CASE NOTES

The Co-conspirators Exception to the Hearsay Rule in New Zealand: R v Qui

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The co-conspirators exception to the hearsay rule was nearly lost to the new Evidence Act 2006, but Parliament's Justice and Electoral Committee saw it, and saw that it was good. The Supreme Court's decision in *R v Qui*[1] clarifies the operation of the rule at common law, which is now preserved in a new section 12A of the Code. *Qui* also ends the *Crossan*[2] case's gloss on section 330(1) of the Crimes Act 1961, and the arcane pleading of duplicity in the framing of counts should now function as Parliament intended. This note examines the co-conspirators exception to the hearsay rule, before some concluding remarks on the other grounds of appeal — the adequacy of the trial judge's jury directions and the rule against duplicity. First, some background on the *Qui* litigation.

I *R v QUI* [2007] NZSC 51

The case was about blackmail. The appellant had been involved in a "brides for cash" immigration scheme, and was acting as the New Zealand agent for a Chinese company that took fees for the introduction of Chinese women to men with New Zealand residency. The complainant was such a man. This time, however, (his fourth) he found the love no money could buy, and refused to pay the Chinese company its introduction fee (the grooms, of course, made their money by charging their brides to be). In a Burger King, the appellant (herself on crutches with broken legs) threatened to break the complainant's legs if he did not pay the fee and return a stolen IOU note relating to an earlier dispute. The windows of the complainant's house and car were then smashed. Having inquired, the complainant reported the appellant's response as: "what can you do about it?" Aside from this, the Burger King incident was the only direct evidence in the case; what allegedly followed was a pattern of intimidation, relayed through the testimony of the complainant and his new wife. That testimony described

* Thanks to Scott Optican, Peter Sankoff (fine teachers), and Lisa Fong. For the broad context, see Peter Williams' excellent commentary on the Evidence Act 2006 in this volume.

1 [2007] NZSC 51.

2 [1943] NZLR 454.

telephone discussions with the appellant and unknown others, some of which contained threats to break legs, but only one of which linked the unknown caller to the appellant with the statement: "[the appellant] has paid me $10,000 to break your legs." The complainant recorded some of the phone calls, but these related to the debt and did not contain threats. The complainant also described an incident where he (a handyman) was called to a job only to find the address empty and then to be tailed through the suburbs while receiving threatening calls on his mobile phone.

The case was effectively a credibility dispute over whether the alleged threats had been made. The appellant did not give evidence, though a video statement she gave to the police was played to the jury at trial. Despite the Crown's limited corroborative evidence, the appellant was convicted under section 237(1) of the Crimes Act on the basis that she had, together with others, threatened expressly to endanger the safety of the complainant with intent to obtain a cash payment.[3] She appealed to the Court of Appeal, who rejected her appeal,[4] and then to the Supreme Court, who accepted that a miscarriage of justice had occurred, quashed her conviction, and ordered a retrial.

II THE CO-CONSPIRATORS EXCEPTION TO THE HEARSAY RULE

The Evidence Amendment Act 2007 inserted a new section 12A into the Evidence Act 2006 to preserve the common law rules relating to the admissibility of the statements of co-conspirators or persons involved in joint criminal enterprises.[5] The amendment was motivated by a concern that section 27 of the Evidence Act, which codifies the common law rule that a defendant's statement is admissible against themselves but not against a co-defendant in the same proceeding, would have destroyed the common law exceptions to that rule. Those exceptions were the co-conspirators exception to the hearsay rule, and the rule that a defendant's statement is admissible against a co-defendant where the statement is accepted by the co-defendant. The Evidence Act now preserves the exceptions by reference. In its report to the House on the Amendment Bill, the Justice and Electoral Committee warned that, despite its recommendations, the Evidence Act should still be regarded as a codification of the law of evidence in New Zealand, and that the amendments should not be seen as resiling from the purpose of the Act.[6]

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3 The indictment is set out in para [1] of the Court of Appeal's judgment: *Qui Jiang v R* (CA495/05, 3 May 2006, Chambers, John Hansen and Baragwanath JJ).

4 Ibid.

5 The issue is not new. Sir Walter Raleigh was convicted of treason (and executed) largely on the basis of the out-of-court testimony of Lord Cobham, an alleged co-conspirator.

6 *Report of the Justice and Electoral Committee: Evidence Amendment Bill 2007 (129-2)* (June 2007), 2.

In spite of the "code" referring to the common law, the co-conspirators exception to the hearsay rule should not be the Trojan horse that lets the rabble of other common law exceptions through the gates. It was preserved because it operates in situations where the testimony of a co-defendant is adduced against a defendant in the same proceeding, but as an exception to the *hearsay* rule, it is different in kind from the multitude of historical hearsay exceptions, all connected by the golden thread of "apparent reliability" as identified by the Court of Appeal in *R v Manase*.[7] Debate in the House (under urgency) focused on whether the amendment was necessary at all in light of section 10 of the Evidence Act, which provides that the Act may be interpreted in light of the common law to the extent that it is consistent with the Act.[8] The amendment, therefore, is not Parliament's tacit acknowledgment that the common law exception was inconsistent with the new general hearsay exception in section 18 of the Evidence Act (concerned, as it is, with an assurance of reliability). Being party to a conspiracy does not of itself provide reasonable assurance that any statements made in furtherance of the conspiracy are reliable. Because of this, the explicit preservation of the exception was necessary, and the Supreme Court, no doubt mindful of this fact, has preferred a test that imports a reliability standard commensurate with the general hearsay exception in the Act.

The exception allows the acts and declarations of a co-conspirator to be admitted for the purpose of establishing the truth of any express or implied assertion contained in them against each and every other co-conspirator. Three conditions must be satisfied before the exception will operate: (a) the existence of a conspiracy of the kind or type alleged; (b) the accused's participation in that conspiracy; and (c) the relevant statements must have been made in furtherance of the conspiracy.[9] The exception is not confined to conspiracy cases, and can apply in party cases where the Crown alleges a common purpose to do the unlawful act or acts charged.[10]

The rationale for the exception is that statements made by one member of a joint criminal enterprise in furtherance of the common criminal purpose can be attributed to all members, on the basis that there is implied authority in each to speak on behalf of the others.[11] This is an appeal to the principle of agency, though not to agency principles, as there merely must

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7 [2001] 2 NZLR 197, per Tipping J at [18]; see also Sankoff, "Gazing into the Hearsay Crystal Ball — Will New Zealand Adopt the Canadian Approach to the Residual Exception for Hearsay?" [2002] NZLJ 250; Optican and Sankoff, "The Evidence Bill: A New Approach to Hearsay Raises New Issues" [2005] NZLJ 446.

8 See (2007) 640 NZPD 10334 (Mark Burton, Ross Robertson); similarly, see s 12.

9 Gillies, *The Law of Criminal Conspiracy* (2ed, 1990) 183; it may be worth noting that the Parliamentary debate accompanying the Amendment Act made no mention of the third condition here — that the statements must have been made in furtherance of the common design. See (2007) 640 NZPD 10334.

10 *R v Mahutoto* [2001] 2 NZLR 115 (HC); *Tripodi v R* (1961) 104 CLR 1; *R v Shelford* [1993] 2 NZLR 742, 745; *R v Tauhore* [1996] 2 NZLR 641(CA), at 643; *R v Maihi* (High Court, Hamilton, T 981430, 17 February 1999, Penlington J); See also Gillies, *The Law of Criminal Conspiracy* (2ed, 1990) 198; *Phipson on Evidence* (15th ed, 1999), [29-10]; *Cross on Evidence* (NZ ed, 1996) [18.34].

11 [2007] NZSC 51, [24]; his Honour citing the rationale in turn from *R v Humphries* [1982] 1 NZLR 353, 356 (CA); *Tripodi v R* (1961) 104 CLR 1, 7; and *Ahern v R* (1988) 165 CLR 87, 95.

be independent evidence establishing that the statement maker/s and the accused were partners in crime.

In the Supreme Court, his Honour Anderson J was clear that the existence of the enterprise, and the complicity of anyone whose statement in furtherance of the common intention is sought to be admitted, must be proved before the attribution can be made.[12] It was the question of the *quality* of the evidence establishing a common design and an accused's participation in it that had divided courts here and throughout the Commonwealth. That question is now settled in favour of a "reasonable evidence" test, as opposed to the balance of probabilities standard adopted by the trial judge.[13]

The relevance of the question of the test for admissibility derives from a concern to prevent judges usurping the function of the trier of fact, as would be the case if proof of the existence of the conspiracy and the accused's role in it was required to the criminal standard. The Court of Appeal in *R v Humphries*[14] had met this problem by requiring that before the acts or words of one in furtherance of the common purpose could be admitted against the other, there first must be "reasonable evidence" of the existence of a common intention.[15] Three years after *Humphries*, a five-judge bench of the Court of Appeal reconsidered the issue in *R v Buckton*.[16] A 3:2 majority (Woodhouse P, McMullin and Richardson JJ) held that the simple, certain, and well understood balance of probabilities standard applied.[17] The minority (Cooke and Somers JJ) preferred the "reasonable evidence" test in *Humphries*, which they thought had not been shown to have caused any injustice in practice.[18]

In *R v Crowe*[19] and *R v Harris*,[20] the minority position in *Buckton* was applied without question. The issue was considered again in *R v Uea*[21] and *R v Morris (Lee)*.[22] In both cases, reference was made to the decisions of the High Court of Australia in *Tripodi v R*[23] and *Ahern v R*,[24] which had preferred the approach of Cooke and Somers JJ in *Buckton*. However, in both *R v Uea* and *R v Morris (Lee)* it was considered that the result would have been the same regardless of the test adopted, and the Court of Appeal

12 [2007] NZSC 51, [24].

13 *R v Qui Jiang* (High Court at Auckland, CRI 2005-004-008984, 6 September 2005, Courtney J), [11].

14 [1982] 1 NZLR 353.

15 Ibid 356; referring to *R v Gunn and Howden* (1930) 30 SR (NSW) 336, 342; *Tripodi v R* (1961) 104 CLR 1, 6-7; and *Mirza Akbar v King-Emperor* [1940] 3 All ER 585, 591.

16 [1985] 2 NZLR 257.

17 It was held that particularity was not required, and that it was sufficient to show that the conspiracy was of the type or kind alleged: ibid 261-262.

18 Ibid 259 per Cooke J.

19 [1996] 3 NZLR 415 (CA), 422.

20 [1998] 1 NZLR 405 (CA), 407.

21 (1989) 4 CRNZ 703.

22 [2001] 3 NZLR 759.

23 (1961) 104 CLR 1.

24 (1988) 165 CLR 87.

adopted the majority holding from *Buckton* — the balance of probabilities — in both cases.

The tide began to turn back to the position in *Humphries* and the minority in *Buckton* with the rise of Chambers J. In the pre-trial ruling in *R v Mahutoto*,[25] Chambers J, then in the High Court, applied the reasonable evidence test from *Humphries* and the minority in *Buckton*.[26] His Honour explicitly avoided the majority holding from the Court of Appeal in *Buckton* by alluding to its insecurity in light of Woodhouse's P obvious misunderstanding (in a 3:2 split) as to the meaning of McMullin's J decision, and took *Buckton* to have been implicitly overruled by *R v Crowe*.[27] Chambers J saw the reasonable evidence test as consistent with the "preponderance of authority."[28]

We then arrive at the *Qui* proceedings. The trial judge considered herself bound by the finding in *R v Morris (Lee)*,[29] and adopted the balance of probabilities approach accordingly. On appeal, the Court of Appeal clarified that not all of the threats made by the "unknown others" were hearsay; most were admissible as verbal acts. Only those statements admitted for their truth — namely that "[the appellant] has paid me $10,000 to break your legs" — required admission via the co-conspirators exception.[30] Chambers J, now in the Court of Appeal, and writing for a unanimous bench, affirmed his decision in *Mahutoto*, and held that the test was "reasonable evidence".[31] This was confirmed by Anderson J in the Supreme Court, his Honour considering the authorities in support of the reasonable evidence test more persuasive than those supporting the balance of probabilities standard, and, importantly, consistent with the general test for admissibility of hearsay provided by the new Evidence Act.[32]

To admit the acts and declarations of a co-conspirator for the purpose of establishing the truth of any express or implied assertion contained in them against each and every other co-conspirator, therefore, a court will require reasonable evidence of: (a) the existence of a conspiracy of the kind or type alleged; and (b) the accused's participation in that conspiracy;

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25 [2001] 2 NZLR 115 (HC).

26 Ibid [15].

27 Ibid [19]; in *Buckton*, Woodhouse P appears to have taken McMullan J, who rejected the reasonable evidence test, to have identified that test with the balance of probabilities. Though Chambers J took *Buckton* to have been impliedly overruled by *R v Crowe*, that judgment too may suffer from a mistake as to the meaning of McMullin's J judgment in *Buckton*.

28 Ibid [22]; on a subsequent appeal against conviction, Ms Mahutoto abandoned a challenge against the pre-trial ruling, and the Court of Appeal sanctioned this (and therefore Chambers' J holding) as consistent with "established" authority: *R v Mahutoto* (CA342/00, 13 December 2000, Gault, McGrath, Penlington JJ), at [11].

29 [2001] 3 NZLR 759, [15]-[20].

30 *Qui Jiang v R* (CA495/ 05, 3 May 2006, Chambers, John Hansen and Baragwanath JJ).

31 Ibid [24].

32 [2007] NZSC 51, [28]-[29]; for a discussion of relationship between the hearsay exceptions and reliability see *R v Manase* [2001] 2 NZLR 197; for an analysis see Sankoff, "Gazing into the Hearsay Crystal Ball — Will New Zealand Adopt the Canadian Approach to the Residual Exception for Hearsay?" [2002] NZLJ 250.

additionally, (c) the relevant statements must have been made in furtherance of the conspiracy. This test is consistent with the position in Australia[33] and England,[34] differing from the standards adopted in Canada[35] and the United States.[36]

At all levels of the *Qui* litigation, it was emphasised that the difference between reasonable evidence and the balance of probabilities may not be great, and that the two tests will often assimilate in practice to produce the same result. In applying the reasonable evidence test, the Court of Appeal indicated that, had her Honour applied it, the trial judge would have been correct on that standard.[37] Anderson J in the Supreme Court held similarly that the trial judge's decision to admit the evidence was justified on both standards.[38] She was entitled to have relied on evidence such as the similarity in the nature of the threats and their timing in relation to the Burger King incident, as well as the evidence of the appellant's reaction to the complainant about the broken windows.

Why all the fuss then? The balance of probabilities appears to be a cleaner and more familiar test for courts to apply. In *Buckton*, the majority (or at least McMullin and Richardson JJ) rejected the reasonable evidence test as too vague.[39] In *R v Pektas*,[40] the Full Court of the Supreme Court of Victoria criticised the reasonable evidence test as importing a degree of judicial discretion beyond that normally exercised at the admissibility stage of proceedings, requiring the judge effectively to consider issues of weight normally reserved for the trier of fact.[41] These criticisms should not worry us. The new Evidence Act is built on discretion, and while the amount of hearsay that will now be let in as against the old regime remains to be seen, it is clear that the facts often exert more pressure than the rules. My sense of this is that we lose our way if we deploy spatial metaphors to conceive of these standards as notches on an imaginary scale or something like the bar in a high jump "over" which the evidence must somehow pass (how much does the right to confront one's accuser weigh — is it as heavy as a small car?).[42] As the case law suggests, a judge will not fail by one standard and succeed against another, and the two tests assimilate in practice because

33 *R v Tripodi* (1961) 104 CLR 1; *R v Ahern* (1988) 165 CLR 87; but see the criticisms in *R v Pektas* [1989] VR 239.

34 *R v Jones* [1997] 2 Cr App R 119 (CA).

35 See *R v Carter* [1982] 1 SCR 938, and *R v Mapara* [2005] 1 SCR 358.

36 See Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1983) §17; *Bourjaily v United States* 483 US 171 (1987); Federal Rules of Evidence, r 801(d)(E).

37 *Qui Jiang v R* (CA495/05, 3 May 2006, Chambers, John Hansen and Baragwanath JJ), [26].

38 [2007] NZSC 51, [30].

39 [1985] 2 NZLR 257, 259-260.

40 [1989] VR 239.

41 Ibid 245 per Murphy J.

42 For the Americans, a big truck: see *Crawford v Washington* 124 S. Ct. 1354 (2004) (Sup Ct (US)); for a comparative discussion see O'Brian, "The right of Confrontation: U.S. and European Perspectives", (2005) 121 LQR 481.

they are not tests, but merely phrases.[43] The benefit of reasonable evidence over the balance of probabilities in this regard is that it reminds those exercising their discretion to admit untested hearsay of the fundamental principle of fairness to an accused. In this light we can understand the sentiment of Somers J in *Buckton* that the phrase "reasonable evidence" connotes evidence "of such a nature that the Judge considers it safe to admit".[44] The view that the essence of "reasonable evidence" is that it is "safe" is supported by Cooke J in *Buckton*,[45] who also disclaimed the drive to articulate a more precise test as rigid and unhelpful, and by Thomas J in *R v Crowe*.[46]

In an exception to the hearsay rule that is not animated by the principle of reliability in the same way as the other historical exceptions, the courts' development of the reasonable evidence test has been motivated by a concern to provide accused persons with a similar degree of protection against the dangers of hearsay. It is for this reason that "independent" evidence is necessary to constitute the foundation in relation to the accused's participation in the conspiracy. In *Ahern*, the High Court of Australia refers to this as "proof aliunde" (from another source).[47] Similarly, in *R v Morris (Lee)*, the Court of Appeal made it clear that once the Crown had shown there was evidence of a conspiracy or common design, it then had to prove the accused's participation in it to the requisite standard with reference to matters *external* to statements made by the other co-conspirators in the absence of the accused.[48]

In the Supreme Court, Anderson J did not discuss the independent evidence requirement, but insofar as it exists in *R v Morris (Lee)*, it can be taken as preserved by section 12A. Its subsistence is implicit in Anderson J's holding that the trial judge was entitled to rely on the evidence of the similarity in the nature of the threats and their timing in relation to the Burger King incident (admissible as verbal acts as evidence of coincidence rather than to prove their truth), as well as the evidence of the appellant's reaction to the complainant about the broken windows as reasonable evidence of the accused's participation in the common design. These factors are all evidence independent of hearsay statements made about the accused in her absence, in distinction from: "[the appellant] has paid me $10,000 to break your legs".

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43 The balance of probabilities (one of several possible explanations is probable) only makes sense as a "test" in contradistinction from beyond reasonable doubt (no alternative explanation to the Crown's is possible). But even then, beyond reasonable doubt defies numerical approximation (see *R v Wanhalla* (2006) 22 CRNZ 843 (CA) for a useful summary of the standard). If we were concerned with measuring conditional probabilities, we would do as the mathematicians do and use Bayes' Theorem. But we don't — because we're not really concerned with measuring conditional probabilities! See *R v Adams* [1996] 2 Cr App R 467, 482; *R v Adams (No 2)* [1998] 1 Cr App R 377 383-384; *R v Hoto* (1991) 8 CRNZ 17; and the debate in Tribe "Trial by Mathematics: Precision and Ritual in the Legal Process" (1971) 84 Harv LR 1329; Glanville Williams "The Mathematics of Proof" [1979] Crim LR 297; and Cohen "The Logic of Proof" [1980] Crim LR 91.

44 [1985] 2 NZLR 257, 263.

45 Ibid 259.

46 [1996] 3 NZLR 415, following Cooke J in *Buckton* at 422.

47 (1988) 165 CLR 87, 95.

48 [2001] 3 NZLR 759 (CA), [18].

Anderson J did note that the general lack of independent evidence required a careful direction to the jury.[49] His Honour cited *Ahern* in support of this proposition, where the High Court of Australia had noted:[50]

> It will be proper for [the judge] to tell the jury of any shortcomings in the evidence of the acts and declarations of the others including, if it is the fact, the absence of any opportunity to cross-examine the actor or maker of the statement in question and the absence of corroborative evidence. Where it is appropriate, it will not be difficult to instruct a jury that they should not conclude that an accused is guilty merely upon the say so of another nor will that be an instruction which it is difficult to follow.

This falls short of the rather stronger admonition by Cooke P in *R v Walters*, who, when reiterating the need for reasonable evidence of an individual's participation in a conspiracy to be "safe", stated that:[51]

> when appropriate [the jury] should be helped by a warning from the Judge to the effect that it would be *dangerous and unfair* to convict the accused merely on statements made by others while he was not there.

In any event, what has emerged is a rule crafted to provide trial judges with a degree of discretion to ensure that any hearsay admitted under the co-conspirators exception is relatively reliable or "safe", in accordance with the scheme of the codified hearsay rule and its general exception in the new Evidence Act. Because the statements of co-conspirators may not be made in circumstances that provide reasonable assurance that they are reliable, and because section 12A is not a tacit acknowledgment that the co-conspirators exception was not a reliability-based exception, it is encouraging that the Supreme Court has adopted the approach more favourable to accused persons. The first review of the Act is scheduled for December 2011. Perhaps then Parliament will spell out the principles of this area of the common law in the Act itself.

49 [2007] NZSC 51, [16].

50 (1988) 165 CLR 87, 104.

51 [1989] 2 NZLR 33, 38 (emphasis added).

III CONCLUDING REMARKS — JURY DIRECTIONS, THE RULE AGAINST DUPLICITY, AND THE END OF *R v CROSSAN*

The Supreme Court affirmed that the trial judge was correct to have admitted the hearsay in this case, so why a miscarriage of justice? The case was determined on the other grounds of appeal. The trial judge had misdirected the jury as to the use they could make of the hearsay once admitted. In the Supreme Court, Anderson J was clear that once hearsay evidence is ruled admissible, it may be considered by the jury on the ultimate issue of guilt;[52] the jury do not have to ask themselves the admissibility question of whether there was reasonable evidence of a conspiracy and that the accused was a participant in that conspiracy. The trial judge had also explained the reason that the jury would get to hear hearsay evidence on the grounds that "hearsay evidence is allowed sometimes and one of the exceptions to the rule is where there has been a conspiracy".[53] This suggested to the jury the answer to one of the central issues in the case — whether the accused had acted "together with others" in making the alleged threats to the complainant.[54]

The form of the Crown's indictment was also problematic. The count charged that the appellant "between 17 August 2004 and 18 October 2004, at Auckland, together with others, threatened expressly to endanger the safety of [the complainant] with intent to obtain a benefit, namely a cash payment."[55] The case could have been analysed simply in terms of the Burger King incident with the other intimidating events serving as evidence that the operative threat at Burger King took place. Alternatively, the Crown could have charged the different transactions in separate counts — one covering the Burger King incident and the other relating to the threats made by the unknown others. Instead, however, the Crown bundled them together in a single count.

The appellant argued that the single count was duplicitous and contrary to section 329(6) of the Crimes Act 1961, which requires that every count shall in general apply only to a single transaction. Historically, the rule against duplicity was designed to prevent embarrassment to the accused in the framing of counts encompassing several distinct offences, and, along with particularity requirements, to ensure that an accused knows exactly what allegations they have to meet. Section 330(1) of the Crimes Act is a saving provision, however, providing that a count shall not be deemed objectionable merely on the ground that it charges in the

52 [2007] NZSC 51, [13].

53 Ibid [12], referring to [31] of the trial judge's summing up, reproduced in the Supreme Court's judgment at [10].

54 Ibid.

55 See *Qui Jiang v R* (CA495/ 05, 3 May 2006, Chambers, John Hansen and Baragwanath JJ), [1].

alternative several different matters, acts, or omissions, or on the grounds that a count is "double or multiple."[56] A court may divide the count where the interests of justice so require.

The rule against duplicity was considered something of an anachronism, and had come to be relaxed in practice. Section 330(1) was probably an attempt to abolish it.[57] However, the section was read down by the Court of Appeal in *R v Crossan*,[58] where, despite the clear words of the 1908 counterpart to section 330(1), a majority of the Court held that the saving provision applied only to duplicity where the same act or conduct gave rise to alternative or cumulative charges,[59] and not to situations where two separate and distinct offences not arising out of the same act or conduct were included in a single count.[60] In *Crossan*, the appellant had been charged under section 226 of the Crimes Act 1908, under which it was an offence to "take away or detain" a woman with an intent to carnally know her. The count charged the appellant with taking away *and* detaining the woman, and was therefore bad for duplicity and not saved by the then equivalent of section 330(1). This restrictive reading of the section, which had reigned for more than 50 years, received an ignoble death in Anderson J's first footnote.

Anderson J noted that it was common for a pattern of offending to be charged by one or more representative counts, particularly when acts of a similar character are alleged to have happened frequently.[61] His Honour nonetheless expressed a preference for separate counts where the acts or events alleged could meaningfully be separated, even when the events are of a common character.[62] In this case, however, the count charged the appellant in different capacities — i.e., as a principal in relation to the Burger King incident, but as a secondary party or procurer in relation to the threats of the unknown others. If this case was one betraying a continuing *actus reus* of the type envisaged in *R v Kaitamaki*,[63] as the Crown argued, then this placed a particular duty on the trial judge to deliver careful directions to the jury, a duty that was not satisfied.

Finally, because the count was composite, and concealed alternate bases for liability, careful directions were required to ensure that the jury

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56 In *DPP v Merriman* [1972] 3 All ER 42, 59, Lord Diplock noted that where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose and in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the 18th century, to charge them in a single count of an indictment.

57 Orchard, "The Rule Against Duplicity" [1973] NZLJ 468, 470; see also Williams, "The Court System and the Duplicity Rule" [1966] Crim LR 255.

58 [1943] NZLR 454 (CA).

59 i.e. where offences are charged in the alternative in respect of the same act or conduct, or where the same act or conduct constitutes two distinct offences.

60 [1943] NZLR 454 (CA), 464.

61 [2007] NZSC 51, [8].

62 Ibid.

63 [1984] 1 NZLR 385.

was unanimous as to the basis upon which they were convicting.[64] The trial judge, however, had directed only that each juror, individually, must be of the opinion that the appellant was either guilty or not guilty, but that this did not mean they had to be unanimous in their reasons for reaching a verdict.[65] While (beyond this) the Court would not be drawn on the question of what constitutes a unanimous verdict where distinct factual alternatives are concerned,[66] they found the conviction unstable on the ground that the trial judge had suggested that the charge of threatening "together with others" could have been satisfied if the jury found that the appellant had acted *either* alone *or* in conjunction with the unknown others. While it was unlikely that a juror who discounted the Burger King threat would have convicted solely on the basis of the threats of the unknown others, the fact that the judge did not address these factual alternatives in terms of party liability was sufficient, along with the other shortcomings noted, to have made the verdict unsafe. The Solicitor General stayed proceedings in August 2007.

64 [2007] NZSC 51, [11] and [18].

65 Ibid, noted at [17].

66 See *R v Mead* [2002] 1 NZLR 594; *R v Chignall* [1991] 2 NZLR 257; cf the English approach in *R v Brown* (1983) 79 Cr App R 115 (CA), and the Canadian approach in *R v Thatcher* [1987] 1 SCR 652; see the debate in Smith, "Satisfying the Jury" [1988] Crim LR 335; Robertson and Vignaux, "Rethinking Verdicts: Chamberlain, Chignell and Stratford" [1993] NZ Recent Law Review 122.

Putting it to the Jury: Has R v Coutts Imposed Too Great a Burden?

BLAIR KEOWN

When a trial judge sums up to a jury, he walks a tightrope between specificity and generality. A summing up which explores the peripheral at the expense of identifying the real issues for determination is prone to appellate court criticism for wasting the precious commodity of juror attention. Yet an overly focussed summing up risks taking issues away from the jury and intruding into the exclusive domain of the fact finder. In *R v Coutts*[1] the House of Lords has removed some of the guesswork from this dichotomy by articulating a general requirement for trial judges to put lesser alternative offences to a jury where there is a sufficient evidential basis for so doing. In holding that this requirement extends to all but trivial alternative offences and applies notwithstanding the objections of counsel, their Lordships have given cause to consider whether in giving clarity with one hand, they have imposed an additional burden on trial judges with the other.

I BACKGROUND

On 19 April 2003, the body of a friend of the appellant's partner was found charred and unclothed in woodland. A ligature, fashioned out of a pair of tights, was discovered around her neck. Police enquiries revealed that the victim had died at the appellant's flat. Thereafter, he had retained custody of the body for five weeks, storing it first in his car and shed and subsequently in a commercial storage facility. Closed circuit television footage showed the appellant visiting the storage facility on a number of occasions throughout the five-week period. A police search of the appellant's storage unit recovered:

- a condom (containing the appellant's semen on the inside and the deceased's DNA on the outside);
- the appellant's severely bloodstained shirt (containing traces of the appellant's semen and deceased's DNA); and
- a petrol can.

The appellant was charged with one count of murder. At his trial, he gave evidence that the victim's death was a tragic accident which occurred

1 *R v Coutts* [2006] 4 All ER 353.

during a consensual asphyxial sexual encounter. Expert evidence was led to support the thesis that death could spontaneously occur as a result of moderate and fleeting pressure applied to the windpipe. The Crown invited the jury to reject that possibility entirely. In its submission, the appellant had deliberately strangled the victim to satisfy a long-standing and macabre sexual fantasy.

At the conclusion of the evidence, the judge sought counsel's views on whether manslaughter should be left to the jury. Both sides objected to that course. The Crown considered it would be unfair given that the case was presented throughout on the basis that the victim's death was either a deliberate killing demanding conviction or a pure accident entitling acquittal. The appellant, having conferred with counsel and been informed of the likely sentence for manslaughter, decided to "roll the dice" in the hope that the jury, faced with a stark choice between murder and accident, would acquit him.

The judge made no mention of manslaughter in his summing up. The jury returned a guilty verdict. In an audacious but understandable about-turn, the appellant appealed on the ground that the judge should nevertheless have left manslaughter to the jury. Having failed in the Court of Appeal, the appellant appealed to the House of Lords.

II THE APPEAL

From the outset of the appeal it was accepted that there was an evidential basis for a possible verdict of manslaughter. The principal issue before the House of Lords was whether the trial judge ought to have left manslaughter to the jury. Repeating the submissions that proved successful in the Court of Appeal, counsel for the Crown defended the trial judge's refusal to put manslaughter to the jury on three related grounds:

- a trial judge ought not ignore the requests of both counsel that a particular direction not be given;
- a direction on an alternative offence which neither counsel had addressed during their respective cases would have been unfair; and
- the inclusion of an alternative offence would have complicated the jury's task.

Even if such a direction was required, counsel submitted that there was nothing to suggest that either the conviction was unsafe or a miscarriage of justice had occurred.

III THE DECISION

Substantive speeches were delivered by four of the five Law Lords (Lord Bingham of Cornhill, Lord Hutton, Lord Rodger of Earlsferry and Lord Mance, Lord Nicholls of Birkenhead concurring). All unanimously agreed on two conclusions. First, manslaughter should have been left to the jury. Second, a miscarriage of justice had been automatically occasioned by the failure to do so. Lord Bingham's speech provided the basis of the first conclusion. Lord Hutton's formed the crux of the second.

Manslaughter Should Have Been Left to the Jury

As the authorities stood, two key principles regulated trial judge directions on alternative offences:

- a trial judge has a duty, in a murder trial, to leave a possible manslaughter defence arising on the evidence to the jury even though such a defence has not been advanced or has been expressly disavowed at trial; and
- a trial judge should, with limited exceptions, leave the possibility of convicting of lesser-included offences to the jury.

While the first principle was sufficient to dispose of the appeal, Lord Bingham made clear that their Lordships' decision was not confined to the relationship between murder and manslaughter. To the contrary, the appeal raised a question of broader public importance concerning:[2]

> [T]he duty and discretion of trial judges to leave alternative verdicts of lesser-included offences to the jury where there is evidence which a rational jury could accept to support such a verdict but neither prosecution nor defence seek it.

In his Lordship's opinion the fundamental objective of the jury system was to ensure that defendants were neither over-convicted nor under-convicted. Pivotal to this objective was the trial judge who had an unqualified duty to alert the jury to the options open to it. That duty was not contingent upon the requests of counsel. As Lord Rodger added, the interests of justice were more likely to be undermined where a jury was not apprised of a full understanding of the law. Any additional complications or perceived unfairness was simply the price of the information necessary for jurors to effectively discharge their responsibilities.

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2 Ibid [1].

That policy analysis lent itself to a general requirement for trial judges to put alternative offences to the jury. In a statement with which all of the Law Lords concurred, Lord Bingham said:[3]

> The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support ... I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial.

To that principle were added two safeguards. First, a trial judge was not bound to put "trifling" offences to the jury.[4] Second, a direction was not to be given where it would infringe the defendant's right to a fair trial,[5] though most unfairness would ordinarily be offset by the judge by providing counsel with advanced notice of the direction.

In the context of the appellant's case, it followed that a direction on manslaughter should have been given.

A Miscarriage of Justice Will Automatically Follow

Two divergent avenues of authority met their Lordships' consideration of whether a miscarriage of justice had been occasioned by the failure to put manslaughter to the jury. One avenue, tracing its origin to the *obiter* remarks of Lord Ackner in *R v Maxwell*,[6] restricted miscarriages of justice to those cases where the court was satisfied that the jury convicted out of a reluctance to see the defendant get away with disgraceful conduct. The other avenue was more direct, providing that a failure to give a requisite direction on an alternative offence automatically led to a miscarriage of justice.

Led by Lord Hutton,[7] all of the Law Lords rejected the former line of authority. In their view, a principle that pegged injustice to the possible content of jury deliberations was open to two fundamental criticisms:

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3 Ibid [23].

4 *Coutts*, supra note 1, [17] and [19] per Lord Bingham, [84] per Lord Rodger, [100] per Lord Mance.

5 *Coutts*, supra note 1, [24] per Lord Bingham, [45] per Lord Hutton, [84] per Lord Rodger, [100] per Lord Mance.

6 *R v Maxwell* [1990] 1 All ER 801.

7 Who had previously adopted Lord Ackner's dicta in *Hunter v R* [2004] 2 LRC 719.

- it requires appellate courts to speculate into the factors which may have influenced the jury's decision. The secrecy accorded to jury deliberations limited the means by which a court could reliably do so;[8]
- it rests on an assumption that jurors would disregard their oath.[9]

In light of those criticisms, a "presumption" of injustice was the only workable option. This had been demonstrated by the experience of the High Court of Australia, which, having initially adopted the dicta of Lord Ackner, had progressed to the stage where a failure to put an alternative count to the jury was assumed to have caused the jury to convict on an unsound basis. Lord Hutton formulated the principle as:[10]

> Save in exceptional circumstances, an appellate court should quash a conviction, whether for murder or for a lesser offence, as constituting a serious miscarriage of justice where the judge has erred in failing to leave a lesser alternative verdict obviously raised by the evidence.

The appellant's conviction was quashed and a new trial ordered.

IV WHAT WILL THIS MEAN IN PRACTICE?

R v Coutts represents two significant developments in the criminal law:

- The requirement to put alternative offences to the jury has been extended beyond a murder-manslaughter context to all but "trivial" alternative offences; and
- The general consequence of a failure to put a direction will be a miscarriage of justice and a quashing of the resulting conviction.

These developments seemingly place a significant practical burden on trial judges. A judge must now put all but "trivial" alternative offences for which there is an evidential basis to the jury under the threat of automatic appellate intervention should he fail to do so. The difficulty lies in the absence of any guidance as to when an offence will be deemed so "trivial" as to escape the requirement for it to be put to the jury.

English authority demonstrates the dangers of leaving the parameters of "triviality" unarticulated. In one instance burglary has been considered

8 *Coutts*, supra note 1, [60] per Lord Hutton, [87] per Lord Rodger and [99] per Lord Mance.

9 Ibid [87] per Lord Rodger.

10 Ibid [61].

too trifling an offence to be left to a jury in a robbery trial.[11] Yet driving without due care was considered a necessary alternative in a trial of causing death by reckless driving.[12] In both cases the disparity in maximum penalty between principal and alternative offence was virtually the same.

In light of this uncertainty and the appellate sanction that automatically follows from a failure to put alternative counts to the jury, it is possible that judges will err on the side of caution and adopt an inclusive rather than exclusive philosophy when putting alternative offences to the jury. While experience is yet to bear this out, there is a risk that understandably cautious judges may bombard jurors with alternative offences that complicate the main issues in the case and counteract the very ideal that a summing up seeks to advance.

It remains to be seen whether *Coutts* leaves such an indelible mark on the conduct of jury trials in New Zealand. Its impact to date has been limited to its narrow ratio by reinforcing the existing requirement for New Zealand trial judges to put manslaughter to the jury when there is a sufficient basis for doing so.[13] Nevertheless, it does provide a platform of high authority from which to extend the requirement to put alternative counts beyond a murder-manslaughter context. Should a New Zealand appellate court choose to adopt this course, it is imperative that the parameters of the requirement are fleshed out in advance. Trial judges already have enough on their plate.

11 *R v Maxwell* [1988] 1 WLR 1265 (HL).

12 *R v Fairbanks* [1986] 1 WLR 1202 (CA).

13 See *R v Robinson* CA246/06 7 August 2007, [27]; and *R v Leuluaialii* CA122/06 22 November 2006, [20].

Applying the Bill of Rights in the New Zealand Context

MEREDITH WEBB

I INTRODUCTION

In *Hansen v R* [2007] NZSC 7 the Supreme Court has answered some of the outstanding questions relating to the use of the New Zealand Bill of Rights Act 1990 ("Bill of Rights") in relation to other enactments. The consideration of the Bill of Rights' operation has also demonstrated some reasonably strong differences in perspective within the Court. In doing so it has also raised issues for future discussion.

II THE FACTS

Mr Hansen was convicted after a jury trial on a charge under section 6(1)(f) of the Misuse of Drugs Act 1975 of being in possession of a cannabis plant for the purposes of supply. The issue in his trial was whether Mr Hansen's possession of the drug was in fact for the purpose of supply. Section 6(6) of the Act at that time provided that "a person shall until the contrary is proved" be deemed to be in possession for the purposes of supply if he or she has possession of 28 grams or more of cannabis plant, thereby creating a reverse onus on the defendant to prove on the balance of probabilities that the drugs in his possession were not for the purposes of supply.

The argument submitted on Mr Hansen's behalf in the Court of Appeal was that the legal burden of proof falling on the defendant in this situation impinged upon the right set out in section 25(c) of the Bill of Rights. Section 25 outlines the minimum standards of criminal procedure and subsection (c) protects "the right to be presumed innocent until proved guilty according to law". It was further submitted that section 6 of the Bill of Rights, which provides that where possible an interpretation consistent with the Bill of Rights is to be preferred, directed the Court to read section 6(6) as imposing the lesser requirement of an evidential burden (i.e. the accused is to satisfy the judge that there is sufficient evidence before the court to the contrary of the presumed fact to raise a triable issue).

This argument was rejected in the Court of Appeal on the grounds that section 6(6) was only properly capable of bearing one meaning. In particular, the word "proved" meant that the provision could not be read as imposing an evidential burden only.

III THE INTERACTION BETWEEN SECTIONS 4, 5 AND 6

In considering the impact of the Bill of Rights on any other enactment, three key sections come into play. It is the relationship between these sections that is the central focus of this judgment. Section 4 provides that, despite any inconsistency between another enactment and the Bill of Rights, the other enactment should still be applied. Section 5 provides that subject to section 4, the rights and freedoms contained in the Bill of Rights may only be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Finally, section 6 states that where an enactment can be given a Bill of Rights consistent meaning, that meaning is to be preferred.

Although it is clear that sections 4, 5 and 6 are required to interact in the consideration of enactments potentially inconsistent with the Bill of Rights, the legislation provides no guidance on how this interaction is to take place. As Blanchard J notes, "the Bill of Rights does not mandate any one method or sequence of application for applying and reconciling ss 4-6 in a given case".[1] *Hansen*, however, provides an indication of the direction the Court may take.

The issue facing the Court was the nature of the right that should be considered against the enactment. This involved a consideration of whether the relevant right is the absolute right as protected in the Bill of Rights, or that right reasonably limited, if possible, by section 5. With the exception of the Chief Justice, the majority took the view that the preferred approach is to involve section 5 in the first instance in a consideration of whether the limit imposed on the right is a reasonable one that can be justified in a free and democratic society. According to Tipping J, only after the Court is satisfied that the intended meaning is not justified under section 5 should it look to section 6 for a possible alternative meaning. He elucidates, "this is not to subvert section 6 but rather to say that if a meaning which is apparently inconsistent is nevertheless justified under s 5, it is no longer inconsistent for the purposes of s 6."[2] This is in line with Paul Rishworth's assertion that "if the suggested 'breach' is no more than a reasonable limit of the right, it is not a breach at all and there is no call to avoid it through interpretation".[3]

Blanchard and Tipping JJ, however, were careful to point out that this approach would not apply in all cases and that the interaction between the provisions was designed to be flexible.[4] Noting that the approach adopted in *Hansen* differed from *Moonen*, Blanchard J stated, "when new situations arise it is necessary to approach them in a way which is best

1 *Hansen* [2007] NZSC 7, [61].
2 Ibid [91].
3 Rishworth et al, *The New Zealand Bill of Rights* (2003), 119.
4 *Hansen*, supra note 1, [61] and [91].

suited in the circumstances to give effect to what appears to be the overall Parliamentary intention."[5]

This analysis differs to that provided by the Chief Justice. Elias CJ was of the view that the question of whether section 6(6) may be a demonstrably justified limitation under section 5 is distinct from the section 6 question of whether it can be interpreted consistently with section 25(c).[6] To conflate the inquiries would be to needlessly dilute the protected right. In her Honour's view section 6 does not give "preference to a meaning consistent with limitations justified under section 5, if a meaning consistent with the unlimited right is tenable."[7]

The Chief Justice also diverged from the majority on the issue of whether the right to be presumed innocent could be limited in any sense. In arguing this point Elias CJ fastened onto the absence of any qualifications on the right in the International Covenant of Civil and Political Rights.[8] This emphasis on the rights as protected contrasts sharply with the views of McGrath J, for example, who refers to Paul Rishworth's characterization of the Bill of Rights as "a bill of reasonable rights" and then states that "rights are part of a social order in which they must accommodate the rights of others and the legitimate interests of society as a whole."[9] This seems to represent a fundamental difference in approach between members of the Court to the import and scope of the rights protected in the Bill of Rights.

IV THE ADOPTION OF THE *R v OAKES* SECTION 5 TEST

The test to be adopted under section 5 in relation to whether limitations on a protected right are reasonable and demonstrably justified in a free and democratic society has been the basis of much debate, and it is considered here by all the judges.

As Hanna Wilberg points out, all five judges referred to the leading Canadian case of *R v Oakes* or more modern restatements of that test, indicating that it provides the basis for the general approach in New Zealand.[10] Blanchard, Tipping, Anderson and McGrath JJ adopted similar tests based on *Oakes*. This (much simplified) test involves a consideration of the objective at which the enactment is aimed, whether there is a rational connection between the provision and the objective, whether the right is impaired "as little as possible", and finally whether the impairment is only to an extent that is proportional to the objective. Tipping J added to his

5 Ibid [61].

6 Ibid [8].

7 Ibid [15].

8 Ibid [7], (1966) 999 UNTS 171 (ratified by New Zealand in 1978).

9 Rishworth, "Interpreting and Invalidating Enactments Under a Bill of Rights" in Bigwood (ed), The Statute: Making and Meaning (2004) 251, 277; *Hansen*, supra note 1, [186].

10 Hanna Wilberg, *The Bill of Rights and other enactments*, NZLJ, April 2007, 113.

assessment a consideration of the words in section 5, focusing on the use of the terms "free and democratic society" to support an argument that parliamentary intent is central to any consideration of what a reasonable limit is. He described the role of the courts as being to keep "Parliament faithful to the s 5 instruction, but with some inherent room for Parliamentary appreciation."[11]

Applying the above test to the issue before the Court, Tipping J was satisfied that the objective was an important one and that there was a rational connection between the objective of establishing guilt for the prosecution and thereby deterring individuals from possessing drugs for supply and section 6(6).[12] McGrath J was unsure as to whether there was a rational connection, but agreed with Tipping J that the imposition of section 6(6) on the right was not the minimum impairment of the right available to achieve the objective.[13] In their view, the objective could also be achieved through the lesser impairment on the right of an evidential burden on the accused.[14]

Anderson J could not accept that there was a rational connection at all between section 6(6) and the objective of facilitating the conviction of drug dealers.[15] Conversely, Blanchard J felt not only that the objective was a good one, but that the imposition of a legal burden, given the difficulties faced by the prosecution, was required to meet that objective. Blanchard J was seemingly impressed by the existence of an Expert Committee charged with advising the Minister on the appropriate levels indicating a likelihood of possession to supply (despite the fact that the trigger point for cannabis supply had remained unchanged since 1965).[16] This, combined with the difficulties faced by the prosecution, in his view, demonstrated both a rational connection and a reasonably necessary impairment of the right.

V A LESS 'ADVENTUROUS' APPROACH?

After considering whether section 6(6) was a reasonable limit under section 5, the members of the Court then logically moved on to an examination of whether the words of section 6(6) could be held to have a meaning consistent with section 25(c), as directed by section 6.

Ultimately all five judges were of the view that section 6(6) could not be read down to mean an evidential rather than a legal burden on the

11 *Hansen*, supra note 1, [106].
12 Ibid [125].
13 Ibid [214] and [224].
14 Ibid [129].
15 Ibid [275].
16 Ibid [77], [79] and [211].

accused.[17] This was in line with the Court of Appeal's previous decision in *R v Phillips*, but in opposition to the House of Lords decisions in *R v Lambert* and *R v Director of Public Prosecutions, ex p Kebilene*.[18] Like *R v Phillips* and *Hansen*, *Lambert* and *Kebilene* concerned the impact of the right to be presumed innocent on a comparable reverse onus provision. In those cases the House of Lords "interpreted" the provision in question to place only an evidential burden on the accused. Interestingly, Lord Cooke of Thorndon, who sat as President of the Court of Appeal on *R v Phillips*, took a different approach in *Kebilene* on the basis that "unless the contrary is proved" could be read down to mean "unless sufficient evidence is given to the contrary". This was partly because it was felt that section 3 of the Human Rights Act 1998 (UK) (the equivalent of section 6) provided scope for a more inventive interpretation.

The House of Lords' stance in *Lambert* and *Kebilene* led Tipping, Elias, McGrath and Anderson JJ to a consideration of the House of Lords' approach against that traditionally taken by New Zealand courts. Section 3 of the Human Rights Act 1998 (UK) has a similar purpose to section 6 of the Bill of Rights, providing that "so far as it is possible to do so primary legislation and subordinate legislation must be given effect in a way which is compatible with convention rights". Although in New Zealand section 6 has been read on the basis that an alternative meaning must be reasonably or properly open, this has not been the approach to section 3 in the United Kingdom.

The Court, with the exception of Blanchard J who did not address the point, was of the view that although there are slight differences between the way section 6 of the New Zealand Bill of Rights and section 3 of the United Kingdom Act is expressed, there is no material difference between the two provisions. This is despite the House of Lords' pronouncements to the effect that New Zealand's section 6 is a "slightly weaker model".[19]

McGrath J felt that the legislative history of the Bill of Rights, and the context in which section 6 appears, supported the approach that the text is central to the identification of alternative meanings taken in the New Zealand environment. He viewed the public debate that occurred prior to the enactment of the Bill of Rights over whether the Bill of Rights should have the status of supreme law as demonstrating that the Act is now intended to have interpretative power only within the limits of that concept.[20] The incongruous aspect of this argument is that the very fact that New Zealand's Bill of Rights was initially intended to operate as supreme law leads to the result that the eventual impact of the Act is more restricted than it would be had the Bill of Rights been intended to be merely interpretative from the start.

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17 Ibid [61].

18 [2000] 2 AC 326.

19 *Hansen*, [12-13], [243]; [287]; *R v A (No 2)* [2002] 1 AC 45; see also: *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, 374.

20 *Hansen*, supra note 1, [238]-[240].

The difference between the jurisdictions was also acknowledged by Tipping J in his examination of the United Kingdom cases. Noting that the United Kingdom approach has been described by Butler and Butler as "adventurous", Tipping J reframed the description by stating, "the same point could be rendered by saying that the English courts, in their different and more complicated supra-national environment, seem to have felt it appropriate to strike the balance between the judicial and the legislative roles in a rather different way".[21]

Regardless of the legal niceties of that description, it seems that despite what opponents of the Supreme Court may have contended before its creation, "judicial activism" is not a purely homegrown affliction.

VI CONCLUSION

Despite their different findings on the facts, all five Justices were of the view that section 4 requires the Court to apply section 6(6) of the Misuse of Drugs Act 1975, despite any inconsistency with section 25(c). However, the length of the separate reasons alone indicates that the Court takes seriously the infringement of protected rights. It is also clear though, that the Supreme Court, unlike its United Kingdom counterpart, will not use section 6 to subvert the clear language of section 4.

21 Ibid, per Tipping J [156].

The Trinity Scheme: Accent Management and Ors v Commissioner of Inland Revenue

SHANE MCGREGOR*

I FACTUAL BACKGROUND

In *Accent Management*,[1] a forestry investment scheme (the "Trinity scheme") was established for what the Court of Appeal concluded was no ostensible business purpose. The taxpayers agreed, amongst other things, to license land from Trinity Foundation (Services No. 3) Limited ("Trinity 3") for 50 years.[2] The fee for the license was $2,050,518 per plantable hectare, payable in 2048. Trinity 3 licensed 484 plantable hectares and was indirectly owned by the Trinity Foundation Charitable Trust; the scheme was still likely to produce sizable charitable dividends from the revenues that were likely to exceed $990 million upon completion.[3]

The land could have been purchased outright at the time of establishment in 1997 for around $600 per hectare; given that, a number of Income Tax Act 2004 ("ITA") provisions were utilized in the design of the business structure to make the venture more attractive for the taxpayers. In particular, the taxpayers took advantage of the fact that deductions associated with the establishment and maintenance of the forest could be made in the current year even though the income would not be derived until 2048. Furthermore, the scheme was formed around loss attributing qualifying companies,[4] ("LAQCs") allowing the taxpayers direct access to the tax losses, all the while providing limited liability protection.

In sum, the impetus of the scheme rested on the idea that the taxpayers could deduct the depreciation on the license fee immediately; for the 1998 year, the taxpayers claimed tax deductions of approximately $40,000 per hectare ($2,050,518÷50).[5] The result of the scheme was a 50-year tax holiday to the extent of the taxpayers' claims.

The taxpayers argued that the aforementioned features by themselves did not amount to tax avoidance, citing the principles of taxpayers' autonomy and choice.[6] The Commissioner disallowed the taxpayers'

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* Thank you to Michael Littlewood for his assistance in composing this piece of work.

1 *Accent Management and Ors v CIR* [2007] NZCA 230.

2 Ibid [3].

3 $2,050,518*484= $992,450,712.

4 Under the rewrite of Part H of the Income Tax Act 2004, LAQCs will be known as Loss Attributing Companies, or LACs.

5 *Accent Management*, supra note 1, [12].

6 Ibid [132] – [136].

claims, maintaining that the general anti-avoidance rule (section BB 9 in 1997 and section BB 1 in 1998)[7] applied. Venning J in the High Court agreed and the Court of Appeal unanimously dismissed the taxpayers' appeal, finding the scheme was "technically correct but contrived".[8]

II CLASH OF RULES: THE RELATIONSHIP BETWEEN SPECIFIC TAX RULES AND THE GENERAL ANTI-AVOIDANCE PROVISION

The Court of Appeal concluded that the deductions for the license fee were deductible within the depreciation rules relied on by the taxpayers. On the other hand, the Court also concluded that the Trinity scheme "[was] caught by a literal reading of the general anti-avoidance provisions".[9] This case raised the predicament that is the hallmark of tax avoidance cases in New Zealand: namely, which part of the Act takes priority, the general anti-avoidance provisions or the specific tax rules?

Following the drift of modern authority, the Court adopted a balancing act, or as Richardson P put it in *CIR v BNZ Investments Ltd,*[10] "a line drawing exercise", requiring the Court to look at the scheme and purpose of the provisions under which the deductions are claimed and assess if there is any underlying policy. In concluding that the scheme did not meet what Parliament must have contemplated as a precondition of deductibility, the Court assessed both the pre-tax economic burden incurred by the taxpayers and the lack of business purpose.

The pre-tax economic burden was established as a precondition of deductibility in *Peterson v CIR.*[11] The evaluation of a pre-tax economic burden is an attempt by the judiciary to investigate the commercial aspects of a transaction while attempting to respect a taxpayer's autonomy. What follows in the judgment is an assessment of whether the taxpayers incurred some loss and, if so, whether there was any basis to conclude that the legislature had not intended to permit the deduction of the loss in the circumstances. The Court concluded that, while there was a technical legal burden to pay the license fee, the economic requirements were absent.[12] In doing so, the Court placed heavy emphasis on the "voluntary" nature of the obligation and the absence of personal guarantees.[13]

The other material factor in the Court of Appeal's analysis was

7 Under the Income Tax Act 2004 the anti-avoidance rule is covered by section BG 1.

8 *Accent Management*, supra note 1, [144].

9 *Accent Management*, supra note 1, [109].

10 *CIR v BNZ Investments* [2002] 1 NZLR 450.

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

12 *Accent Management*, supra note 1 [144].

13 Ibid.

the lack of business purpose.[14] The ITA provides various incentives for particular commercial arrangements but the underlying requirement for their application is a genuine business purpose. The lack of business purpose in this scheme was highlighted by the admission of a draft business plan (the "business plan") which was prepared by CSI Insurance Group Limited, a company which covered the taxpayers for the contingency that the forestry returns maybe insufficient to cover the license fee. The business plan revealed that the real purpose of the scheme was not to conduct a commercial forestry business, but rather the generation of tax benefits.[15] As an aside, it is important to note that the admissibility of the document was challenged by the taxpayers, though this note does not explore that aspect of the decision.

The culmination of these two factors (the absence of a pre-tax economic burden and the lack of business purpose) provided the Court with its basis to conclude that the arrangement was tax avoidance and "well and truly across the line".[16]

III SCHEME AND PURPOSE TEST

The scheme and purpose test was first articulated in New Zealand by Richardson J in *CIR v Challenge Corporation Ltd*:[17]

> Section 99 thus lives in an uneasy compromise with other specific provisions of the income tax legislation. In the end the legal answer must turn on an overall assessment of the respective roles of the particular provision and s 99 under the statute and of the relationship between them. That is a matter of statutory construction and the twin pillars on which ... rests are the scheme of the legislation and the relevant objective of the legislation."

Although the decision by Richardson P was reversed by the Privy Council[18] this approach remains current and was applied by the both the majority and the minority in the Privy Council decision of *Peterson v CIR* as well as by the Court of Appeal in the case at hand.[19] Accordingly, the test serves as a consistent means of differentiating between tax avoidance and tax mitigation.

It is respectfully submitted that the Court of Appeal erred in its assessment of the scheme and purpose when it held that the essentially

14 Ibid.

15 Ibid [141].

16 Ibid [146].

17 *CIR v Challenge Corporation Ltd* (1986) 8 NZTC 5,001 (CA).

18 *CIR v Challenge Corporation Ltd* [1986] 2 NZLR 513.

19 See e.g. *Peterson v CIR*, supra note 11 and *Accent Management and Ors v CIR*, supra note 1.

"voluntary" nature of the payments meant the taxpayers did not suffer the requisite pre-tax economic burden. The Court's interpretation of "voluntary" seemed to encompass the large time period between when the Agreement was reached and when payment would be made, the uncertainty of profitability, and the absence of personal guarantees from the shareholders of the LAQCs. This conclusion evidences the Court's attempt to form its own views on commercial outcomes, and in doing so the Court opposed the sanctity of contract by rejecting the proposition that the taxpayers' companies would perform in line with their contractual obligations. In fact, there was a pre-tax economic burden which was to be suffered; accordingly it should be immaterial that the payment was not to be made until some time in the future and no personal guarantees were offered.

The Court's reasoning should have focused on the fact that the taxpayers entered into this scheme without the necessary intention to participate in commerce, a lack of business purpose. The judgment ought to have have concluded that[20] the license fee was not a cost of the kind contemplated by the depreciation provisions relied on; this is because there was no business purpose, simply a purpose of generating deductions, and in this respect the taxpayers have not met what Parliament must have contemplated as a precondition of deductibility. The reasoning inherent in this conclusion is consistent with the scheme and purpose of the ITA.

IV WOULD THE OUTCOME HAVE DIFFERED, ABSENT THE BUSINESS PLAN?

The business plan defined the benefit of the scheme as "[the] tax concessions that can be obtained ... by the investors and the Foundation" and went on to say "the actual outcome of the deal in fifty years is not considered material".[21] In this writer's opinion, the business plan was the conclusive factor in the case. But for the business plan, if the taxpayers had argued that their purpose was to invest in a forestry venture, the Court would have little grounds to accept the Commissioner's tax avoidance argument, despite the manifest tax advantages the scheme provided.

In *Newton v FCT* it was decided that:[22]

> In order to bring the arrangement within the section you must be able to predicate - by looking at the overt acts by which it was implemented - that it was implemented in that particular way so as to

20 *Accent Management*, supra note 1, [144] (c).

21 Ibid [142].

22 *Newton v FCT* (1958) 98 CLR 1, 8; (1958) 7 AITR 298, 304-5 (PC).

> avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section.

Concomitantly the Courts have consistently confirmed that if a genuine business transaction can be implemented in two different ways, with one involving a lesser tax liability than the other, then the anti-avoidance provision should not automatically apply because the taxpayer chose the most efficient alternative.[23]

Thus, if the Trinity scheme was presented to the Court, absent the business plan, the outcome would rest on the Commissioner's ability to convince the Court that the scheme lacked business purpose. Prima facie this would be a challenging task, especially in light of the highly artificial nature of the transactions and the decisions in *CIR v Auckland Harbour Board*[24] and *Peterson v CIR*.[25]

V THE EFFECT OF THE DECISION ON TAX PLANNING

The *Accent Management* decision offers some important lessons for the tax planning community. First and foremost, documents detailing that a scheme is motivated by tax consequences and lacks commercial motivation can negatively impact the success of the scheme if subject to review, as one would expect. Secondly, there is still no clear dividing line between tax avoidance and tax mitigation. The only substance that can be extracted on this point is that the scheme and purpose analysis remains firmly secured in the courts' judicial toolbox. This should serve as a continued warning that there must be a tangible element of commerciality in any scheme that reduces a taxpayer's liability to income tax.

23 *Mangin v IRC* [1971] AC 739 at 751.

24 *CIR v Auckland Harbour Board* [2001] 3 NZLR 289.

25 See e.g. *Peterson v CIR*, supra note 11.