meaning is now to be changed by the court.

Sticking to intended meaning, while allowing for differences in application, would seem to be a logical solution to the “living tree” problem, and one that accords with orthodox statutory interpretation

method. However, Lord Hoffmann could be read as implicitly rejecting this solution when he goes on to say:

[W]hether [the framers] entertained these thoughts or not, the terms in which these provisions are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights (*Boyce*, 416-417).

This passage arguably hints at two other possible approaches to determining which interpretative method (i.e. orthodox or “living tree”) should be applied to a given provision. First, the answer may be found in the nature of the words themselves. However, as Lord Hoffmann himself has emphasised elsewhere (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 1 WLR 749 (HL), 774-775), words have no magic in themselves; they only yield discernible meaning because, in context, they illuminate the intentions of those who spoke or wrote them.

The remaining possibility then, is that the living tree approach will be adopted whenever sufficient vagueness is present to make updating permissible, and judges feel that the exigencies of the situation demand it. This is the approach that the minority seems to have adopted. Such an approach invites the charge of arbitrariness discussed above. More concerning, if judges are free, when they think “[t]imes have changed” (*Matthew*, 469), to revise not only the content of particular human rights but the superstructural provisions that govern the legal impact of those rights, there would seem to be scant protection for some of the most basic constitutional premises of a politico-legal system.

The *Boyce*, *Matthew*, and *Watson* decisions are commendable for the fact that the majority disavowed such a radical move. However, that result may be attributable to happenstance. The Law Lords were evenly divided, and it was only the presence of a temporary Jamaican judge that tipped the balance in favour of the majority. As the Right Honourable E W Thomas has observed (“The Privy Council and the Death Penalty” (2005) 121 LQR 175, 180), it is unfortunate that the Law Lords have not reached some minimal level of consensus on the “core question[s]” faced in *Boyce*, *Matthew*, and *Watson*, because, until such consensus is reached, the life or death of Caribbean convicts may “depend on the composition of the Board which sits on any given appeal”.

*Nicholas Sage BA/LLB (Hons)**

* My thanks to Professor Jim Evans and Richard Ekins for their comments on a draft of this note.

The Peculiar Nature of GST Avoidance

Ch'elle Properties (NZ) Ltd v CIR (2004) 21 NZTC 18,618 (HC) is the first case in New Zealand in which the taxpayer tried to extract a large amount of money from the Inland Revenue Department (“IRD”) in the form of tax refunds. The carefully arranged scheme was based on the mismatch of the GST registration bases. Had the arrangement been successful, it would have been akin to obtaining an \$80 million loan on an interest-free basis, without any repayments being due for twenty years. Despite being legitimate, on a strictly literal interpretation of the law, the claim for tax refunds was declined by the Commissioner who considered that the arrangement was set up for the tax advantages it could obtain and that tax avoidance under section 76 of the Goods and Services Tax Act 1985 (“the Act”) had occurred. This note examines the factual background that gave rise to the taxpayer’s claim and the findings of the Court.

The nature of GST and the registration bases

To better understand the facts of the case, a brief overview of the nature of GST and the different registration bases may be helpful.

GST is an indirect consumption tax; it is not a tax on business profits or turnover. The tax is paid at each step along the chain of supply, until the goods or services reach the end-user. The tax is collected by a registered person. He or she accounts to the IRD for GST they have collected, pursuant to the accounting basis on which they are registered. A registered person is also entitled to claim a credit for the GST they have paid to another registered person in the course of buying products or services from the latter. The credit off-set system ensures that only a net figure is paid to the IRD by the registered person (or refunded by the IRD, if appropriate). The net figure is the difference between the “output tax” (the GST component in supplies made *by* the registered person) and the “input tax” (the GST component in supplies made *to* the registered person).

Although there are three methods of accounting for GST, only the two methods relevant to the discussion are mentioned here. A particular method determines when output tax and input tax are taken into account for calculating tax payable. The different registration bases were intentionally manipulated by the parties in *Ch'elle* to trigger a mismatch between the times when output tax and input tax were to be accounted for to the IRD, thus producing a long-term entitlement to an input tax credit

by the taxpayer. The two methods relevant to this discussion are as follows.

- (a) The *invoice basis*: registered persons become liable to output tax when they issue a tax invoice for the supply of goods or services, and they may claim an input tax credit upon receiving a tax invoice. This is the default payment basis used by the majority of taxpayers.
- (b) The *payment basis*: registered persons do not become liable to output tax until they receive payments for goods or services supplied. Similarly they cannot claim an input tax credit until they have made payment on an invoice. Registered persons must be eligible to furnish GST returns on a payment basis in accordance with section 19A of the Act and have to make an application to the IRD to do so. Section 19A provides the requirements for accounting on a payment basis. The major requirement is that the value of the registered person's taxable supply in a 12-month period is less than \$1,300,000.

Factual background

There were three parties involved in the scheme, namely Ch'elle Properties (NZ) Ltd (also referred to as "the taxpayer" in the judgment of the High Court); the Ashton Group of companies; and Waverley Developments Ltd.

Ch'elle Properties (NZ) Ltd (Ch'elle) carried on the business of land subdivision and development and was registered for GST on an invoice basis.

The Ashton Group (Ashton) consisted of 114 companies incorporated by Mr Ashton. These companies had no assets and were specifically incorporated for the purpose of purchasing land from the developer, Waverley Developments Ltd (Waverley). Each of the 114 companies was registered for GST on a payment basis. The only reason for incorporating 114 companies was to satisfy the requirements for accounting on the payment basis as provided by section 19A of the Act, that the total value of the person's annual taxable supplies cannot exceed \$1.3m. Had Mr Ashton only incorporated one company, the scale of the transactions would have rendered it ineligible to account for GST on the payment basis.

On 5 November 1998, each of the 114 companies entered into an agreement to purchase one section of land from Waverley. Each section had a purchase price of \$70,000 with a deposit of \$10 to be held by the vendor's solicitor as stakeholder. The remaining \$7,978,860 was due on

settlement. Settlement was not due until 20 years after the date of purchase.

In May 1999, each of Ashton's 114 companies entered into an agreement to sell its section to Ch'elle. The total value of the transactions exceeded \$80 million. The agreements specifically provided for a delay in giving possession to the taxpayer of up to 20 years.

The price that Ch'elle had to pay included all the improvements on the land during the delay period. The price was also adjusted upwards to accommodate expected increases in the prices of the properties in the following 10-20 years. Hence Ch'elle was paying for the expected value of the land rather than its present market value.

Since the settlement was delayed, Ashton, being registered for GST on a payment basis, was not required to account for GST until it received payment from Ch'elle that was not due for 20 years. Meanwhile, Ch'elle, being registered for GST on an invoice basis, could make a claim for input credits and pay the deposits on each agreement to the relevant company in Ashton. This, in turn, could put each of those companies in funds to complete the purchase of the section under the agreement with Waverley. This would ultimately enable Waverley to embark on the building of the houses to satisfy the contracts with Ch'elle.

The key element of the scheme was claiming and using public money in the chain of transactions. Without the lengthy period of mismatch between the entitlement of Ch'elle to the input tax credit and Ashton's output tax liability, the scheme could not have been executed. Neither Ch'elle nor Ashton Group had the means of fulfilling the obligations under their respective contracts without the use of the GST input tax credits. When it became clear that the input tax refund was not forthcoming from the IRD, the whole series of transactions collapsed. As a result, Ashton was not in a position to fulfil its obligations under the contract with Waverley, because it had no funds to pay for the land. Nor could it perform its contract with Ch'elle. As Waverley had cancelled the contract with Ashton, it no longer had a title to the land or any means of acquiring it.

The case was first heard by the Taxation Review Authority where Willy DCJ found for the Commissioner in *Case W22* (2003) 21 NZTC 11,212 (TRA). It is noteworthy that the case was decided under section 76 of the GST Act, which was amended in October 2000. The amendment's purpose was to align the wording of the GST general anti-avoidance provision with the wording of the income tax anti-avoidance provision. The taxpayer then appealed unsuccessfully to the High Court

(Hansen J). The discussion below considers the salient points of the High Court judgment.

Does section 76 apply regardless of compliance with the specific provisions of the Act?

Counsel for Ch'elle contended that, since they had complied with the specific provisions of the Act (namely sections 19, 19A and 20), the intent of the Act could not be defeated by the appellant's actions. The Court rejected this argument. Hansen J pointed out that, as a general anti-avoidance provision, section 76 has application regardless of compliance with other specific provisions of the Act. The High Court adopted the view of Richardson P in *CIR v BNZ Investments Ltd* [2002] 1 NZLR 450 that:

... [T]he general anti-avoidance provision cannot be subordinated to all the specific provisions of the tax legislation. It, too, is specific in the sense of being specifically directed against tax avoidance; and it is inherent in the section that, but for its provisions, the impugned arrangements would meet all the specific requirements of the income tax legislation.

The High Court also adopted the principle established in *Challenge Corporation v CIR* [1986] 2 NZLR 513 (PC) regarding the interrelationship between the general anti-avoidance provision, Section 99 (the predecessor to section BG 1 of the Income Tax Act 2004) and the specific provisions (559):

Tax avoidance schemes largely depend on the exploitation of one or more exemptions or reliefs or provisions or principles of tax legislation. Section 99 would be useless if a mechanical and meticulous compliance with some other section of the Act were sufficient to oust s 99. Richardson J, giving judgment in the Court of Appeal in favour of Challenge, nevertheless recognized that s 99 would be a dead letter if it were subordinate to all the specific provisions of the legislation.

The Privy Council in *Challenge* held that the mere fact the series of transactions complied with the specific requirements of the Act was not the answer to whether those transactions constituted tax avoidance.

In the context of section 76 of the Act, the Court in *Ch'elle* pointed out (18,625) that:

[the section] was invoked precisely because Ch'elle had established a right to a refund in accordance with the available provisions of the Act. Section 76 calls for a more broadly based enquiry than is required to establish technical compliance. It is whether the arrangement has been entered into "to defeat the intent and application of the Act... [and] it goes beyond the technical legality of the constituent parts of the arrangement. It requires the arrangement to be assessed by reference to the principles which underlie the Act.

The Court thus followed the approach established in the area of income tax avoidance, which provides that if there is an inconsistency, the general anti-avoidance provision is superior to the specific sections of legislation.

Is a tax advantage a necessary element of the section?

Counsel for Ch'elle argued that "tax avoidance" was not established on the facts of the case because Ch'elle did not obtain any tax advantage given that the chain of transactions ultimately failed. The Court therefore had to determine whether obtaining a tax advantage was an integral part of the definition of "tax avoidance" in section 76. It held that it was not.

A tax advantage does not have to be established before the Commissioner can treat an arrangement as void for tax purposes. Once the Commissioner is satisfied that an arrangement has been entered into between persons to defeat the intent and application of the Act, the Commissioner shall treat such arrangement as void and can adjust the amount of tax payable by any registered person as the Commissioner considers appropriate so as to *counteract any tax advantage* obtained by that registered person from or under that arrangement: section 76(1).

Under section 76(1), the question of a tax advantage thus arises only in relation to the *adjustment* to be made by the Commissioner subsequent to a finding that an arrangement falls within section 76. The question of a tax advantage is irrelevant to the primary determination of whether there was "tax avoidance" falling within the section.

Whether intention to defeat the intent and application of the Act is required

The next issue the Court considered was whether there must be proof of intention to defeat the intent and application of the Act. As discussed earlier, the Taxation Review Authority found that this had to be proven on a *subjective* basis. The High Court overruled the judgment of the Taxation Review Authority on this point and held that proof of such intention is not required by the Act. Hansen J said (at 18,626):

I think it more likely that the section is directed to the *effect* or *purpose* of the arrangement. Whether or not a particular arrangement constitutes tax avoidance should not depend on fine judgments as to what the taxpayer had in mind. If it did, a scheme which was void if devised and implemented by one taxpayer could be permitted if developed by another in different circumstances. That could not be the intended outcome of a section which carries no penal consequences and should be applied evenhandedly. In my opinion, the question is whether the arrangement is one which, objectively, defeats the intention and application of the Act. [Emphasis added.]

Having found that subjective intention to defeat the intent and application of the Act was not required, the Court determined that, objectively, the appellant had such an intention. The Court held that on an objective determination *two essential elements* of the Act were defeated by the scheme.

First, the Act's underlying intention to achieve an overall balance between the outputs and inputs of a registered person was defeated. The balance between outputs and inputs was grossly distorted by the gap of up to 20 years between Ch'elle receiving an input credit and the time when liability would arise for output tax on Ch'elle's taxable supply.

Secondly, the Act aims for some reasonable correspondence between the times when outputs and inputs in relation to a particular supply are accounted for. In the present case it was distorted by the mismatch between the liability of Ashton for output tax and the entitlement of Ch'elle to claim the input tax refund. The Act's underlying intention is that the nature and degree of such mismatches must be limited. This is demonstrated by the conditions on which registration on a payment basis is permitted. Registration is generally limited to taxpayers with a turnover of less than \$1m. This limitation was circumvented, however, by using a separate company for each transaction

and, therefore, the degree of the mismatch, prima facie contemplated by the Act, escalated to a level that could never have been intended.

The Court concluded that even though the arrangement conformed to the strict wording of the Act, it departed from its underlying principles to a degree that those principles were defeated. Therefore, the intent and application of the Act had been effectively defeated, and the arrangement amounted to tax avoidance within section 76.

Conclusion

Ch'elle Properties (NZ) Ltd v CIR has addressed the important question of the scope of section 76 of the Goods and Services Tax Act 1985. Regardless of compliance with the specific provisions of the Act, an arrangement will constitute a tax avoidance arrangement if it distorts the operation of these provisions. A tax advantage does not have to be established before the Commissioner can treat an arrangement as void for tax purposes. The actual intention of the taxpayer to defeat the operation of the Act does not need to be proved. It is sufficient if such intention is determined objectively.

The case has also demonstrated that the nature of GST avoidance is different from income tax avoidance. In cases of income tax avoidance a taxpayer may devise complex arrangements to escape paying income tax. In cases of GST avoidance, on the other hand, the taxpayer aims to comply meticulously with the provisions of the Act in order to be able to use public money as an input tax credit for its own purposes.

Ch'elle Properties (NZ) Ltd v CIR is now under appeal to the Court of Appeal. A final ruling on the exact scope and applicability of section 76 is awaited.

Helen Wells, LLB (Hons)