Brown v New Zealand Basing Ltd*: Statute, Party Autonomy and Public Policy in Conflict of Laws*

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I INTRODUCTION

Can a New Zealand-based employee seek relief under the Employment Relations Act 2000 (the ERA) against his foreign-based employer for unjustified dismissal where the employment contract contains a choice of foreign law? The Supreme Court answered this question in the affirmative in *Brown v New Zealand Basing Ltd*.[1] It considered that the case was a matter of statutory, rather than contractual, interpretation. Having examined the legislative scheme and history, the Supreme Court overturned the Court of Appeal's decision and departed from traditional conflict of laws methodology.

On its face, the case is notable for clarifying when forum statutes apply despite the parties' express choice of foreign law. However, the true reach of the case is limited by the particular nature and history of the ERA and, more precisely, its anti-discrimination provisions.

II BACKGROUND

The Facts

The plaintiffs, Messrs Brown and Sycamore, were New Zealand-based pilots for Cathay Pacific, a Hong Kong-based airline. They were employed by the defendant, New Zealand Basing Ltd (NZBL), a Hong Kong company and a wholly-owned subsidiary of Cathay Pacific. NZBL's sole business was to employ New Zealand-based staff.

Brown and Sycamore's employment agreements provided that the pilots were to retire at age 55. The contracts included a choice of law clause electing Hong Kong law as the governing law.

By way of background to the dispute, in 2006, five London-based pilots brought a claim against their employer, Veta Ltd, a Cathay Pacific subsidiary in Hong Kong, for unfair dismissal upon reaching age 55. The case eventually went before the House of Lords and involved three joined appeals. The case is known as *Crofts*.[2] The pilots were peripatetic employees: they were based in London, but they worked overseas. The central issue was the

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1 *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245 [*Brown* (SC)].

2 *Lawson v Serco Ltd* [2006] UKHL 3, [2006] All ER 823 [*Crofts*].

territorial scope of the Employment Rights Act 1996 (UK) (the UK Act), s 94(1) of which gives employees the right not to be unfairly dismissed. The House of Lords, finding for the pilots, held that the territorial application of the UK Act turns on the employee's place of work: the "base test".[3]

As a result of *Crofts*, Cathay Pacific reviewed its operations. Cathay Pacific revised its employment contracts to be governed by the law of the jurisdiction in which the employee is based. NZBL implemented this revision in its new Conditions of Service 2008 (COS08). In 2009, Cathay Pacific (and NZBL) offered pilots the option of entering into a new employment contract that incorporated COS08.[4] Those Conditions had a retirement age of 65 years, but a reduced salary.[5] Brown and Sycamore declined the offer and stayed with their COS02 terms (with a retirement age of 55).

With the pilots' 55th birthdays impending, NZBL sought to retire them. The pilots brought a personal grievance claim in New Zealand under the anti-discrimination provisions of the ERA, challenging the lawfulness of NZBL's decision to dismiss them.

Submissions

Brown and Sycamore relied on pt 9 of the ERA, on the basis that they were based in New Zealand, where they live, and start and finish work. They sought relief under s 104(1)(c), which prohibits termination of employment by reason of age. The crux of their case was that the ERA enacts minimum standards to protect employees working in New Zealand, and parties cannot contract out of these statutory protections per s 238.

NZBL, on the other hand, protested jurisdiction. It relied on the express choice of law clause in the employment contract. It said that the proper law of the contract is Hong Kong law, which does not prohibit dismissal on the basis of age, and that the ERA did not apply to the employment relationship.

Ultimately, the matter turned on whether or not the ERA applied.

III THE LOWER COURTS

The Employment Court

The case first appeared before Ms Fitzgibbon, a member of the Employment Relations Authority, in 2014.[6] The case was removed to the Employment Court on the grounds that there were important matters of law arising.

3 At [29], [31] and [40].
4 *Brown* (SC), above n 1, at [14].
5 The parties agreed that being under the age of 65 years is a genuine occupational qualification for international pilots: see Human Rights Act 1993, s 30(1).
6 *Brown v New Zealand Basing Ltd of Hong Kong* [2014] NZERA Auckland 386.

In the Employment Court, Judge Corkill found that New Zealand law applied.[7] Applying *Crofts*, he reasoned that the pilots were based in New Zealand and therefore subject to its laws. As s 104(1)(c) of the ERA prohibits termination of employment by reason of age, the compulsory retirement provision was unlawful. The result would be different under Hong Kong law, under which there is no such age-prohibition. However, Judge Corkill considered that s 238 of the ERA overrode the parties' choice of law.[8]

In any event, he continued, even if Hong Kong law did apply, the choice of law clause should not apply on public policy grounds. He held the recognition of Hong Kong law would be "unjust and unconscionable" as effecting age discrimination is an affront to basic principles of justice and fairness,[9] and NZBL acted unfairly in attempting to "bargain a fundamental human right".[10]

Accordingly, Judge Corkill found for the pilots. NZBL appealed.

The Court of Appeal

The Court of Appeal allowed NZBL's appeal on two issues.[11] First, if the ERA applied, did it override the parties' choice of Hong Kong law? Secondly, if the ERA did not apply, would the application of Hong Kong law to the employment contract be contrary to public policy?

Harrison J, delivering the judgment of the Court, mused that "[t]his was a classic conflict of laws problem".[12] In accordance with ordinary conflict of laws rules, the ERA would only apply to the employment agreements: (a) where the proper law is that of New Zealand; or (b) if the ERA is a mandatory overriding rule.

The Court characterised the matter as one of contract. As such, the proper law was that which was expressed in the contract: Hong Kong law. On this analysis, New Zealand statutes would not apply to the contract. Moreover, the Court did not consider s 238 to confer overriding effect to the ERA.[13] The ERA is silent as to territorial scope. Further, Parliament could not have intended to displace established rules of private international law, absent express wording to that effect.[14] The Court distinguished *Crofts*.[15] The UK Act, which was considered in *Crofts*, has a distinctive statutory background, including that the Rome Convention recognises that the UK Act applies irrespective of choice of law.[16]

On the second issue, the Court held that the high threshold for the public policy exception had not been satisfied. Application of Hong Kong law

7 *Brown v New Zealand Basing Ltd* [2014] NZEmpC 229 [*Brown* (EmpC)].
8 At [100]–[101].
9 At [112]–[113].
10 At [114]–[127].
11 *New Zealand Basing Ltd v Brown* [2015] NZCA 168.
12 *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 [*Brown* (CA)] at [35].
13 Section 238 provides: "No contracting out: The provisions of [the ERA] have effect despite any provision to the contrary in any contract or agreement."
14 *Brown* (CA), above n 12, at [57].
15 At [41]–[55].
16 At [46].

would not shock the conscience of a reasonable New Zealander. Age discrimination is not an absolute value. The treatment of age is "linked to and reflects a range of fiscal, social and cultural factors".[17] This lessened the objectionability of a retirement age clause. Hong Kong law provided adequate protection to the employee pilots, who received collateral benefits such as a favourable income tax rate. In layperson's terms, the pilots could not have their cake and eat it too.

NZBL's appeal was allowed. Brown and Sycamore appealed.

IV THE SUPREME COURT

The Supreme Court granted leave in the following terms: whether the Court of Appeal was correct to conclude that age discrimination provisions of the ERA did not apply to the employment agreements between the pilots and NZBL.[18] Notably, the issue was limited to the application of the anti-discrimination provisions and not the ERA as a whole.

The Supreme Court unanimously allowed the appeal, with reasons by Ellen France and William Young JJ.

William Young and Glazebrook JJ

It is appropriate to start with the concurring judgment of William Young and Glazebrook JJ, delivered by the former. This is the way the judgment is set out, and the majority reasoning adopts, in part, the analysis in the concurring judgment.

William Young J addressed three questions. The first and second related to personal jurisdiction over NZBL and subject matter jurisdiction over the employment agreement, respectively. But it is the third discussion that is of particular significance: "Do the provisions of Part 9 of the 2000 Act relating to discrimination apply to the conduct of NZBL towards Messrs Brown and Sycamore?"[19] The Court answered, "Yes".

First, the Court adopted the "single step interpretation approach" in favour of the traditional methodology enunciated in *Dicey, Morris and Collins* and applied by the Court of Appeal.[20] That is, the territorial scope of legislation is best determined by a purposive interpretation of the statute in question.[21] This is consistent with s 5(1) of the Interpretation Act 1999. The Supreme Court rejected the Court of Appeal's approach of looking at the contract to determine the proper law. It rejected the assumption that the starting point is that the provisions of a forum statute do not apply where

17 At [74].
18 *Brown v New Zealand Basing Ltd* [2017] NZSC 12.
19 *Brown* (SC), above n 1, at [50].
20 The Court of Appeal's approach is summarised in *Brown* (SC), above n 1, at [30]: characterise the matter; identify the proper law; and, if a foreign law is the proper law, consider the law of the forum to determine whether there is a mandatory rule or public policy that overrides the proper law.
21 *Brown* (SC), above n 1, at [8].

foreign law is elected. The sole question is whether the relevant ERA provisions apply as between the pilots and NZBL.[22]

Secondly, in answering that question, the Court examined the scheme and history of the ERA.[23] It noted that the ERA operates in parallel with the Human Rights Act 1993 (HRA).[24] Therefore, the two should be read in conjunction with one another, which the Court of Appeal had omitted to do in its analysis.

Thirdly, having considered the overall scheme, the Court commented that not all matters arising from the employment contract are contractual in nature.[25] The ERA is premised on the view that employment involves a relationship, rather than just being a contract.[26] This is explicit in the object of the ERA, as set out in s 3.

There are non-contractual statutory rights and obligations in the context of employment agreements. For example, tax obligations and health and safety rules.[27] The Court reasoned that personal grievance rights are not contractual per se. In the case of some personal grievance rights, such as the right to be free from sexual and racial harassment, the employment agreement is only relevant to the extent that it provides the context in which the rights exist and might be infringed.[28] The right not to be discriminated against is of a similar nature.

As these rights are not contractual, there is no reason why they should be confined to employment relations governed by New Zealand law. The Court considered that these rights could not be excluded even if the parties elect a foreign law as the proper law of contract.[29] This is because the rights are being breached by conduct that occurs within New Zealand. The choice of Hong Kong law could not immunise NZBL from liability for breaches occurring in New Zealand. Brown and Sycamore were based in New Zealand. Therefore, the Court held, the anti-discrimination provisions applied to their employment relations with NZBL.[30]

Elias CJ and O'Regan and Ellen France JJ

Ellen France J delivered the reasons of the majority. The majority broadly agreed with the approach adopted by William Young and Glazebrook JJ. In particular, they agreed that the effect of the legislative scheme was such that the pilots were protected by the anti-discrimination provisions of the ERA.[31] However, they expressed their reasons differently.

22 At [8] and [58].
23 At [66]–[67].
24 At [59]–[61] and [68]–[70].
25 At [50]–[57].
26 At [56].
27 At [51].
28 At [55].
29 At [69].
30 At [71].
31 At [75].

The majority reviewed the starting point as being a question of interpretation of the ERA because of the *sui generis* nature of employment law.[32] As Lord Hoffman noted in *Crofts*, the general principle is that legislation is prima facie territorial in application:[33]

> Employment is a complex and sui generis relationship, contractual in origin but, once created, having elements of status and capable of having consecutive or simultaneous points of contact with different jurisdictions.

Notably, the Court unanimously opined that a different approach might apply to the right not to be unjustifiably dismissed, recognising the unique interplay between the ERA's anti-discrimination provisions and the HRA.[34] But, the majority continued, "where the issue relates to the application of the anti-discrimination provisions … the position is clear cut".[35]

V COMMENTARY

Traditional Choice of Law Approach

When do domestic (or forum) statutes apply in conflict of laws cases? According to *Dicey, Morris and Collins*, there are six different types of statutes:[36]

(a) statutes with no indication of their application in space;[37]
(b) statutes with a particular (or unilateral) choice of law clause;[38]
(c) statutes with a general (or multilateral) choice of law clause;[39]
(d) self-limiting statutes;[40]
(e) overriding statutes;[41] and
(f) self-denying statutes.[42]

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32 *Crofts*, above n 2, at [6] as cited in *Brown* (SC), above n 1, at [77]; and Employment Relations Act 2000, s 3(a)(i) and (ii).
33 *Crofts*, above n 2, at [6].
34 *Brown* (SC), above n 1, at [57] per William Young and Glazebrook JJ and [86] per Elias CJ and O'Regan and Ellen France JJ.
35 At [86].
36 Lord Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [1-036].
37 At [1-037]–[1-041].
38 At [1-042]–[1-406]. "A statute containing a particular or unilateral conflict rule answers the question, When does the system of law of which the statute forms part apply?": [1-042].
39 At [1-047]–[1-048]. These statutes "lay down a general or multilateral rule of the conflict of laws purporting to indicate what law governs a given question": [1-036].
40 At [1-049]–[1-052]. These statutes contain "a limitation in space or otherwise which restricts the scope of a rule of substantive or domestic law": [1-036].
41 At [1-053]–[1-062]. These statutes "must be applied regardless of the normal rules of the conflict of laws, because the statute says so": [1-053].
42 At [1-063]–[1-064]. These statutes "do not apply in the circumstances where the statute says they shall not apply, even though they would apply under the normal rules of the conflict of laws": [1-063].

In other words, Parliament may expressly provide whether the statute applies to cases with a foreign element.[43] For example, s 7 of the Property (Relationships) Act 1976 expressly provides that that Act applies to movable property if one of the spouses or partners are *domiciled in New Zealand*.

However, most statutes are silent as to their cross-border application, as is the case with the ERA. In such cases, Maria Hook argues that courts must turn to the conflict of laws rules regarding choice of law and jurisdiction.[44] The traditional conflict of laws methodology for determining the applicable law is as follows.[45]

First, characterise the issue.

Secondly, determine the proper law. If the issue is characterised as contractual in nature, the applicable law is the proper law of contract. The proper law can be determined by looking at the express or implied choice of law by the parties or, absent that, an objective choice of law by the court (that is, the law with the *closest and most real connection* to the contractual relationship).

Thirdly, if the proper law is determined to be the law of a foreign system, a court may then consider whether there is a mandatory rule of public policy ground in the law of the forum overriding the proper law.

So, a forum statute will apply in a case with a foreign element only where: (a) the parties have elected the law of the forum as the proper law; or (b) the foreign law is overridden by a mandatory consideration or public policy. This was essentially the approach followed by the Court of Appeal.[46]

But how can this approach be justified? Ordinarily, statutory gaps are filled as a matter of statutory interpretation. That is, by reference to the text, Parliament's intention and the purpose of the Act. Hook's reply is simple: "Parliament would not intend to abolish established processes of choice of law unless it said so".[47] Moreover, this is a rebuttable presumption. A statute that is silent as to its cross-border application can still have effect if it is an overriding mandatory rule.[48] There is, however, an alternative model.

Alternative Statutory Interpretation Model

Unlike the Court of Appeal, the Supreme Court did not follow the traditional approach. It rejected the starting point that a forum statute does not apply unless one of the two above conditions are met.[49] Rather, the Supreme Court adopted the ordinary rules of statutory interpretation as its starting point.[50] Guided by s 5(1) of the Interpretation Act, the Court determined that the

43 Maria Hook "The 'statutist trap' and subject-matter jurisdiction" (2017) 13 J Priv Int L 435 at 437. See also Christopher Bisping "Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974" (2012) 8 J Priv Int L 35.
44 Hook, above n 43, at 436.
45 See Collins, above n 36, at [32-006].
46 *Brown* (CA), above n 12, at [30].
47 Hook, above n 43, at 440.
48 At 441.
49 *Brown* (SC), above n 1, at [6]–[8].
50 At [8] per William Young and Glazebrook JJ and [76] per Elias CJ and O'Regan and Ellen France JJ.

meaning of a statutory provision "must be ascertained from its text and in light of its purpose". William Young J, in his concurring judgment, observed that the Supreme Court's approach is similar to the third step of the traditional analysis, namely whether the relevant provisions are mandatory overriding rules. He continued, "[t]he main difference … is that the exercise [the Supreme Court] propose[s] to undertake is not premised on a starting point assumption that the provisions do not apply."[51]

This alternative model has its supporters. Notably, Adrian Briggs has proposed a similar approach.[52] Briggs disagrees with the traditional conflict of laws approach that, in effect, places private international law on a higher order than the laws made by Parliament.[53] His starting point appears to be the hallowed notion of parliamentary supremacy. Parliament is free to make or unmake any law — it is the supreme law-making body. Accordingly, Briggs argues that the common law conflict of laws principles should be subject to parliamentary rule-making. He surmises:[54]

> … the right approach [ought to be], … that a court, asked to apply the words of a local statute, should expect to do so unless the statute, on a true construction, was meant to be applied only if the rules of the conflict of laws so provided.

Therefore, he suggests that the starting point should be that statutes were drafted to be applied, and one will need good reason not to apply them, not the reverse.[55] But that is not the ultimate position — it is only a starting point. The court may conclude that Parliament did not intend for the statute to apply in certain circumstances. For example, it may find that the purpose of the Act is to govern activities taking place within the territory. Nevertheless, this model permits (and requires) courts to inquire as to the intention of Parliament and the purpose of the Act, as with any other statutory interpretation task.

Briggs proposes the following approach.[56] First, if the ordinary conflict of laws rules direct the court to apply the law of the forum, then forum statutes will be applied as part of that law. This is the same as under the traditional approach. Secondly, however, even if the conflict of laws rules reveal a foreign law as the proper law, forum statutes should still be applied if there is a *real and substantial connection* to the forum.[57] The test would be applied on a case-by-case basis, assessing the individual merits of the particular case.

This alternative approach retains the conflict of laws principle of looking for a *real and substantial connection*. That requirement is also

51 At [58].
52 Adrian Briggs "A Note on the Application of the Statute Law of Singapore Within its Private International Law" [2005] Sing JLS 189.
53 At 195.
54 At 196.
55 At 196.
56 At 197–198.
57 At 198.

consistent with the idea that Parliament cannot have intended domestic statutes to apply to the whole world.

The Supreme Court's approach mirrors Briggs' alternative model. Regrettably, however, the Court did not frame its reasoning in such conflict of laws terms, nor did it adequately justify its departure from ordinary conflict of laws methodology.[58] Its reasoning was idiosyncratic, focusing on the particular scheme and history of the ERA, or, more precisely, the anti-discrimination provisions. The Court neglected to clarify the law regarding the application of domestic statutes in cases where foreign law is elected; no generally-applicable statement of principle was expressed, nor can one be inferred.

On the other hand, however, such an idiosyncratic approach is precisely what is required under Briggs' alternative model: a case-by-case analysis. The Court framed the issue narrowly, limiting itself to the anti-discrimination provisions in particular. It was further confined by the unique nature of employment law. Arguably, the Court properly dealt with the case at hand, as anticipated under the Briggs approach. However, given its narrow framing from a conflict of laws perspective, the case is of limited precedential value in determining the application of other forum statutes.

The Public Policy Exception

In the Employment Court, the pilots' sole ground for bringing a claim was that the choice of law clause should not be enforced as it was contrary to public policy. The exception was invoked in the Employment Court, dismissed by the Court of Appeal and absent from the Supreme Court's judgment.

The public policy exception is often criticised for its uncertainty and the broad, unfettered discretion that it affords judges. It is unpredictable. Public policy was infamously described as "a very unruly horse, and when once you get astride it you never know where it will carry you".[59]

In conflict of laws, a law will not be applied if it "shock[s] the conscience of a reasonable New Zealander", is "contrary to New Zealand's view of basic morality" or "a violation of essential principles or justice or moral interests in New Zealand".[60] The ultimate question is whether the result of enforcing the foreign law would be "wholly alien to the fundamental requirements of [New Zealand] justice".[61] The threshold is high. The Court of Appeal opined that applying the public policy exception would amount to the court "condemning the foreign law which would otherwise apply".[62] But *Dicey, Morris and Collins* clarifies that it is the application of the foreign law

58 See Maria Hook "The Supreme Court's decision in *Brown v New Zealand Basing Ltd*: comments on the majority judgment" (21 December 2017) The Conflict of Laws in New Zealand: News and Comment <https://blogs.otago.ac.nz>.

59 *Richardson v Mellish* [1824-34] All ER Rep 258 at 266.

60 *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA) at [67] as cited in *Brown* (CA), above n 12, at [62].

61 At [67].

62 At [65].

in the particular case, not the law in the abstract, which must be contrary to public policy.[63]

The Employment Court held that the public policy exception applied. It reasoned that depriving a person of their employment and income for no reason other than their age is contrary to New Zealand public policy.[64]

The Court of Appeal, on the other hand, dismissed the public policy exception. First, the Court held that age is not an absolute value.[65] But, the Court left open the possibility of the exception applying to other employment contracts, which may be characterised by power imbalances.[66] However, this was not a case where the chosen law failed to provide adequate protections for the employees.[67] Rather, the Court observed, the pilots had benefited financially from the choice of Hong Kong law.[68] For example, the pilots paid their income tax at a flat rate of 15 per cent.[69]

Secondly, the Court held that the pilots could not seek to retain the advantages of Hong Kong law whilst, at the same time, saying that Hong Kong law should not apply for public policy reasons. In determining whether the foreign law offends public policy, it would be artificial to ignore the collateral benefits obtained by the pilots as a result of that foreign law.[70]

The Court of Appeal's method of reasoning is sound. It followed the conflict of laws principles. But the substance of its reasoning has been criticised. Mr Skelton QC, counsel for Brown and Sycamore in the Supreme Court, noted in his submissions that the Court of Appeal erred in finding that the pilots obtained collateral benefits through the choice of Hong Kong law.[71] The tax benefits, he submitted, arise from the New Zealand Double Tax Agreement (Hong Kong) Order 2011. It is NZBL's residence in Hong Kong, and not the parties' choice of Hong Kong law, that gave rise to the tax benefit.[72] Hook and Jack Wass similarly criticised the Court's cursory disposal of the exception, arguing that the real question is: "whether the pilots' contracts conferred additional benefits that would offset or alleviate the economic impact of early retirement".[73]

Regardless of whether the Court of Appeal's conclusion is correct, it is notable that the Court engaged with the issue of applying traditional conflict of laws methodology. By contrast, the Supreme Court neglected to consider the public policy exception, despite it being raised by counsel. This is consistent with the beat of the Supreme Court's judgment — a failure, or refusal, to engage with the conflict of laws principles and frameworks in relation to its choice of law analysis.

63 Collins, above n 36, at [32-185].
64 *Brown* (EmpC), above n 7, at [102]–[106].
65 *Brown* (CA), above n 12, at [71], [74] and [83].
66 At [69].
67 At [77].
68 At [76]–[77].
69 At [75].
70 At [77]–[80].
71 *Brown* (SC), above n 1, at 247.
72 At 248.
73 Maria Hook and Jack Wass "The Employment Relations Act and its effect on contracts governed by foreign law" [2017] NZLJ 80 at 83.

VI CONCLUSION

Brown v New Zealand Basing Ltd engages diametric theories of the case. The Court of Appeal considered the case was a classic conflict of laws situation requiring contractual interpretation as to the choice of law. The Supreme Court, however, viewed the case as one of statutory interpretation. The majority reasoned that this was due to the *sui generis* nature of employment law. The concurring judges, William Young and Glazebrook JJ, applied the ordinary rules of statutory interpretation, examining the text and purpose of the ERA (and, in parallel, the HRA).

From a private international law perspective, the case is of limited precedential value on the issue of when domestic statutes apply in the face of a choice of foreign law. This is due in part to the idiosyncratic reasoning of the Supreme Court, as well as the narrow construction of the question on appeal, limiting the case to just the anti-discrimination provisions of the ERA. The Court itself noted that a different result might have arisen had the case involved an ERA provision other than anti-discrimination provisions.[74] Notably, however, the Supreme Court demonstrated a willingness to depart from ordinary conflict of laws rules and apply alternative models such as that of Briggs (albeit without any express reference to that model). It remains to be seen whether this departure will have any lasting impact.

74 *Brown* (SC), above n 1, at [57] per William Young and Glazebrook JJ and [87] per Elias CJ and O'Regan and Ellen France JJ.