CASE NOTES

What's a Supreme Court to do?

CIR v Peterson (2005) 22 NZTC 19,098 (PC)

There is perhaps no thornier issue in the law than the question of what constitutes tax avoidance. The general anti-avoidance provision has been in effect in one form or another for over 50 years in New Zealand. Yet there is still no definitive guide to its interpretation. In the latest and last instalment of tax avoidance jurisprudence from the Privy Council in *CIR v Peterson,*[1] the split decision of the Board has illustrated the difficulties in developing a coherent, principled approach to the tax avoidance – tax planning dichotomy. The tight 3:2 split combined with the relatively recent retirement of Ivor Richardson as New Zealand's superior taxation jurist has left New Zealand's own Supreme Court with a fresh canvas on which to formulate its own approach to the issue.[2]

The facts

Peterson was a solicitor for and a member of two syndicates that sought to invest in the production of the films *The Lie of the Land* and *Utu*. Investment in the films was marketed as a vehicle to obtain significant tax advantages. Against this background, the syndicate entered into two separate agreements under which a production company undertook to produce each film for the syndicate in exchange for a payment of $X + $Y.[3] $X was to be funded out of the cash contributions of the syndicate. $Y was to be funded out of the proceeds of a non-recourse loan advanced to the syndicate by a party related to the production company.

The terms of the non-recourse loans differed for *The Lie of the Land* and *Utu*. In the case of *The Lie of the Land,* the loan was to be repaid out of the net receipts generated by the film in the home video market in the United States of America. Net receipts generated in other markets would only be applied to the repayment of the loan once the syndicate had recovered its own initial investment. Adding to the favourable terms of *The Lie of the Land* loan was a maximum interest rate of 10 per cent per annum. The loan for *Utu* was slightly less favourable. It provided that repayment was to be made out of the "Net Proceeds of the Exploitation" of the film.[4] The interest rate was 15 per cent per annum.

Unbeknown to the syndicate, only $X was applied by the production company to the production of both films. The balance of $Y (the non-recourse loan) was returned virtually immediately to the initial lender. *Utu* went on to become one of the most successful films in New Zealand history and generated a substantial income with receipts still being obtained 17 years later. The Privy Council presumed that repayment of the *Utu* non-recourse loan was subsequently made out of the receipts of the film.[5] By contrast, *The Lie of the Land* was never commercially released and did not generate any income. In its case, the non-recourse loan, although returned virtually immediately to the lender, was never formally repaid by the syndicate.

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[1] *Peterson v CIR* (2005) 22 NZTC 19,098 (PC).

[2] See also Williams "Privy Council Delivers Final Tax Avoidance Decision: Peterson v CIR" (2005) 11(3) NZ J Tax L & Policy 283, 291.

[3] The algebraic representations were used in both the majority and dissenting opinions of the Board.

[4] Meaning receipts generated by the sale and distribution of the film.

[5] *Peterson*, supra note 1, 19,119.

IRD policy at the time permitted the deduction of the total production cost of films over a period of two years: 50 per cent of the total cost in year one and 50 per cent of the total cost in year two. These deductions could be set off against the other income of investors. The members of the syndicate accordingly sought to deduct their share of the total amount of $X + $Y from their taxable income over the relevant two year period. The Commissioner, however, only allowed the deduction of $X, being the amount contributed by the private equity of the syndicate. The deduction of $Y was accordingly refused. The syndicate challenged this ruling.

The arguments

By the time the case arrived at the Privy Council the sole issue was whether the general anti-avoidance provision could be invoked to challenge the deductibility of $Y. The syndicate's argument was simple. They had incurred a liability to pay $X + $Y in entering a production agreement. They had contributed $X from their own funds and incurred a liability to repay the loan of $Y out of the net receipts of the film.

However, from the Commissioner's perspective, there were a number of questionable elements to the financing arrangement:

(a) The deceitful inflation of the costs of production of the film;
(b) The use of a non-recourse loan to finance part of the investment;
(c) The high gearing (56.6%) of the debt-financed portion of the investment; and
(d) The circular movement of funds.

Taken cumulatively, these elements were relied on to support the Commissioner's submission that the level of underlying commercial activity was insufficient to sustain the considerable deductions that the syndicate sought to claim.

The majority decision

Lord Millett delivered the decision for the majority (Lord Millett, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood). The critical question was whether the tax advantage obtained (the deduction of $X + $Y) amounted to tax avoidance.[6]

Drawing on Lord Templeman's distinction between tax avoidance and tax mitigation in *Challenge Corporation Ltd v CIR,*[7] the Board accepted that avoidance occurs where the taxpayer reduces his liability to tax without incurring the loss or expenditure that entitles him to that reduction. The syndicate had ostensibly paid $X + $Y to the production company to acquire a film. The preliminary conclusion was that they had incurred the expenditure that Parliament contemplated should entitle them to the deduction.[8]

The majority then considered the film-financing arrangement against the statutory purpose of the depreciation allowance regime.[9] That statutory purpose, in Lord Millett's opinion, was the provision of a tax equivalent to the accounting practice of writing off the capital cost of a trade asset. In the film-financing context,

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[6] Ibid.
[7] *Challenge Corporation Ltd v CIR* [1986] 2 NZLR 513, 561 (PC).
[8] *Peterson*, supra note 1, 19,109.
[9] Ibid.

the focus was on the taxpayer and the loss or expenditure that he or she had incurred to acquire the film. What the party to whom it was paid then did with that expenditure was irrelevant to the inquiry. It was wrong to suggest that the purpose of the statutory depreciation regime was not fulfilled unless the production company applied all of the proceeds provided by the syndicate in making the film.[10] On this basis, Lord Millett concluded that the syndicate had suffered the full economic burden of $X + $Y. Its members were therefore entitled to the full amount of the deductions that they sought.

In concluding the majority opinion, Lord Millett noted that his decision was based on the way in which the Commissioner had put his case.[11] Had the Commissioner framed his case in another way, firstly by obtaining a ruling that the loans were on wholly uncommercial terms and then arguing that the payment of $Y was incurred in connection with obtaining tax effective finance rather than a film, his case may have been successful.[12]

The dissent

Two members of the Board (Lord Bingham of Cornhill and Lord Scott of Foscote) were unable to concur with their counterparts in the majority. Lords Bingham and Scott agreed that the critical question was whether the tax advantage obtained by the investors amounted to tax avoidance.[13] Drawing on the dissent of Thomas J in *CIR v BNZ Investments Ltd,*[14] their Lordships asserted that the jurisprudential development of tax avoidance principles in the United Kingdom had little, if any, relevance to the interpretation and application of the New Zealand general anti-avoidance provision. The issue therefore crystallised into a matter of pure statutory construction relying on the scheme and the objectives of the legislation.[15]

Having outlined the relevant statutory background, Lords Bingham and Scott separately considered the arrangements in *The Lie of the Land* and *Utu*. Turning to *The Lie of the Land* first, they considered the non-recourse loan was such that a commercial lender would not advance capital on its terms.[16] Three terms in particular influenced this conclusion. First, repayment depended entirely on the success of the film. Second, the borrower's own investment was to be repaid before any repayment of principal or interest was made to the lender. Third, the maximum interest rate was 10 per cent.

The *Utu* loan also had some questionable elements including an interest rate of 15 per cent. Prevailing interest rates at the time of the arrangement (1984) were high. The six-month deposit rate averaged 11.5 per cent,[17] while variable mortgage rates averaged 14 per cent over the same period.[18] Focusing on the interest rates alone, no rational investor would advance unsecured funds on the basis of a 10 per cent or even 15 per cent return in that economic climate. They would be better off placing their money on term deposit and assuming zero risk.

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[10] Ibid 19,110.
[11] Ibid 19,111.
[12] Ibid.
[13] Ibid 19,121.
[14] [2002] 1 NZLR 450.
[15] *Peterson*, supra note 1, 19,114 citing Richardson J in *Challenge*, supra note 7, 548-549.
[16] *Peterson*, supra note 1, 19,117.
[17] Reserve Bank of New Zealand *Statistics* <www.rbnz.govt.nz/statistics/exandit/b3/hb3.xls> at 26 February 2006.
[18] Ibid.

It was this suspicion that pervaded the opinion of the minority. That no commercial lender would advance money on either of *The Lie of the Land* or *Utu* non-recourse loan terms suggested that an ulterior purpose underpinned the transactions. The process by which the funds were advanced confirmed this suspicion. Accepting that the members of the syndicate were "innocent dupes",[19] the minority looked beyond the relationship between syndicate and production company to the relationship between the production company and the lender. While in the case of *The Lie of the Land*, the funds were immediately recycled back to the lender, the *Utu* arrangement was more questionable. Not only were the funds immediately recycled back to the original lender, via a circle of 13 cheques but the production company also fraudulently represented that the New Zealand Film Commission had invested in the film. False invoices were manufactured to show how the proceeds of the non-recourse loan had been spent.

In the minority's opinion, the argument of the syndicate reduced to one simple proposition:[20]

> That if an investor is asked to pay and agrees to pay an inflated price for the film rights in a particular film, he is entitled...to depreciate the whole of the cost of acquisition, whether inflated or not.

The minority were not willing to countenance such a suggestion, citing the fact that the costs of production of the film were falsely inflated for no other reason than to bring about a higher depreciation deduction.[21] Such an arrangement was of a plainly undesirable kind that could not be reconciled with the statutory purpose of encouraging investment in the film industry.[22]

Lords Bingham and Scott were unable to accept the majority's conclusion that the syndicate had incurred the economic burden of paying $Y. Although the Utu loan had been repaid out of the receipts of the film, the retention of those receipts was in the minority's opinion unlawful and the lender would be accountable to the investors for them.[23] The consequence was that the investors had not incurred $Y as the loss or expenditure that entitled them to a reduction in tax liability. A clearer case of tax avoidance, in the words of Lord Bingham, could hardly be imagined.[24]

Had the full economic burden been suffered?

Irrespective of constraints placed on the majority by the pleading of the Commissioner's case, the *Peterson* arrangements do not fit comfortably within the standard capital asset depreciation paradigm. Depreciation of capital assets requires that the depreciable asset have a fixed and identifiable cost. In establishing the depreciable cost of the film to be $X + $Y the syndicate, and consequently the majority of the Privy Council, essentially shut their eyes to what happened after the syndicate had parted with $X + $Y. A broader inquiry would have identified two relevant issues. First, the terms of the non-recourse loans raised doubts over whether they were in fact loans. Second and relatedly, the immediate recycling of the non-recourse loan raised questions as to whether the syndicate incurred the economic burden of $Y.

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[19] *Peterson*, supra note 1, 19,116.
[20] Ibid 19,120.
[21] Ibid 19,121.
[22] Ibid 19,121.
[23] Ibid 19,122.
[24] Ibid 19,121.

With regard to the first issue, the majority unreservedly accepted that the $X + $Y payments made by the syndicate were made on their own account. This overlooked the possibility that the payment of $Y was tantamount to a capital contribution of the non-recourse lender. Putting to one side the immediate recycling of the loan, the *Peterson* financing arrangement represented a simple joint venture whereby the lender contributed 56.6% of the equity and the syndicate contributed the remainder. The lender was not a debt holder but an equity partner.[25] By agreeing to be repaid out of the net receipts of the films the lender outwardly assumed just as much risk if not more than that assumed by the syndicate. On this basis the depreciation deductions pertaining to $Y would belong not to the syndicate but to the lender of the non-recourse loan who assumed the residual risk. This was particularly apparent in the case of *The Lie of the Land* where the lender only enjoyed a preferential interest in the proceeds from the United States home video market. In all other markets, the syndicate's investment took priority.

The introduction of the recycling portion of the arrangement did not shift this economic burden. If anything, it extinguished it. In accordance with the arrangement, any perceived risk was nullified by the immediate recycling of the initial advance back to the lender. The majority's conclusion that the syndicate still incurred the full economic burden of $X + $Y seems to have been influenced, at least in part, by the Commissioner's remarkable concession that the recycling of $Y did not discharge the investors' liability to repay the loan out of the receipts of the film.[26] Irrespective of whether one labels the payment of $Y as equity or debt, the immediate recycling of that sum cancelled out its legal effect. It is difficult to accept that the syndicate or any party could be liable to repay a loan that had been returned to the lender immediately after it was advanced. The production company did not make a secret profit at the investors' expense as suggested by Lord Millett.[27] The money was simply recycled back to the initial advancer of the loan.

Conclusion

The decision in *Peterson* has issued a reminder of the difficulties that developing a coherent and principled approach to the tax avoidance - tax mitigation distinction ultimately presents. The Privy Council was united in principle but divided on application. Both opinions do suggest that the dictum of Lord Templeman in *Challenge* has been well and truly revived.

In the end, the principle difference between majority and minority in *Peterson* was the breadth of focus that each took in determining the scope of the anti-avoidance provision. Both sides implicitly accepted that the question was one of statutory construction. The majority confined its inquiry to the taxpayer contrary to its observations that it was necessary to look to the wider setting. The minority adopted a much broader focus and considered the circumstances in which the funds were employed in the production of the films as well as the circumstances in which the funds were recycled. The result of this difference in focus was that one side found the syndicate to have incurred a genuine liability (tax mitigation) while the other side found no liability existed at all (tax avoidance).

Blair Keown

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[25] See *Peterson*, supra note 1, 19,116 per Lord Bingham.
[26] Ibid 19,108.
[27] Ibid 19,110 per Lord Millett.

Judicial Review and Editorial Freedom

> "Private power may affect the public interest and the livelihoods of many individuals but that does not subject it to the rules of public law." [1]

Introduction

The decision of the High Court in *Dunne v Canwest*[2] held that the editorial judgment of a private television broadcaster was amenable to judicial review. At its core, the decision creates the possibility of private companies being subject to public law review on the basis that their decisions have a "public impact." Such an expansive conception of judicial review undermines the foundations of judicial review of administrative decision-making and the liberty of the press.

Overview

Two leaders of minor parliamentary parties had not been invited by TV3 – a private broadcaster – to participate in a pre-election televised political debate. The decision was based on polling data suggesting that their respective parties enjoyed low levels of electoral support. The two leaders challenged the decision by way of judicial review seeking a mandatory interim injunction requiring TV3 to include them in the debate.

Justice Ronald Young held that the decision of TV3 was amenable to judicial review and issued a mandatory injunction. This note examines the Court's preliminary conclusion that TV3's decision was susceptible to judicial review.[3]

The Judge's reasoning

Justice Ronald Young observed that judicial review is not limited to bodies exercising statutory functions but could also extend to "what are essentially public functions or the exercise of public powers."[4] In the circumstances, the Judge considered that the broadcaster was "performing a public function and exercising a public power."[5] In support of that view, the Judge set out a series of considerations:

(a) TV3 was a "public free-to-air" broadcaster;
(b) Broadcasters are subject to statutory controls under the Broadcasting Act 1989 (the Act);
(c) TV3 performed a vital "public function" in covering the election campaign and its broadcasting decisions had a "public impact"; and

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[1] *R v Jockey Club Disciplinary Committee, ex parte Khan* [1993] 1 WLR 909, 932 per Lord Hoffmann.
[2] [2005] NZAR 577 (presently under appeal).
[3] Whether the programme's decision to exclude the leaders was irrational or whether the Court ought to have ordered a mandatory injunction – rather than the orthodox remedy of quashing the decision and ordering the decision-maker to reconsider – has been explored by Dean Knight in "*Dunne v Canwest TVWorks Ltd*: enhancing or undermining the democratic and constitutional balance?" (2005) 21 NZULR 711.
[4] *Dunne*, supra note 2, [28].
[5] Ibid.

(d) TV3 had "thrust itself into the public arena" by choosing to broadcast a political debate.

The Judge acknowledged that the first consideration "could not possibly be sufficient" by itself and considered it merely "relevant." Likewise, in terms of the second consideration, it could not be suggested that the decisions of regulated businesses are amenable to judicial review solely by virtue of being regulated.[6]

The third and fourth considerations relating to the *impact* of the decision, however, lie at the core of the decision. These issues cut to the heart of an important doctrinal debate on the interface between public and private law. In particular, there is an emerging school of thought that the courts may "review commercial bodies whose decisions have public impact."[7]

A first principles approach to judicial review

Judicial review supervises the exercise of governmental power and statutory powers of decision. As Lord Hoffmann observed in *R v Jockey Club Disciplinary Committee, ex parte Khan* "private power may affect the public interest and the livelihoods of many individuals but that does not subject it to the rules of public law."[8] The exception is the specific procedure set out in Part 1 of the Judicature Amendment Act 1972 under which the exercise of statutory powers by private bodies corporate is subject to judicial review.

The absence of a specific statutory foundation is not determinative of whether governmental power is being exercised. For instance, in *R v Panel on Take-overs and Mergers, ex parte Datafin plc*, the English Court of Appeal held that decisions of the Take-overs Panel were amenable to judicial review notwithstanding that it had no statutory foundation.[9] The Court of Appeal explained that this position was "a complete anomaly" having to do with the emergence of a regulatory framework around existing City institutions.[10] Nevertheless, as Sir John Donaldson MR explained, "central government has incorporated the panel into its own regulatory network built up under [various statutes]."[11]

Accordingly, *Datafin* represented no departure from the basic principle that judicial review involves oversight of governmental power or statutory power. As Hoffmann LJ explained in *Khan*, the *Datafin* decision acknowledged that "governmental power may be exercised de facto as well as de jure. But the power needs to be identified as governmental in nature."[12] In that case, the Court held that a jockey club's decisions were not susceptible to judicial review. As Sir Thomas Bingham MR observed "while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental."[13]

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[6] That would be an untenable proposition. The regulation of private enterprise does not transform private business decisions into the exercise of a public power.
[7] See Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 750.
[8] *Khan*, supra note 1, 932.
[9] [1987] QB 815.
[10] Ibid 835.
[11] Ibid 836.
[12] *Khan*, supra note 1, 931.
[13] Ibid 923.

The "public impact" approach

The "public impact" approach suggests that, because a decision has important consequences for the public, it is tantamount to a "public decision." That is unsound. Conceptually, the public nature of a decision has nothing to do with the extent of its impact on the public. A trivial decision by a government administrative body is no less public in nature than a far-reaching decision. Conversely, a private company's decision to, say, relocate its operations is not a "public" decision, in the relevant sense, irrespective of its "impact." The company, through the management of its board, makes those decisions as a private person. Such decisions may be subject to specific regulatory regimes or actionable at private law but they are not amenable to judicial review. Private decisions are not transformed into public ones because they have consequences for others.[14] Instead, the board is ultimately accountable to the shareholders for the exercise of its judgement with respect to the interests of the company as a whole.

The reasoning underlying the "public impact" approach involves affixing the description "public" to private businesses on the basis that they serve and affect the public. That approach uses the expression "public" in a sense which is disconnected from the relevant legal inquiry for judicial review purposes. Professor Watts has observed, "it is sleight of hand to suggest that, because one generally welcomes the public into one's shop or mall, that lends a 'public' aspect to the land and business that justifies invoking "public law."[15]

The transplantation of public law standards of administrative decision-making into the private sphere also implicates basic principles of property rights. The right to exclude others is a corollary of private property. The company is to be managed by the board in the best interests of the company as a corporate commercial entity.[16] Aside from its statutory obligations under the broadcasting legislation, a media company has no obligation to grant access or coverage to any issue. The classic exposition of these principles is set out in Wade & Forsyth on *Administrative Law*:[17]

> The powers of public authorities are ... essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property as he may wish. He may act out of malice or in a spirit of revenge, but in law this does not affect his exercise of power. ... This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest.

Simply put, a private media company is not obliged to broadcast any political debates at all, let alone debates upon such terms as a court might consider reasonable. Newspapers, magazines, and television companies are entitled to run their business as they consider fit within the limitations imposed by statute. Defeating their editorial judgement on these matters is inconsistent with a due respect for their proprietary rights and the doctrinal limits of judicial review.

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[14] Were it otherwise, the consequences would be extraordinary. No major business enterprise could confidently rule out the possibility that a court would treat its decisions as being amenable to review on the rationale that the enterprise has significant public consequences. On that logic, anything from pricing to business restructuring could be described – contrary to precedent and legal expectations – as a "public" decision.

[15] Watts, "The Forging of Public Claims on Private Businesses" (2003) 119 LQR 380, 383.

[16] See generally J D Heydon, "Directors' Duties and the Company's Interests" in P D Finn ed *Equity and Commercial Relationships* (Sydney, 1987) 122.

[17] (9th ed, 2004) 355.

Editorial independence and freedom of the press

For the reasons expressed below, judicial review of editorial decision-making is also contrary to the rights of the television companies and their viewers, guaranteed by section 14 of the New Zealand Bill of Rights Act 1990, "to seek, receive, and impart information and opinions of any kind in any form." Significantly, the judgment does not consider section 14.

Freedom of the press is a fundamental right in liberal democratic societies. This necessarily involves editorial independence about what to publish, and the manner and style of publication. These are matters for editors and journalists rather than politicians and judges. The decision of the United States Supreme Court in *Miami Herald Publishing Co v Tornillo*[18] is apposite. In that case, the Court considered the constitutionality of a "right of reply" statute requiring newspapers to publish statements by political candidates whose record or platform had been criticised by the newspaper. The Court unanimously held that the statute constituted an impermissible infringement of the First Amendment guarantee of freedom of the press. Justice White's judgment succinctly encapsulates the rationale for eschewing governmental control over broadcasting and publishing:[19]

> We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where the government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we prefer the power of reason as applied through public discussion and remain intensely sceptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

The Court acknowledged the important public interest in fair elections but explained:[20]

> [P]rior compulsion by government in matters going to the very nerve centre of a newspaper - the decision as to what copy will or will not be included in any given edition - collides with the First Amendment. Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.

To like effect, Burger CJ explained "a responsible press is an undoubtedly desirable goal, but ... like many other virtues it cannot be legislated."[21] Instead, a balanced media is a consequence of the free flow of ideas in a liberal State with a robust civil society. Balance and responsibility result not from control but from the choices of media consumers between an array of media outlets, with competitive pressures driving excellence and innovation. The decision of the United Supreme Court in *Columbia Broadcasting System Inc v Democratic National Committee*[22] is apt:

> The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers - and hence advertisers - to assure financial success; and, second, the journalistic integrity of its editors and publishers.

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[18] Ibid.
[19] Ibid 259.
[20] Ibid 260.
[21] Ibid 257.
[22] 412 US 94, 117 (1973)

Neither does the possibility that private media coverage would differ from what politicians would prefer provide a sound basis for imposing a public law duty of "reasonableness" on editors. As Brennan J observed in the United States Supreme Court decision in *Nebraska Press Association v Stuart* "discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors."[23] The Judge went on to observe that the free press "may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges."[24]

Conclusion

The High Court's decision to grant an application for judicial review of the editorial and programming decisions of private media company represents an unprincipled extension of the ambit of administrative law standards. Although one would expect the decision to be overturned on appeal or distinguished in future cases as an anomaly, its full implications remain to be seen.

Jesse Wilson

[23] 427 US 539, 573 (1976).
[24] 613.

International Crimes and Domestic Criminal Law in *R v Jones* [2006] 2 WLR 772

"All these defences thus depend upon the proposition that the war in Iraq was a crime as well as a mistake."[1]

Introduction

Customary international law ("CIL") forms part, or is a source, of the common law.[2] However, the question of the limits on the domestic enforceability of CIL standards in the developing areas of international criminal law and human rights remains uncertain. In *R v Jones* the House of Lords was faced with a question relating to the interaction between domestic and international criminal law.

Facts

Twenty appellants came before the House of Lords. All had been charged with offences arising out of acts of protest against the war in Iraq in February and March 2003.

The first set of appellants[3] were variously charged with conspiracy to cause criminal damage, aggravated trespass, having articles in their custody or control with the intent to destroy or damage property, attempting to cause arson, and criminal damage, all relating to the Royal Airforce Base at Fairford. Jones and Milling had broken into the base on the night of 13 March 2003. They were in possession of the tools which had allowed them to gain entry, and with which they intended to cause damage to equipment on the base. Before they were apprehended, they had caused damage to three refuelling trucks, two munitions trailers, and tractor units. Olditch and Pritchard had been found lying in the grass inside the base on 18 March 2003, having in their possession items that were intended to cause damage. Richards was discovered just after 2am on 18 March 2003 outside the perimeter fence, close to where it had been recently cut. He was in possession of a mixture of petrol and detergent, with which he said he intended to set fire to the wheels of a bomber.

The second set of appellants[4] were charged with aggravated trespass, and some of them with criminal damage. On 4 February 2003, the Ministry of Defence was loading tanks, weapons, and other equipment onto ships at the Sea Mounting Centre in Marchwood for transportation to the Middle East. The equipment was to be used in Iraq. Two of the appellants cut the fence and the appellants entered the port. Three of the appellants chained themselves to the gates of the port, while eleven others attached themselves to tanks awaiting loading. Two appellants applied paint to

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[1] *R v Jones* [2006] 2 WLR 772, para [44] per Lord Hoffman.

[2] See, e.g., *Triquet v Bath* (1764) 3 Burr 1478, 1481; *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529, 554 (CA); *Attorney-General v Zaoui* [2006] 1 NZLR 289, 302 (SC); as well as *Blackstone's Commentaries* Bk IV, Chap 5, 67; "A New Zealand Guide to International Law and its Sources" Report of the Law Commission 34, para 69.

[3] These appellants were the subject of the decision of the Court of Appeal in *R v Jones (Margaret)* [2005] QB 259 (CA).

[4] These appellants were the subject of the decision of the High Court in *Ayliffe v Director of Public Prosecutions* [2006] QB 227.

a tank. In accordance with Greenpeace's principles, they passively resisted when removed and arrested.

The appellant Swain[5] was charged with trespass and criminal damage. On 9 March 2003 she cut a perimeter fence at the RAF base at Fairford, entered the base, and disrupted operations thereon.

All of the appellants claimed in their defence that the United Kingdom's actions in preparing for, declaring, and waging war on Iraq in 2003 were unlawful acts amounting to the international crime of aggression, which the appellants were lawfully justified in attempting to prevent.

Issue on appeal

Lord Bingham of Cornhill stated the general issue facing the House of Lords as being:[6]

> [W]hether the crime of aggression, if established in customary international law, is a crime recognised by or forming part of the domestic criminal law of England and Wales.

The question arose because the first set of appellants sought to rely on the defence provided by section 3(1) Criminal Law Act 1967 (UK) which relevantly reads:

> A person may use such force as is reasonable in the circumstances in the prevention of a crime...

The appellant Swain sought to rely on section 68(2) of the Criminal Justice and Public Order Act 1994 (UK) which reads:

> Activity on any occasion on the part of a person or persons on land is 'lawful' for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.

The appellants claimed that they acted as they did in order to:[7]

> [I]mpede, obstruct or disrupt the commission of that crime [the crime of aggression], or what they believed would be the commission of that crime, by Her Majesty's Government or the Government of the United States against Iraq...

The appellants contended they were, therefore, legally justified in acting as they did.

The Court of Appeal and Divisional Court certified as questions of general public importance for the House of Lords whether either "crime" in section 3(1) of the 1967 Act, or "offence" in section 68(2) of the 1994 Act, included the international crime of aggression and, if so, whether it was justiciable at a criminal trial. The House was not asked to rule whether the actions of either government in fact amounted to the commission of the international crime of aggression. It was asked to rule whether, if they may have done, that would justify the appellants' otherwise criminal conduct.

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[5] This appellant was the subject of the decision of the High Court in *Swain v Director of Public Prosecutions* [2006] QB 227.

[6] *R v Jones*, supra note 1, [2].

[7] Ibid.

Discussion

The appellants' argument was couched in terms of several broad propositions, which were (in summary):

(1) CIL is part of the domestic law of England and Wales without the need for any domestic statute or judicial decision. Crimes recognised at CIL are recognised and enforced by the domestic law of England and Wales;

(2) At all times relevant to the appeals, CIL recognised a crime of aggression;

(3) "Crime" in section 3 of the 1967 Act covers the crime of aggression either because it is a crime established at CIL, or because it is part of the domestic law of England and Wales; and

(4) "Offence" in section 68(2) of the 1994 Act covers the crime of aggression either because it is a crime established at CIL, or because it is part of the domestic law of England and Wales.

1 Incorporation of CIL into domestic law

Lord Bingham of Cornhill accepted as a general proposition that the law of nations is part of the law of England and Wales. However, as there was no issue between the parties that anything else was the case, neither his Lordship nor Lord Hoffmann considered the proposition in any detail.[8]

His Lordship's acceptance of the proposition was in line with previous English authority, including *Blackstone's Commentaries, West Rand Central Gold Mining Co Ltd v The King,*[9] and *Trendtex Trading Corpn v Central Bank of Nigeria.*[10] In *Trendtex* Lord Denning MR examined the two doctrines by which international law is said to enter domestic law. The doctrine of incorporation provides that the rules of international law are incorporated into the common law automatically and considered to be part of that law unless they are in conflict with an Act of Parliament. The doctrine of transformation says that rules of international law are not part of domestic law unless and until they enter it by judicial decision, statute or "long established custom".[11]

Lord Denning came to the conclusion that the doctrine of incorporation was to be preferred to the doctrine of transformation as correctly stating the position in England. This was so because the courts have recognised and given effect to changes in international law in a way that would not be possible if the doctrine of transformation were correct.

2 The crime of aggression

The United Nations General Assembly agreed in 1974 on the definition of aggression. Article 1 of General Assembly Resolution 3314 (xxix) provides:[12]

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[8] Ibid [11].
[9] [1905] 2 KB 391, 406-7.
[10] [1977] 1 QB 529 (CA) ("*Trendtex*").
[11] Ibid 553.
[12] GA Resolution 3314 (XXIX), 14 December 1974.

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations...

Examples of aggressive acts are contained in article 3, including armed invasion or attack, and bombardment by the armed forces of a State against the territory of another State.

In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v United States)*[13] the International Court of Justice accepted the prohibition on the use of force as *jus cogens,* a peremptory norm of international law. Additionally, the crime of aggression was included as one of the most serious crimes "of concern to the international community as a whole" in the Rome Statute of the International Criminal Court in 1998. However, that Court's jurisdiction is limited in a variety of ways.

Lord Bingham of Cornhill expressly accepted that, at all times relevant to the present appeals, international law has recognised a crime of aggression. Lord Hoffmann, although never explicitly stating as much, appeared to accept that such an international crime exists.

3 Statutory interpretation

The question for the House of Lords in *Jones* in essence was: whether and to what extent are the English courts able domestically to enforce international crimes? Several propositions should be noted at the outset.

First, it is trite to observe that the common law cannot override an inconsistent statute. The common law is an aid to interpreting statutes, and provides a set of presumptions to assist in that exercise. However, where the purpose of the statute is clear, and clearly inconsistent with the common law, the statute prevails to the extent of the inconsistency.[14]

Secondly, an argument that the courts should enforce, in their criminal jurisdiction, a common law offence that has never previously been held to be such has been rendered largely untenable by the codification of criminal offences and repudiation of any power in the courts to create, or broaden the scope of, criminal offences in favour of the principle of legality.[15]

The approaches of the two lead speeches in *Jones* both recognise two categories of international crimes. The first is those that have been recognised for centuries, form part of the law of England, and are capable of enforcement as such – piracy *jure gentium*, diplomatic immunity, and the violation of safe conducts.[16] Statutory recognition that these principles are part of the law of England has been held to amount to just that – recognition of principles that were *already* part of the law of England.[17]

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[13] [1986] ICJ Reports 14, para [190].

[14] See Burrows *Statute Law in New Zealand* (3rd Ed, 2003) 17.

[15] See, e.g., s 9 Crimes Act 1961 (NZ) and *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435, 457-8 per Lord Reid. Some discussion of the principle of codification arises in the Court of Appeal's decision in *R v Hutchinson,* discussed below.

[16] See, e.g., the decision of the Privy Council *In re Piracy Jure Gentium* [1934] AC 586.

[17] *R v Jones*, supra note 1, [21]. See also *R v Bow Street Magistrate, ex parte Pinochet (No 3)* [2000] 1 AC 147, 203 per Lord Browne-Wilkinson.

The second category, the subject of analysis in the appeal, contains all other international crimes, including war crimes, crimes against humanity, and aggression.[18] While these crimes might be triable and punishable under the ordinary criminal law (for example where commission of one of them constitutes culpable homicide), they are not "crimes" or "offences" for which a person may be tried and punished in England without statutory incorporation. Both lead speeches recognise two reasons for this.

(a) The democratic principle

Lord Bingham of Cornhill and Lord Hoffmann both recognised the "democratic principle" that it is for Parliament, and only Parliament, to criminalise conduct. Statute is now the sole source of new criminal offences, and the courts are no longer capable of recognising and enforcing them at common law. Lord Hoffmann stated that such offences should not "creep into existence" as a result of international consensus to which only the Executive is a party.[19] Lord Bingham of Cornhill accepted that an international crime could be assimilated into English law, but did not accept that that result follows automatically. His Lordship stated that "it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties" and that "[o]ne would need very compelling reasons for departing from that principle."[20]

In interpreting the word "offence" in domestic legislation, his Lordship stated that the established practice is to treat it as referring to an offence against a statutory rule or recognised common law offence.[21] The lack of statutory incorporation of the crime of aggression is, therefore, significant, particularly given that the other crimes contained in the Rome Statute of the International Criminal Court were incorporated into English law by the International Criminal Court Act 2001 (UK). The English courts by that Act were given jurisdiction to try individuals accused of the crimes of genocide, war crimes, and crimes against humanity, but aggression was (deliberately) omitted. It would be anomalous for an English court to give effect to the crime of aggression apart from that statute, given the practice of legislating to give effect to international law, and the safeguards contained within the Act for prosecutions for the crimes it does cover.

(b) The constitutionality principle

Both speeches also found that prosecution of an individual for the crime of aggression would be unconstitutional. Attribution of the crime of aggression to an individual is not possible without first establishing that a State has committed an act of aggression. Additionally, aggression is, by its nature, a 'leadership crime': "minions and footsoldiers" are incapable of committing it.[22] So, individual liability for the offence requires, as a prerequisite, that a violation by the State be found to exist. However, the power to wage war has long been held to be a discretionary power of the Crown,

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[18] *R v Jones*, supra note 1, per Lord Bingham of Cornhill, [21] – [22], per Lord Hoffmann, [62].
[19] Ibid [62].
[20] Ibid [29].
[21] Ibid [26].
[22] Ibid [16], per Lord Bingham, citing the *Draft Code of Offences against the Peace and Security of Mankind*, International Law Commission, 1996, commentary para (14) to article 8.

the exercise of which is non-justiciable.[23] Lord Hoffmann found that the fact that the power to make war is not justiciable is one powerful reason that aggression cannot be a crime or offence within the meaning of the domestic provisions in question.[24]

Lord Bingham of Cornhill stated that international agreement on the existence of an international crime, while giving legislatures power to enact legislation covering such offences, does not give the domestic courts jurisdiction to enforce them automatically. His Lordship accepted also that "customary international law is applicable in the English courts only where the constitution permits".[25] The consequences for the liberty of the individual, political accountability, and legal certainty of allowing executive action to modify the criminal law should be rejected on the basis that that is the province of the legislature.[26]

4 Use of aggression as a defence

Lord Hoffmann acknowledged the argument that a criminal defendant should not be deprived of a defence that is available to him or her as one aspect of the right to a fair trial, contained in article 6 of the European Convention on Human Rights. However, his Lordship stated, and counsel agreed, that article 6 does not require that any particular defence be available.

Application in New Zealand?

In the case of international crimes like aggression, what does it mean to say that CIL rules "are part of the law of New Zealand"?[27] It is worth noting the comment contained in the speech of Viscount Sankey LC in *Piracy Jure Gentium*, that "a little common sense is a valuable quality in the interpretation of international law."[28]

For completeness, the position in respect of ratified, but unincorporated, international treaties is somewhat different. In *New Zealand Airline Pilots' Association Inc v Attorney-General,*[29] Keith J for the Court of Appeal stated that:[30]

> [W]hile the making of a treaty is an Executive act, the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. The stipulations of a treaty duty ratified by the Executive do not, by virtue of the treaty alone, have the force of law.

By contrast, it would appear that where an international criminal offence is recognised as existing at CIL, it becomes part of the common law of New Zealand automatically.

The applicability of the reasoning in *Jones* to New Zealand criminal law will be restricted in several ways. First, section 2 of the Crimes Act 1961 contains a definition of "offence", which restricts its application to "any act or omission for which one can be punished under *this Act or under any other enactment*..." (emphasis

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[23] While the prerogative *qua* prerogative is not immune from review (*CCSU v Minister for Civil Service* [1985] AC 374), the decision to go to war is a question of national security and foreign policy into which the courts will not enquire. Compare the recent decision of the Court of Appeal in *Gentle v Prime Minister* [2006] EWCA Civ 1078 (26 July 2006).

[24] *R v Jones,* supra note 1, [67].

[25] Ibid [23].

[26] Ibid [26].

[27] *Attorney-General v Zaoui* [2006] 1 NZLR 289, 302 (SC).

[28] Supra note 16, 594.

[29] [1997] 3 NZLR 269.

[30] Ibid 280-291.

mine). Thus, the question of whether the crime of aggression is an "offence" for the purposes of, for example, the defence contained in section 41[31] does not arise. It will be noted in this regard that the International Crimes and International Criminal Court Act 2000 contains no provision creating an offence of aggression.

However, section 20 of the Crimes Act preserves common law defences, including "all rules and principles... which render any circumstances a justification or excuse for any act or omission". This may include necessity arising out of duress of circumstances, as discussed by the Court of Appeal in *R v Hutchinson*.[32] According to the principle that no defence should be excluded unless it is clearly unavailable,[33] it would appear that an accused *may* (the Court of Appeal left open the question of whether the defence continues to exist in New Zealand, as it had not had full argument on the point) have a defence where the elements recognised in *Kapi v Ministry of Transport*[34] are present. The Court of Appeal in *Hutchinson*, however, expressed some doubt as to whether, given the emphasis on the concept of codification in the Crimes Act, new forms of duress not already recognised as defences might be recognised in this country.

Another way of looking at the place of CIL crimes within the domestic law in New Zealand would be as providing a presumption of consistency in the interpretation of other statutes. In *Governor of Pitcairn and Associated Islands v Sutton,*[35] Cooke P stated that: "A general statute, however apparently comprehensive, is not to be interpreted as contrary to international law...".[36] However, as recognised by Geiringer in her seminal article,[37] "an interpretive presumption can only assist if the statutory language at issue can, ultimately, bear more than one interpretation."[38] It is extremely difficult to conceive of a statute that would permit an interpretation consistent with a prohibition on aggression, given the nature of the power to declare war as both an exercise of the prerogative and non-justiciable.

Lord Hoffmann's suggestion, contained in the quote below the title to this note, reflects a judicial balancing of the increasing importance of developments in CIL, with the constitutional importance of the principles of criminal law. How these continue to be balanced will no doubt be a matter of interest for a long time to come.

Vicki McCall

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[31] The prevention of suicide or other offences.
[32] CA92/03, 7 July 2003 (CA).
[33] *R v Witika* [1993] 2 NZLR 424, 433 (CA). See also s 25(e) New Zealand Bill of Rights Act, which protects the right to present a defence.
[34] (1991) 8 CRNZ 49 (CA).
[35] [1995] 1 NZLR 426 (CA).
[36] Ibid 430.
[37] Geiringer "*Tavita* and all that: confronting the confusion surrounding unincorporated treaties and administrative law" (2004) 21 NZULR 66.
[38] Ibid 76.