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SPECIAL CONFERENCE ISSUE
FROM PROFESSING TO ADVISING TO JUDGING:
CONFERENCE IN HONOUR OF SIR KENNETH KEITH

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THE EARLY EXPERIENCE OF THE NEW ZEALAND SUPREME COURT

Rt Hon Peter Blanchard*

New Zealand patriated its final court of appeal in 2003, with the establishment of the Supreme Court of New Zealand. In this article, the Rt Hon Peter Blanchard — who, with Sir Kenneth Keith, was one of the inaugural members of the Court — discusses the Supreme Court's experiences in its first few years. His Honour examines a range of cases heard since the Court commenced hearing appeals in 1 July 2004 and reflects on some of the main issues and procedural hurdles that the Court has confronted over that period.

A Introduction

Sir Kenneth's final and too brief period as a serving judge in New Zealand was as a member of the Supreme Court, established by the Supreme Court Act 2003 (Supreme Court Act) as from 1 January 2004 and able to hear cases from 1 July of that year. Unfortunately, we lost him to the International Court of Justice after only about 16 months and 17 cases in which he wrote substantial judgments and contributed a major portion of a joint judgment.[1] Some of these, notably *Zaoui v Attorney-General (No 2)* (*Zaoui (No 2)*),[2] were considerable and important contributions to the jurisprudence of this country and indeed of the common law world.

I had the great privilege of sitting as a judge with Ken for almost a decade, sharing the Bench with him in hundreds of cases. In that time I never heard him speak sharply. His patience and courtesy towards counsel and indeed to his fellow judges was most notable. In that respect he set an example some of us wish we could emulate. But his distinguishing features as a judge were

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* A Judge of the Supreme Court of New Zealand. The discussion in this article is based on Supreme Court cases as at the date of the Conference (August 2007). However, generic statistics have been updated to the end of 2007.

1 He has been appointed as an acting judge of the Court under section 23 of the Supreme Court Act 2003 but has not yet been available to sit at a time when a replacement for one of the permanent judges has been needed.

2 *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (NZSC) [*Zaoui (No 2)*].

undoubtedly his intellect and his learning. He has an amazing ability to think laterally about the law — a gift he shared with Robin Cooke — and an elephantine memory, not only of case law but of significant events in government pertaining to the law which might bear on a decision the court was currently considering. We were fortunate indeed to have him amongst us in the Court of Appeal and, for too short a time, in the Supreme Court.

B The Patriation of New Zealand's Final Court of Appeal

Ken Keith's presence helped get the new Court off to a sound start. It was born out of controversy. New Zealand really is a funny little country. Its provincial attitudes, especially the unwillingness to conceive that we can do things as well as others, were to the fore in the public debate which preceded the Supreme Court Act. A particular New Zealand characteristic in relation to legal matters is the enthusiasm of uninformed commentators. I was struck by the absence of analysis identifying what New Zealand cases were going to London, and why, and how they were dealt with there by the Privy Council.

It was said that New Zealand judges in a Supreme Court would be too close to the litigants and their lawyers, but critics were either unable or unwilling to consider the lost opportunities for development of New Zealand law when cases could not be taken to London because of a statutory bar or the poor economics of the exercise, and were equally unable or unwilling to analyse the results in the Privy Council beyond a generalised level of admiration for the reputations of the Law Lords. Nor were the critics willing to acknowledge the advantages of an awareness of local conditions which could not be expected from judges on the other side of the world.

In this atmosphere of recent controversy, and aware also that there would be criticism when the early workload of the new Court inevitably proved to be quite light, we approached our new role as New Zealand's ultimate court with a degree of nervousness that was not dispelled when it became apparent that the first two cases, *Awatere Huata v Prebble*[3] and *Zaoui v Attorney General* (*Zaoui*),[4] were of some political interest, the first very directly.

C Baptism by Fire — the Zaoui *Appeals*

I do not propose to say anything about *Awatere Huata v Prebble* as the particular legislative provision under which it arose has expired and has not been renewed by Parliament. We heard argument on three occasions in *Zaoui* and *Zaoui (No 2)*. The first issue concerned the availability of High Court bail in a civil proceeding.[5] There had been a direct application for bail that was not a

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3 *Awatere Huata v Prebble* [2005] 1 NZLR 289 (NZSC).

4 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (NZSC).

5 Ibid, 629.

matter arising ancillary to some other process. It was not difficult to conclude that if the courts had for centuries been able at common law to grant bail to persons accused of crimes as serious as murder, there must be an inherent jurisdiction for the High Court to grant bail to someone who was in custody but had not even been accused of the commission of a crime. The more troublesome question was whether the general power that was discernible in case law was overridden by a clear enough prohibition in the Immigration Act 1987. We came to the view that it was not. Following a separate hearing, we then determined that in the particular circumstances Mr Zaoui should be granted bail. I am not going to make any comment about that decision save to note the amazing suggestion by some commentators that we should have remitted the actual decision on bail to the High Court because we were depriving Mr Zaoui or the Crown of any right of appeal!

In the case which is reported as *Zaoui (No 2)* we were concerned with the construction of article 33 of the United Nations Convention Relating to the Status of Refugees, which prohibits expulsion or return of refugees whose life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or of political opinion.[6] The benefit of that protection is not, however, claimable by the refugee where there are reasonable grounds for regarding him as a danger to the security of the country he is in or where he has been convicted of a serious crime there and constitutes a danger to the community. The question was whether it was necessary for the Inspector-General to look at more than the security of New Zealand in reviewing the issue of a security risk certificate; whether, at that stage in the process, there had to be a balancing of the threat to the refugee's life or freedom or of his rights under the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) read with the International Covenant on Civil and Political Rights and the Convention on Torture.[7] In a judgment written by Sir Kenneth, we answered that question in the negative. We said that article 33.2 applied and denied the protection against refoulement under article 33.1 if the refugee was considered on objectively reasonable grounds to pose a threat of substantial harm to the security of New Zealand. Therefore the Inspector-General was to look only to the security criteria, and not at any threat to Mr Zaoui if sent back to his home country. But the Court accepted that the prohibition of torture at international law is absolute, even if the protection against refoulement in the Refugee Convention is not. We held that there was no authority for the Governor-General, acting upon ministerial advice, to make an order for deportation under section 72 of the Immigration Act 1987 where the Minister or the Executive Council was satisfied that there were substantial grounds for believing that, as a result, the person concerned would be in danger of being arbitrarily deprived of life or of being subjected to torture or to cruel,

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6 *Zaoui v Attorney-General (No 2)*, above n 2.

7 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

inhuman or degrading treatment or punishment. So the protection was there, but it came in at the later stage, if that was reached.

D The Court and Law Reform Initiatives

All this was of course necessary because the Department of Labour, which has responsibility for immigration matters, had not taken note of comments from courts in earlier years about the incoherence of its statute and had not instituted general review and reform.[8] We have had cause very recently, in *Arbuthnot v Chief Executive of Department of Work and Income*,[9] to draw attention to the unsatisfactory state of another elderly statute on which the work of a department depends, the Social Security Act 1964. It will be interesting to see if anything is done about it. (I note in this connection references by the New Zealand Law Commission in a discussion paper on the presentation of New Zealand statute law to the example of that Act as one in need of revision.[10]) And there will be few who are unfamiliar with the ongoing pleas for legislative attention to the plight of potential plaintiffs reasonably unaware of the existence of a cause of action. Most recently highlighted by this Court in *Murray v Morel & Co Ltd*,[11] but current in Sir Kenneth's time at the Law Commission in the late 1980s,[12] the difficulties faced by the courts in applying the accrual provisions of the Limitation Act 1950 now seem at last to have spurred the executive into action. I believe a Bill is being drafted.

E Early Experiences With the Bill of Rights Act

We had occasion to look at the Bill of Rights Act in *Zaoui* and, as you would expect, it has featured in several of our decisions, most frequently in the criminal field.

The operation of a reverse onus of proof in cases of prosecution for possession of drugs for supply — putting on the accused the burden of showing that the purpose was not supply — has been before us twice. The first case, *R v Siloata*,[13] involved only the issue of when a jury could be said to be unanimous. Did a failure by the accused to satisfy all members of the jury on the balance of

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8 See for example *Butler v Attorney-General* [1999] NZAR 205 (CA); *Attorney-General v Refugee Council of New Zealand* [2005] 2 NZLR 577, para 73 (CA) McGrath J.

9 *Arbuthnot v Chief Executive of Department of Work and Income* [2008] 1 NZLR 13 (NZSC).

10 New Zealand Law Commission *Presentation of New Zealand Statute Law* (NZLC IP2, Wellington, 2007) paras 104–105.

11 *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (NZSC).

12 See New Zealand Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, Wellington, 1988).

13 *R v Siloata* [2005] 2 NZLR 145 (NZSC).

probabilities that his purpose was not one of supply mean that he must be found guilty, or was there then a hung jury? We held that all members of the jury must be satisfied that the presumption of the purpose of supply had not been rebutted. A disagreement on this meant that there was a hung jury. The presumption in the statute placed the burden of proof on the accused but did not in doing so negate the need for unanimity.

In that case we applied basic principle, modified only to the extent required for consistency with the statutory provision, but we obtained guidance from the United States material, located by our clerks.[14] We were disappointed in this early case that counsel's researches had not led them to look more widely for guidance and to the discovery of this case law.'

In early 2007, we had occasion to look at the logically prior question of what an accused has to prove in order to discharge the reverse onus.[15] We had no difficulty in determining that the statutory phrase "until the contrary is proved" could not, even in the light of section 6 of the Bill of Rights Act, be interpreted to mean that the onus was discharged merely by raising a reasonable doubt as to the purpose of supply. The expression had a natural meaning that was well understood and intended by Parliament. Prior case law, the Attorney-General's report under section 7 of the Bill of Rights Act and parliamentary history made that plain. But the reverse onus was inconsistent with the presumption of innocence, itself affirmed in section 25(c) of the Bill of Rights Act, and a majority of the Court found that it was not a justified limitation in accordance with section 5. The limitation was greater than reasonably necessary and was not a proportionate response to the statutory objective of overcoming prosecutorial difficulties with proving the element of purpose of supply in cases where the quantity of drugs might be equivocal.

It will be interesting to see how the dialogue between the Court and Parliament will now proceed.[16] Will there be a Parliamentary reaction?[17] The Misuse of Drugs Act 1975 is the subject

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14 See for example *Andres v United States* (1948) 333 US 740; *State of Hawaii v Miyashiro* (1999) 979 P 2d 85 (Haw Int Ct App); *Harris v Rhode Island* (1959) 152 A 2d 106 (RI); *State of Hawaii v Yamada* (2002) 57 P 3d 467 (Haw).

15 *R v Hansen* [2007] 3 NZLR 1 (NZSC). For a fuller discussion of this case see Claudia Geiringer "The Principle of Legality and the Bill of Rights: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59.

16 See Peter Hogg "Judges and Legislatures: Constitutional Dialogue Under a Bill of Rights" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole* (Victoria University Press, Wellington, 2008, forthcoming).

17 Since *Hansen*, there has been a section 7 report on an amendment to the Misuse of Drugs Act 1975 reclassifying party pills which largely relies on *Hansen* but essentially notes that the matter is being dealt with comprehensively by the Law Commission: *Report of the Attorney-General Under the New Zealand Bill of Rights Act 1990 on the Misuse of Drugs (Classification of BZP) Amendment Bill 2007* (Wellington, 2008).

of a general reference to the New Zealand Law Commission,[18] which will presumably address this issue in its report.

F Criminal Appeals — the Importance of Competent Trial Representation

Our criminal law has lacked regular second-level appellate scrutiny, such as the High Court of Australia has been able to undertake for a century. It was a major deficiency in our reliance on appeals to the Privy Council, aggravated by the fact that we have a modified version of Stephen's Code and therefore cannot always obtain guidance from decisions in other jurisdictions.[19] Only a handful of New Zealand criminal appeals were the subject of full hearing and decision in London in 150 years. It was expected that the Supreme Court would be active in this field of law and so it has proven. Counting the two cases I have mentioned, *R v Siloata* and *R v Hansen*, by the end of 2007 we had already determined 11 criminal appeals and at the time this paper was delivered another three were reserved. All have enabled us to clarify difficult areas of substantive criminal law or procedure.[20] I have time only to mention two in particular which it is hoped will have lasting and beneficial influence. Both involved the question of when there has been a miscarriage of justice at a criminal trial.

The first is *R v Sungsuwan*,[21] which has readjusted the focus of the courts concerning when a verdict should be set aside because of trial error by defence counsel. The Supreme Court said that the focus must be on the safety of the verdict. The fundamental question which an appellate criminal court must address is whether, in terms of section 385(1)(c) of the Crimes Act 1961, there has been a miscarriage of justice, no matter how that occurred. It is not a matter of allocating blame for the situation which arose at a trial. In a judgment in which Keith J and I joined, Gault J concluded:[22]

> In summary, while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken,

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18 New Zealand Law Commission *Misuse of Drugs Act Terms of Reference* www.lawcom.govt.nz (accessed 6 May 2008).

19 For Stephen's Code and its significance, see *R v Lunt* [2004] 1 NZLR 498, paras 17–20 (CA) Blanchard J for the Court; Stephen White "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 VUWLR 353.

20 For example *R v Walsh* [2007] 2 NZLR 109 (NZSC) (false copy of a forgery is not itself a forgery); *R v L* [2006] 3 NZLR 291 (NZSC) (ingredients of attempted sexual violation by rape) and *R v Timoti* [2006] 1 NZLR 323 (NZSC) (provocation in cases of murder in the Crimes Act 1961, s 167(d)).

21 *R v Sungsuwan* [2006] 1 NZLR 730 (NZSC).

22 Ibid, para 70.

> it must remain open for an appellate Court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

In *R v Condon*[23] we were able to clarify the circumstances in which section 30 of the Sentencing Act 2002 prohibited the imposition of a sentence of imprisonment on a person who had not been represented by defence counsel. But our discussion of how the absence of counsel impacts on the overall fairness of a trial is of wider significance. We reviewed jurisprudence from throughout the common law world and under the European Convention on Human Rights, finding that the common premise in the jurisprudence is that representation by a lawyer at trial is nearly always necessary in order for a trial for a serious offence to be fair.[24] Hence, we said, the accused must have legal representation or at least be afforded a reasonable opportunity of obtaining it. That right to a fair trial is an absolute right. If, because the accused had no lawyer or for any other reason, the trial is fundamentally flawed, the accused will not have had a fair trial and the conviction must be quashed. A substantial miscarriage of justice will have occurred. There can be no resort to the proviso to section 385.[25] But, importantly, we also observed that the assessment of the fairness of a trial is to be made in relation to the trial overall. It is not every irregularity or every departure from good practice that renders a trial unfair.

G Civil Appeals — Vendors, Purchasers and Joint Venturers

It is rather too early to be able to discover patterns in the cases decided by the new Court. But it is certainly achieving the objective of being available to litigants in a wider variety of cases than the narrow range, mostly commercial, which went to London.

There have, for example, been family law cases on adoption[26] and the Hague Convention,[27] resource management cases requiring detailed examination of the scheme of the Resource Management Act 1991[28] and several decisions on appeal rights and procedures.[29] Most of these

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23 *R v Condon* [2007] 1 NZLR 300 (NZSC).

24 Ibid, para 73.

25 Ibid, para 77.

26 *Hemmes v Young* [2006] 2 NZLR 1 (NZSC).

27 *Secretary for Justice (New Zealand Central Authority) v HJ* [2007] 2 NZLR 289 (NZSC).

28 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (NZSC) and *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 (NZSC).

29 *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 (NZSC); *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 (NZSC); *Arbuthnot v Chief Executive of Department of Work and Income*, above n 9; *Jones v Skelton* [2007] 2 NZLR 178 (NZSC).

were unlikely to have been heard by the Privy Council because of the cost and delay involved or, in some cases, no provision for appeal to the Privy Council. We have been able to give urgent hearings to two habeas corpus appeals,[30] as well as to Mr Zaoui's bail appeal. There have been six conveyancing cases in which the Court has clarified requirements for the payment of deposits[31] and for settlement,[32] vendors' duties in relation to procuring deposit of subdivision plans and when cancelling in circumstances of inability to achieve fulfilment of a condition in a sale contract,[33] and the application of the doctrine of laches in a situation of long delay in the implementation of a contract for creation of an easement.[34] We have also had two intellectual property appeals relating to patent[35] and copyright.[36]

Apart from the conveyancing cases, the only cluster of civil litigation has been three appeals in which the Court explored questions of fiduciary obligations arising in relationships between persons alleged to be joint venturers. In the first of these, *Chirnside v Fay*,[37] two experienced businessmen had been working towards the development and acquisition of a commercial property in central Dunedin, until one "went cold" on the other and effectively excluded him by bringing in alternative investors. The parties were found to have gone beyond preliminary conversations of the kind where it can be said that no one has made any form of commitment to another to act for their joint benefit. Although they were still in the process of formulating their agreement, they had become entitled to repose trust and confidence in one another so that Mr Chirnside's appropriation of the venture to himself constituted a breach of his fiduciary duty of loyalty. Mr Fay therefore remained entitled to an equal share in the proceeds of the development, subject to an allowance that recognised the disproportionate time and effort invested by his erstwhile co-venturer.

The respondent in *Paper Reclaim Ltd v Aotearoa International Ltd* (*Paper Reclaim*) appeal had been exporting the appellant's waste paper, on an exclusive basis, under a longstanding oral contract

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30 *Morgan v Superintendent, Rimutaka Prison* [2005] 3 NZLR 1 (NZSC) and *Jones v Skelton*, above n 29.

31 *Otago Station Estates Ltd v Parker* [2005] 2 NZLR 734 (NZSC); *Southbourne Investments Ltd v Greenmount Manufacturing Ltd* [2008] 1 NZLR 30 (NZSC).

32 *Bahramitash v Kumar* [2006] 1 NZLR 577 (NZSC) and *Larsen v Rick Dees Ltd* [2007] 3 NZLR 577 (NZSC).

33 *Steele v Serepisos* [2007] 1 NZLR 1 (NZSC).

34 *Eastern Services Ltd v No 68 Ltd* [2006] 3 NZLR 335 (NZSC).

35 *Lucas v Peterson Portable Sawing Systems Ltd* [2006] 3 NZLR 721 (NZSC).

36 *Henkel KGaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 (NZSC).

37 *Chirnside v Fay* [2007] 1 NZLR 433 (NZSC).

found to be terminable upon reasonable notice.[38] In assessing the consequences of the appellant's termination of the relationship, the High Court had found the parties to be in a joint venture and thus required to act towards each other with mutual trust, confidence and loyalty. The Court of Appeal had not seen the "joint venture" label, which it too adopted, as carrying with it any fiduciary obligations. The Supreme Court held that both courts below had been "too ready to label as a joint venture an arrangement that was in respects relevant to this litigation no more than a contract of agency".[39] The Court stressed the need to decide exactly what contractual terms the parties have agreed upon before considering whether any aspect of their agreement gives rise to or is properly supplemented by a fiduciary relationship. In this case, it was necessary to distinguish between the fiduciary obligation owed by an agent to its principal (but not vice versa) and the mutual obligations of loyalty owed between true joint venturers. The respondent was not assisted by its failure to have pleaded any duty of confidentiality with independent existence from the contractual relationship.

In the third of these appeals, *Maruha Corporation v Amaltal Corporation Ltd*,[40] the parties to a commercial fishing venture had deliberately substituted the Companies Act 1993 regime for that of the Partnership Act 1908 by incorporating the jointly-owned entity that carried out the venture's operations. In these circumstances, the Court could see no warrant for superimposing on their contract the general fiduciary obligations to which they had previously been subject as partners. That did not, however, preclude a finding that the appellant was entitled to rely upon the respondent for loyal performance of the accounting and tax functions undertaken by the respondent on behalf of the joint venture company. The Court also stressed that fraud cannot be excused by claiming that the victim ought to have been more careful and should not have been deceived.

H Lai v Chamberlains *and the Demise of Barristerial Immunity*

The Court's most important civil decision to date came in one of its few excursions into the law of tort. It also illustrates the advantage of having a local final court with full power to decide issues of law for New Zealand. The case was *Lai v Chamberlains*,[41] in which the issue was whether barristerial immunity from suit should continue. The House of Lords had already abolished the immunity for England and Wales in *Arthur J S Hall & Co (a firm) v Simons.*[42] If the New Zealand case had gone on appeal to the Judicial Committee that result could have seemed predestined, notwithstanding that the High Court of Australia had subsequently preserved the immunity in

38 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 3 NZLR 169 (NZSC).

39 Ibid, para 31 McGrath J for the Court.

40 *Amaltal Corporation Ltd v Maruha Corporation* [2007] 3 NZLR 192 (NZSC).

41 *Lai v Chamberlains* [2007] 2 NZLR 7 (NZSC).

42 *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615 (HL).

D'Orta-Ekenaike v Victoria Legal Aid,[43] but our new Court was free to choose which way to go. It decided to abolish the immunity but for reasons which differed somewhat from those given by the House of Lords. The key issues for the Lords were the possibility of the undermining of the finality of litigation by collateral challenge attacking counsel's conduct of the case and the possible consequence of the removal of immunity for the criminal justice system. The Law Lords considered that relitigation of civil proceedings would be adequately deterred by rules of res judicata, issue estoppel and autrefois acquit/convict and by a court's power to prevent abuse of its processes. A majority of the Lords took the view that this last power in particular would provide sufficient protection for the public interest in the finality of criminal process.[44] In contrast, the principal majority judgment in the High Court of Australia justified the continuance of the immunity on the basis of the principle of finality, "that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances".[45] The Australian judges did not believe that a distinction could satisfactorily be drawn between claims that would be an abuse and those that would not.

The New Zealand Supreme Court said that the end of finality in litigation was adequately addressed by res judicata and the power to strike out for abuse of process. There was a second important consideration, namely responsibility for adverse consequences of the criminal justice system. But that, the Court said, should be addressed through the elements of a cause of action, not through a blanket immunity for a particular occupation, in the application of principles governing liability. Immunity was the wrong response. It did not address legal policy issues distinctly:[46]

> It prevents equally claims by the client for unnecessary costs (in respect of which it is difficult to discern a public interest in protecting the negligent advocate) and claims for compensation for time spent in prison (where liability may be highly questionable). … If there are policy reasons against liability for some losses arising out of the criminal justice process, it is right that they be addressed on the basis of principle, rather than by blanket immunity.

This was a very important decision and, amongst lawyers only, a controversial one. It remains to be seen whether there is a significant increase in claims, both meritorious and unmeritorious, against barristers by their former clients, bearing in mind that they were already potentially exposed to liability for attendances not intimately connected (whatever that meant) with their courtroom work. It will be interesting to learn also whether the cost of insurance for barristers has risen to any great

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43 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

44 *Arthur J S Hall & Co (a firm) v Simons*, above n 42, affirming *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL).

45 *D'Orta-Ekenaike v Victoria Legal Aid*, above n 43, para 45 Gleeson CJ, Gummow, Hayne and Heydon JJ.

46 *Lai v Chamberlains*, above n 41, para 76 Elias CJ joined by Gault and Keith JJ.

extent. As a former solicitor I had to defend — successfully I am glad to say — claims from unhappy clients of my firm and have never been especially sympathetic to the notion of immunity for the Bar. But I can give an assurance that, when as a trial judge I created the situation which gave rise to the claim against Chamberlains, I was blithely unaware that a major case was being germinated for our new final court (on which I did not sit) so many years later.

I Number of Applications Reaching the Court

The Court's caseload has so far been lighter than some may have expected. The Court was not allowed to begin hearing cases until halfway through 2004. In that year it delivered 37 judgments, of which four were on substantive appeals, the rest being leave or interlocutory judgments. The figures since then have been:

2005	85 judgments (14 on substantive appeals, including one setting out the Court's attitude on costs).[47]
2006	113 judgments (22 on appeals).
2007	110 judgments (20 on appeals).

These figures are naturally dependent on what cases are being dealt with by the Court of Appeal from time to time. The level of applications flattened out in 2007. This may reflect the fact that, during this period, the Court of Appeal has been primarily engaged in reducing its backlog of criminal appeals now that it has two additional judges. These appeals are mostly in routine cases, which are unlikely to produce many applications that meet the criteria for leave. As the balance of the Court of Appeal's decisions returns to normal, an increase in genuine second level appeal issues can be expected.

J The Bounds of the Court's Jurisdiction

Before even reaching our first cases we spent some time in 2004 on the mechanics of the Court, setting up its temporary home, gaining an understanding of the Supreme Court Act, and in particular its jurisdictional requirements, and developing rules[48] that were harmonious with the jurisdiction and would enable the Court efficiently to select the cases to be heard and bring them to a hearing. All appeals are of course only brought by leave of the Court.[49]

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47 *Prebble v Awatere Huata (No 2)* [2005] 2 NZLR 467 (NZSC). One of the leave judgments was delivered by five judges because it dealt with the important question of the Court's jurisdiction concerning pre-trial appeals: *R v Clark* [2005] 2 NZLR 747 (NZSC).

48 Supreme Court Rules 2004.

49 Supreme Court Act 2003, s 12.

The jurisdictional provisions in the Supreme Court Act were not as straightforward as might have been hoped. In an ideal world all cases which get as far as the Court of Appeal should be candidates for leave to appeal. But, of course, in an ideal world you do not suffer from unrealistic, sometimes obsessed, litigants who cannot take a well reasoned "no" for an answer. Probably for that reason, the Supreme Court Act provides that an appeal from a refusal by the Court of Appeal to grant leave to appeal or special leave to appeal to that Court cannot be the subject of an appeal to the Supreme Court.[50] We confirmed that early on.[51] But the ingenuity of litigants in person, and the occasional counsel, has caused us to have to give numerous rulings on related questions, for example, that there is no jurisdiction to hear an appeal against the Court of Appeal's refusal to recall its judgment refusing leave,[52] or against its refusal to permit an applicant to withdraw a notice of abandonment,[53] to reopen an appeal,[54] or to allow additional time for the lodging of an appeal.[55] Nor has the Court been enthusiastic about the bringing of a direct (leapfrog) appeal from the High Court after the applicant has already been refused leave by the Court of Appeal.[56] In all but extremely compelling circumstances[57] that will be an abuse.[58]

Other jurisdictional bars exist,[59] the most significant of which is that no pre-trial appeal can come to the Supreme Court after a decision on it by the Court of Appeal.[60] Of course, if the point is of significance at the trial and the accused is convicted, it can be taken on appeal against the conviction under section 385 of the Crimes Act 1961. It is also possible to bring a pre-trial appeal

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50 Ibid, s 7.

51 *Simpson v Kawerau District Council* (2004) 17 PRNZ 358 (NZSC); *Clarke v R* [2005] NZSC 60; *Jew v Schroder* (2004) 17 PRNZ 109 (NZSC).

52 *Ngahuia Reihana Whanau Trust v Flight* (2004) 17 PRNZ 357 (NZSC).

53 *Palmer v R* (12 October 2004) NZSC CRI 13/2004.

54 *De Mey v R* [2005] NZSC 27.

55 *Erwood v Harley* (2007) 18 PRNZ 420 (NZSC).

56 *R v Ngan* [2006] NZSC 41.

57 For example in *Jones v Skelton*, above n 29 (direct appeal permitted after abandonment of appeal to Court of Appeal).

58 *Burke v Western Bay of Plenty District Council* (2005) 18 PRNZ 560 (NZSC); *KMA v Secretary for Justice* (2007) 18 PRNZ 562 (NZSC).

59 For example under the Injury Prevention, Rehabilitation and Compensation Act 2001, s 317.

60 *R v Clark*, above n 47.

directly to the Supreme Court by leapfrog appeal, although to date that has not happened and it would have to be shown that there were very good reasons for not going to the Court of Appeal.[61]

The Crown is, in the pre-trial context, at a considerable procedural disadvantage in relation to the Supreme Court. If it loses in the Court of Appeal at the pre-trial stage, it not only loses any evidence that is ruled inadmissible but it also has no ability to challenge the legal principle enunciated by that Court. And the point is unlikely to arise again in the particular case if there is a conviction. The Crown's only hope is that the same point will arise pre-trial in a subsequent case, enabling it to bring a leapfrog appeal to the Supreme Court. It is understandable that the legislature did not want to see trials delayed by second appeals on pre-trial matters, but the absolute bar is not contributing to the development of our criminal law. On the other hand, the Court would not welcome a spate of such leave applications, which might well follow if the bar were to be removed.

The other disadvantage faced by the Crown, which is a source of even greater concern, is that when an appeal against conviction is successful there is no mechanism equivalent to the United Kingdom's Attorney-General's reference whereby the Crown can bring an appeal on an important question of law which is likely to arise again in future cases, but without prejudice to the position of the successful appellant in the particular case.[62] Important points of criminal law can generally reach the Supreme Court only if the accused person is unsuccessful both before and at trial and then loses the appeal against conviction.[63] This gap in our criminal law exists despite a recommendation from the Law Commission in 1989, authored, I suspect, by Sir Kenneth, that we should have a procedure along the lines of the United Kingdom.[64]

Another jurisdictional gap was revealed when it became apparent early in the life of the Court that those who prepared the Supreme Court Act had not been aware of the Privy Council's decision, in *De Morgan v Director-General of Social Welfare*,[65] that under section 67 of the Judicature Act 1908 there could be no appeal beyond the Court of Appeal in a case originating in an inferior court where the ordinary appeal process applied, that is, where section 144 of the Summary Proceedings

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61 It is necessary to show exceptional circumstances that justify taking the direct appeal: Supreme Court Act 2003, s 14.

62 Criminal Justice Act 1972 (UK), s 36.

63 There is provision in section 380 of the Crimes Act 1961 for a question of law to be reserved by the High Court, but that is only rarely found to be appropriate and it is not entirely clear whether the Crown could bring an appeal to the Supreme Court if it were unsuccessful in the Court of Appeal.

64 New Zealand Law Commission *The Structure of the Courts* (NZLC R7, Wellington, 1989) para 234.

65 *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC).

Act 1957 was not incorporated in the process by a statutory reference.[66] When this bar came to light it was removed by repealing and replacing section 67.[67]

K The Criteria for Leave — Section 13 of the Supreme Court Act

If a case does not face a jurisdictional bar, it must still meet the leave criteria in section 13 of the Supreme Court Act. The Court has to be satisfied that it is in the interests of justice for it to hear and determine the appeal, which will be so if it involves a matter of general or public importance[68] or if a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.[69] Much of the time on leave applications is taken up with isolating the issues and determining whether these criteria are met.

Public and general importance is a well-understood test and rules out disputes which are largely factual or involve construction of unique documentation. Substantial miscarriage of justice is harder. It may have been included with criminal cases in mind, drawn from section 385 of the Crimes Act 1961. But I repeat what I said in a paper for the New Zealand Law Society in 2004:[70]

> It seems improbable that the legislature was contemplating that the Supreme Court would have to review every criminal appeal in which application was made, to see if there might have been a miscarriage of justice in the determination of the facts or in relation to the application of settled law to the facts. The Court of Appeal last year decided nearly 200 appeals against conviction. Human nature being what it is, no doubt a large proportion of those persons whose appeals were unsuccessful continue to regard themselves as having suffered from a substantial miscarriage of justice. The Supreme Court would become swamped if it gave leave in any significant percentage of those cases. Obviously leave would be granted if the proposed appeal involved an arguable question of law of general application, ie going beyond mere application of settled principle to particular facts. But, where that is not the position, it would seem unlikely that leave would be granted, save perhaps in an exceptional case where there was a real concern both about the result of the trial and about the manner in which the Court of Appeal had reviewed it. That said, however, it is my personal opinion that even such exceptional cases, which are

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66 For example Resource Management Act 1991, s 308.

67 Judicature Amendment Act 2006, s 9.

68 Including the subsets, a matter of general commercial importance or a significant issue relating to the Treaty of Waitangi.

69 In the case of an interlocutory appeal, the Court must also be satisfied that it is in the interests of justice to hear and determine the appeal before the proceeding concerned is concluded (Supreme Court Act 2003, s 13(4)), and leapfrog appeals are expressly prohibited (Supreme Court Act 2003, s 8(c)).

70 Rt Hon Peter Blanchard "Supreme Court Jurisdiction and Practice" in *Appeals: the Court of Appeal and the New Supreme Court* (New Zealand Law Society, Wellington, 2004) 61, 63.

> fortunately rare, are better reviewed by the process of a Governor-General's reference under section 406 of the Crimes Act than by a second level appellate Court. I am unaware of any other jurisdiction where the final court of appeal is prepared to conduct an essentially factual review in a criminal (or civil) case.

In practice, we have not so far given leave in a criminal case except where there appeared to be a significant legal issue. However, we have not actually had to consider an application which did not raise such a point but left us with a concern about the guilt of the applicant or the fairness of the trial process.

On its face, the miscarriage ground applies also to civil appeals. But we have taken the view that, in that connection, it must have been intended to enable the Court to review decisions of the Court of Appeal on questions of fact, or on questions of law which are not of general or public importance, in the rare case of a sufficiently apparent error, made or left uncorrected by the Court of Appeal, of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case.[71] In a speech the Chief Justice has said that this ground for leave allows scope for correction of error which, uncorrected, would be an affront to the legal system.[72] Happily such cases appear only rarely.

L Applications Must Be Truly Arguable

The Supreme Court Act makes no mention of the arguability of an appeal. There is no express discretion to reject an appeal that meets the criteria — to pick and choose cases, as other final courts can do. An otherwise qualifying application is not to be rejected merely because it does not look especially promising, all the more so if the result looks as if it is probably right but the reasoning supporting the result is problematical. But the Court has from the outset taken the stance that it cannot be in the interests of justice that a second appeal be permitted in order to ventilate an argument which is quite obviously hopeless — where the result is plainly right and the reasons given are supportable. It is implicit in section 13 that the matter of public or general importance must be a matter which is truly arguable. So, for example, leave was declined in one case where the issues were said to be capable of qualifying for leave because on the best possible view of the facts and the law from the applicant's point of view, the Court did not consider it had sufficient prospects of success to warrant a grant of leave.[73] And in another case a proposed appeal challenging the interpretation of a statutory provision was refused leave because there had been a consistent and unanimous view taken below (this would have been a fourth level appeal under the Social Security

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71 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] 3 NZLR 522 (NZSC).

72 "Supreme Court May Require New Approaches in Advocacy" (September 2005) *New Zealand Bar Association Newsletter* Auckland 7.

73 *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* (2007) 18 PRNZ 424 (NZSC).

Act 1964) that had been "undoubtedly correct".[74] Moreover, an arguable point must lead somewhere. It will not be enough to have a genuinely arguable issue if the point exists, as it were, in a vacuum or if, in order for the appeal to succeed, it would be necessary also for the appellant to succeed on a further or on a logically prior point that is obviously hopeless. In one case where it was contended the Court of Appeal had applied the wrong legal test, the judgment refusing leave said that the law was sufficiently clear and settled and that whatever might be the relevant nuances of that law, the applicant would necessarily fail on the facts concurrently found by the courts below.[75] A commentator said we were wrong to take this approach because we had a responsibility to expound the law for the guidance of all courts.[76] This showed in my view a lack of appreciation of the cost to the parties of a full second level appellate hearing that would have been obviously futile, and of the danger of attempting to refine the law in the absence of any realistic contest. It can do more harm than good to use a hopeless factual scenario as a springboard for articulating generally applicable principles, as tempting as that course might be in notoriously confusing or outdated areas of the law.

M Resolving Factual Disputes at the Appellate Level

Observers may also think it understandable that the Court is reluctant to hear any case where there is a likelihood that in order to determine the appeal it would have to investigate a factual morass — something which is simply not the function of a second level appellate court. In *Chirnside v Fay* we found ourselves in exactly this position.[77] The Court of Appeal had not found it necessary to make a finding on issues concerning the rental value to be ascribed to an area of vacant space within the building in dispute, because of the general approach it took to the appropriate remedy for breach of fiduciary duty. The Supreme Court was therefore required to make a purely factual determination in a context where both parties disputed the approach taken by the trial Judge, the Court of Appeal had accepted (without ruling upon) updating evidence, and further updating evidence had been urged upon the Court even after the hearing of the appeal. This is not an experience we have any wish to repeat. For the same reason, where leave has been granted, the Court does not look favourably on attempts to introduce evidence that should have been subject to scrutiny in the courts below. Interlocutory judgments issued in the course of the *Paper Reclaim* litigation have made it clear that rule 40 of the Supreme Court Rules does not permit collateral challenges to a lower court's ruling that it is not in the interests of justice to admit particular

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74 *Warnock (deceased) v Chief Executive of the Ministry of Social Development* (2006) 18 PRNZ 380, para 2 (NZSC) Judgment of the Court.

75 *Pharmacy Care Systems Ltd v Attorney-General* (2004) 17 PRNZ 308 (NZSC).

76 Andrew Beck "Litigation" [2006] NZLJ 17, 19.

77 *Chirnside v Fay*, above n 37.

evidence.[78] Nor is it within the appropriate bounds of the appellate process for the Court to allow an entirely new case to be put up on appeal, on which fresh evidence has to be called — particularly where that evidence directly contradicts the account given at trial and its authenticity, not to mention its "freshness", is in dispute.[79]

N Determination of Leave Applications

While the Supreme Court Act authorises any two permanent judges to grant or decline leave, we have in the interests of consistency adopted the practice of involving three judges in most leave decisions. That also provides reassurance to the unsuccessful litigant that a majority of the permanent judges has considered the application. The Court is given power to determine leave applications without an oral hearing, and the great majority of applications are decided one way or another in that manner after the panel has considered the judgments below, the leave application and counsels' written submissions. It is only if we are left unsure about whether to grant leave — perhaps because of a concern that we may not have fully understood an argument — or about the framing of the permitted grounds of appeal, which will be set out in the Court's order, that an oral hearing is necessary. The prescribed time limits for oral argument at the leave stage, which are very tight,[80] have not in practice always been strictly enforced.

We have resisted the temptation to compensate for the initially meagre inflow of cases by being less rigorous in our selection of those to be given leave. But there is always likely to be room for argument about some individual cases where it is a fine judgement call whether an issue can be truly said to be of sufficient general importance. We have worked on the basis that if any one of the panel thinks so, leave is granted. The process is of course assisted when counsel for the applicant has taken some care in spelling out in the application and/or written submissions the grounds said to raise a general issue. All too often counsel state their propositions at such a level of generality as to be quite unhelpful to the Court, or appear to misconceive what needs to be established and embark immediately on an argument directed to the merits of the proposed appeal (which should really be unnecessary).

O The Challenges of Appellate Advocacy

While on the subject of counsel, I am bound to say that the level of competence of those appearing or preparing written submissions is variable and occasionally downright poor, even in

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78 *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2007] 2 NZLR 1 (NZSC).

79 *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] 2 NZLR 124 (NZSC).

80 Supreme Court Rules 2004, r 24. Oral submissions are not to exceed 15 minutes for the appellant's opening submission, 15 minutes for the respondent's submission, and 5 minutes for the appellant's statement in reply. The time limits are subject to any contrary directions from the judges hearing the particular case.

important cases. That makes the Court's task harder and creates the risk that, without proper help from counsel, the work product of the Court will be of less than the highest standard. I have to admit to being envious of other final courts, which rarely seem to lack quality appellate advocates. When I asked a visiting judge from the High Court of Australia why this might be, his response was that the judges in that Court had been so "beastly" to incompetent counsel for so long that they have ceased to come. It may be tempting to follow suit but we are very conscious that the new Court needs the goodwill of the Bar, who might not appreciate our methods. All the same, the patience of a saint, or of a Kenneth Keith, is sometimes required.

We cannot do much to control who appears before us. New Zealand has not yet developed a specialist appellate Bar. We cannot refuse to hear any legally qualified counsel, which would effectively require the litigant to instruct someone else or to be unrepresented. All we can do is to try to assist counsel to make appropriate submissions by indicating in our questions and comments the line counsel might usefully take. I should say that the Court has received substantial assistance from the submissions of an amicus curiae in one case to date, *Brooker v Police*,[81] in which the appellant represented himself. There have also been several appearances by interveners, including in *Lai v Chamberlains*.[82] Where interveners are offering what amount to United States-style "Brandeis briefs",[83] rather than appearing to support the position taken by one party to an appeal, it may be expected that their contribution will consist largely of background factual material of the kind that has assisted final appellate courts in other jurisdictions.

P A Statutory Duty to Give Reasons for Declining Leave

We do not give reasons for granting leave but normally those reasons will be apparent from the approved grounds, and certainly once we have delivered a judgment in the substantive appeal. The Supreme Court Act requires that short-form reasons be given when leave is declined.[84] This is an unusual requirement. Other final courts have no such obligation and say little more than announcing the result. It was very rare indeed for the Privy Council to give reasons for declining leave. But the requirement has proved useful. It has been a means of articulating our rulings on jurisdiction and on our application of the leave criteria. In fact, leave judgments have been quite extensively reported in the Procedure Reports of New Zealand and even in the New Zealand Law Reports. The requirement to give reasons has also enabled us to show that we are fulfilling a supervisory role even when

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81 *Brooker v Police* [2007] 3 NZLR 91 (NZSC). For a recent example in which an intervener was of great assistance see *Cumming v R* [2008] NZSC 39.

82 *Lai v Chamberlains*, above n 41.

83 See Ben Keith "Seeing the World Whole: the Functions of External Sources in Legal Method" (2008) 6 NZJPIL 95.

84 Supreme Court Act 2003, s 16.

declining to take a case. We have many times commented in our leave judgments on the reasoning of the Court of Appeal, sometimes indicating our complete agreement[85] and sometimes correcting an inessential error.[86] The status of these judgments is yet to be determined (as is that of significant interlocutory decisions such as those in the *Paper Reclaim* litigation) but will obviously be less than the considered opinion of all the members of the Court after hearing full argument. However, the fact that three judges have participated in a leave or interlocutory application and joined in the decision should enhance its authority as a judgment of the Court.

Q Bringing an Appeal On For Hearing

I will say something about the way in which the Court goes about the business of hearing and determining cases. The Registrar is charged with assigning a hearing date as soon as possible after leave is granted. That depends of course on the availability of counsel and on the Court's periods of recess, which are over the Christmas holiday period and in May and September. The May/September breaks are necessary so that some judges can take sabbatical leave and at the same time there are enough "on deck" to process leave and interlocutory applications. There are only five of us and all must sit on every case.[87] We have taken the view that we should not call upon acting judges (of whom we presently have only two, including Sir Kenneth) in order to facilitate the taking of leave. We ask one of them to sit only when a permanent judge recuses him or herself.

We have to date been able to avoid long delay in getting a case to a hearing save in a very few instances where counsel were unavailable or interlocutory matters intervened. In one case, however, there was a six-month delay because of two recusals.[88]

As soon as written submissions begin to come in (20 working days and 10 working days before the hearing),[89] our law clerks, who are a group of very able recent law graduates (one for each

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85 For example *Clark v Libra Developments Ltd* [2007] 2 NZLR 709, 744 (NZSC) Judgment of the Court (lower courts correct about application of sections of Companies Act 1993 where sole director of company becomes bankrupt and where business of company has been conducted after it has been removed from the register and before it is restored).

86 For example *Belcher v Chief Executive of Department of Corrections* [2007] NZSC 54 (misinterpretation of Supreme Court's reasoning in an earlier decision touching on the jurisdiction of the Court of Appeal).

87 We can drop down to four (or, theoretically, even three) only if someone becomes unavailable when we are about to hear a case for which a fixture has been made or during the hearing: Supreme Court Act 2003, s 30. This has happened twice, in *R v Thompson* [2006] 2 NZLR 577 (NZSC) and *Southbourne Investments Ltd v Greenmount Manufacturing Ltd*, above n 31 (fog and bereavement respectively).

88 *Murray v Morel & Co Ltd*, above n 11. One judge had sat on the case in the Court of Appeal and another had a family business connection with one of the litigants. Unfortunately two of our (then) three acting judges were engaged on the other side of the world at the time the case was originally scheduled and did not return for some months.

judge), begin to consider them and do preliminary research on the issues which have been raised, or should have been raised. The judges consider their work along with the case on appeal and the submissions in preparation for the hearing. We go into hearings better prepared than is normally possible in the overburdened Court of Appeal. The hearing itself can also be more leisurely because of the lack of pressure of other cases waiting to be heard immediately afterwards. We rarely have more than four cases in a month or two in a week.

R The Scope of the Substantive Hearing

While the grounds of appeal identified in the order granting leave set the parameters within which argument is to range, they are not treated with the same rigidity as those stipulated in a case stated, being capable of amendment by leave of the Court at any time.[90] But we have been wary, as I have already signalled, of allowing an appellant to advance an argument that has not been run below, particularly if there was a considered decision not to run the argument or to concede the point in the lower courts. We said in *Otago Station Estates Ltd v Parker*[91] that the Court would not allow this course in a civil case if there was any possibility that the outcome might have been affected if the point had been taken earlier. The Court would need to be sure beyond doubt that it had before it all the facts bearing on the new contention as completely as if the matter had been in issue at the trial. The same would of course apply if a respondent was seeking to support the judgment below on a ground not previously advanced.

The Court has been hampered in several instances, including in *Paper Reclaim*,[92] by more fundamental objections to the case an appellant seeks to advance. The only copyright appeal to date, *Henkel KgaA v Holdfast New Zealand Ltd*, was ultimately disposed of on the basis that the plaintiff's central claim was, contrary to the view of the Court of Appeal, not properly open on its pleadings. The Court took the view that the pleadings fell well short of informing the defendant and the trial court of the specific copyright work in respect of which the defendant was now said to have infringed.[93] The High Court trial had proceeded on the basis of the pleadings and the plaintiff had never sought an amendment to broaden their scope, which the Supreme Court would in any event almost certainly have denied at such a late stage of the case. All the Court was able to do in the circumstances was to offer a summary of the view it would have taken on the substantive issues on the appeal.

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89 Supreme Court Rules 2004, r 36.

90 Supreme Court Rules 2004, r 29.

91 *Otago Station Estates Ltd v Parker*, above n 31.

92 *Paper Reclaim Ltd v Aotearoa International Ltd*, above n 38.

93 *Henkel KGaA v Holdfast New Zealand Ltd*, above n 36, paras 4–33 (NZSC) Judgment of the Court.

S The Post-Hearing Process

Once a hearing finishes we normally have an informal discussion over a cup of tea and after this discussion a clerk is often asked to follow up on a line of research. We try to meet again in formal conference on the case about a week later for a longer discussion. At this time we usually have an indication of the position each judge will take and it is often possible to allocate judgment writing responsibility where there appears to be unanimity. In our discussions we generally follow the Privy Council practice of having a junior judge speak first.

The research done by the clerks is wide-ranging. We ask them to look at cases and sources from around the common law world and sometimes, especially in Bill of Rights cases, from Europe and international tribunals. The fruits of this research can be seen, for example, in *Zaoui (No 2)* and *R v Condon*.[94] There may be informal discussion between individual judges as work progresses on a draft judgment. When it is circulated, it is likely to be the subject of detailed written and oral comments and sometimes one or more further conferences. Often the judge who has prepared the draft agrees to rewrite portions of it to which others have contributed ideas. And it is not unknown for the result to be changed as a consequence of further reflection and debate. The process as it has developed is certainly more detailed and exhaustive than happens in the Privy Council, where the experience of those of us who have sat there is that the conference immediately after the hearing is brief and usually very little comment is made on the draft circulated by the allocated judgment writer, with no further meetings.

Our hope in each case is to add value by clearly articulating and explaining the relevant law, including its history where that is of significance, and exploring the underlying principles in a depth which may not have been possible in lower courts operating under the pressure of greater workloads. Each judgment must attempt to strike the balance between the general and specific reasons for having granted leave in the particular case. Error correction is not the primary function of the Court, but neither, as I have indicated above, is the articulation of legal principles in a form entirely divorced from their practical context.

Before any judgment is delivered it is rigorously proofread by our clerks and modified to comply with our style guide, which is in turn largely harmonised with that of the Law Reports. A press release setting out the main points in the judgment (or majority judgment) is prepared and used as the basis for the announcement of the judgment from the Bench upon delivery, as well as going on our website.[95] And the final stage is reporting. A protocol exists between the editor of the

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94 *Zaoui (No 2)*, above n 2; *R v Condon*, above n 23.

95 Courts of New Zealand www.courtsofnz.govt.nz (accessed 25 June 2008). Transcripts of all substantive Supreme Court hearings are also available on this website, although the Court does not have the resources to check the transcripts thoroughly and their accuracy should not therefore be presumed.

New Zealand Law Reports and the Court. The editor prepares a headnote in draft and sends it to us for comment before the report is published. He also prepares a summary of counsel's argument and we may occasionally offer suggestions on that as well.

T Conclusion

I have endeavoured in this paper to paint a picture of our first few years of experience as New Zealand's senior court. We have already learnt a good deal about the role. In particular, we have bedded down our rules and begun to feel reasonably comfortable about our processes. Whether the product is any good is better left for others to judge. I am too close to it. What I would say is that I believe that the existence of the Court as a replacement for the Privy Council is now accepted by the great majority of lawyers and, most of the time, at least, by the general public and the media. The existence of the Court is no longer a political football, although no doubt from time to time individual decisions will get kicked about, as happens with all final courts.

It has been an interesting experience. I have been glad to be part of it, along with Sir Kenneth.