

# LAWS381: Civil Procedure Course Notes

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## *I Introduction and Overview*

### **A J. A. Jolowicz: *On the Nature and Purpose of Civil Procedure Law***

- Sir Jack Jacob was the father of civil procedure.
- He was a barrister, then became of Master of the English High Court.
  - o A Master deals entirely with procedural matters, NZ version is an associate Judge.
- He believed civil procedure and procedural rules are inherently linked to society's understanding of what the law is.
- Procedural law is the prism through which substantive law is applied, interpreted and perceived.
- It governs which cases are picked up for review and appeal. This process leads to the formation of substantive law.
  - o Example: *Hedley Byrne* could have been dealt with through a summary judgement application which would have meant that negligent misstatement as we currently understand it may never have come into being.
- The grand points of law must be understood through the lens of procedure.
- Civil procedure exists for the parties, all parties have an interest in the outcome of their proceedings.
- Also exists for the benefit of the law and its development, which benefits future litigants and the law as a whole.
- Civil procedure largely exists for expediency and efficiency.
  - o But this must strike a balance with ensuring the law is carefully examined.
  - o There may be a potential question over peoples' right to access justice and where the line should be drawn to prevent expediency infringing on these rights.

### **B Civil Procedure Roadmap**

- Substantive law and procedural law.
  - o Procedure will come first, and that will determine which procedural element is the most important to be decided on substantive law.
  - o The procedure assists the creation and formulation of the substantive.
- Criminal procedure or civil procedure?
  - o Civil procedure is much more efficient and expedient.
  - o Criminal procedure requires a much higher standard of proof due to the potential impacts on liberty.
  - o Civil procedure attaches to the information, criminal procedure attaches to the person.
- Civil dispute resolution options:
  - o ADR: Mediation/Arbitration
    - Requires co-operation of both parties.
  - o District Court
    - Can now handle matters up to \$350k in dispute.
    - However, procedural matters such as injunctions must still be dealt with in the High Court.
- Disputes Tribunals
  - o "Rough justice".
  - o Most efficient and expedient.
  - o Ineffective if the stakes are high and it's very important for you to be right.
  - o There is a continuous trade-off between accuracy and efficiency, Disputes Tribunals heavily favour efficiency at the expense of accuracy.
- Specialist tribunals address the concerns with Disputes tribunals.
- High Court

- Deals with debt or potential damages over \$350k.
- Subject to appeal.
- The High Court deals with matters of judicial review.
- Also deal with all proceedings involving liquidation and insolvency.
- It has inherent jurisdiction to deal with cases which do not fit under any other jurisdiction.

***C I. H. Jacob “Civil Procedure since 1800”***

- Substantive law and equity being two separate constructs created a situations of very difficult rules, levels and processes. Failure to abide by the proceedings of either the law courts or the courts of equity led to the case not being heard.
- This was a highly vexatious process.
- This system was prone to injustice.
- Between 1830 – 1875 a number of reforms took place.
- Culminated in the Judicature Act 1873 (UK).
  - This created a single High Court and fused law and equity.

## *II New Zealand Judicial History and the Judicature Modernisation Reforms*

- The High Court (then called Supreme Court) of New Zealand was established by the Supreme Court Ordinance 1841.
- The Court of Appeal was established by the Court of Appeal Act 1862.
- The Supreme Court was reconstituted as the High Court by the Judicature Amendment Act 1979.
- The Supreme Court was constituted by the Supreme Court Act 2003.

### ***A The Progression of New Zealand Legislation***

#### *1 The Judicature Act 1908*

- The High Court and Court of Appeal were continued.
- This was a consolidating statute, amending and consolidating the law relating to the High Court and the Court of Appeal.
- Also contained miscellaneous provisions dealing with commercial issues such as sureties or discharge of debt and enforcement of certain foreign judgments.

#### *2 District Courts Act 1947*

- Magistrates Courts originally constituted under the Magistrates' Courts Act 1893 and continued under the same Act of 1947.
- District Court Amendment Act 1979 changed the Magistrates Courts to District Courts with the governing act renamed District Courts Act 1947.
- Each District Court constituted as a separate entity.

### ***B Judicature Modernisation Reforms***

- There were previously 3 governing statutes for 4 main courts.
- Beyond this, there were a variety of statutes governing the full scope of the New Zealand Courts, their jurisdiction, powers and procedures.
- The Judicature Act 1908 has been amended more than 40 times between its enactment and 2012.
- The Judicature Modernisation Bill was divided into 23 separate bills.
- They received royal assent on 17 October 2016.
- Most changes came into effect 1 March 2017.
- The reforms addressed a number of issues around accessibility, clarity, intelligibility, rights to a jury trial etc.
  - o The separate status of the 63 District Courts created practical problems.
  - o There was a lack of transparency in the judicial appointment process.
  - o There were needs for better control on vexatious litigation.



## 1 Main Changes

<b>Pre-Reform Position</b>	<b>Post Reform Position</b>
District Court civil jurisdiction limit was \$200k.	District Court civil jurisdiction limit is \$350k.
63 separate District Courts.	The District Courts are united into a Unitary District Court.
Two Acts govern the composition, jurisdiction, powers and procedures of the High Court, Court of Appeal and Supreme Court.	Consolidation under one Act.
Commercial list existed.	Commercial panel is established, other specialised panels may also be created.
Lack of transparency in the judicial appointment process.	Judicial selection and recommendation process for the appointment of judges must be published by the Attorney-General.
Judicial review was governed by the Judicature Amendment Act 1972.	Judicial review is governed by the Judicial Review Procedure Act 2016, with modernised style and language.
Default position under the legislation is that documents used in courts and tribunals are paper based.	The Act allows for the use of electronic documents in Courts and Tribunals instead of paper based documents.
Jury trial was a right where the relief claimed is payment of a debt, pecuniary damages or the recovery of chattels exceeding \$3000 in value.	Jury trial is reserved for special circumstances.

- Key Acts:
  - o High Court Rules 2016
    - Senior Courts Act 2016 s 154.
  - o Senior Courts Act 2016.
  - o District Court Act 2016.
    - Created the Unitary District Court.
  - o District Court Rules 2014.
    - District Court Act 2016 s 246.

## 2 District Court Act 2016

- Section 7: Establishes the District Court of New Zealand, replacing the 63 separate District Courts.
- Section 24: Repeals the District Courts Act 1947.
- Section 73: Criminal jurisdiction conferred by the Criminal Procedure Act 2011 and other enactments.
- Section 74: General civil jurisdiction for proceeding where the amount in dispute is less than \$350k.
- Section 86: But defendant can transfer to the High Court where the amount in dispute is greater than \$90k.

## 3 Senior Courts Act 2016

- Consolidates the High Court, Court of Appeal and Supreme Court under a single Act.
- Repeals the Judicature Act 1908 and the Supreme Court Act 2003.

- One exception: Section 182(4) preserves s 87 of the Judicature Act 1908 (interest on debts and damages) until 1 January 2018, when the Interest on Money Claims Act 2016 comes into force.
- Preserves rule of law and Parliamentary sovereignty (s 3(2)).

#### *High Court*

- Sections 6 and 12: High Court continued and maintains same jurisdiction it had on the commencement of the Act.
- Section 19: Commercial List abolished; commercial panel on its way.
- Sections 145-149: Making of High Court and other Rules.
- Section 166: Power to control vexatious litigation.
- Section 180: Equity prevails over law.

#### *Court of Appeal*

- Section 45: Court of Appeal is continued.
- Section 56: Jurisdiction to hear and determine appeals from the High Court, appeals under the Criminal Procedure Act 2011 and appeals from any court or tribunal under any other Act that gives it jurisdiction.
- Sections 27, 56(3) and 56(4): Appeals from interlocutory decisions are now standardised.
  - Appeals for interlocutory applications have had special rules repealed.
- Section 49: Greater powers for single Court of Appeal judges.

#### *Supreme Court*

- Section 66: The Supreme Court is continued for the hearing of appeals on important legal matters.
- Sections 68-71: May hear and determine appeals against decisions of the High Court, the Court of Appeal and other courts in civil proceedings and criminal proceedings.
- Sections 73 and 78: Appeals are only heard with the Court's leave and are by way of rehearing.
  - Every appeal now requires leave.
  - Section 74 set out the criteria for appealing to the Supreme Court.

#### *4 Electronic Courts and Tribunals Act 2016*

- Sets out processes for using electronic documents in courts and tribunals.
- Also dealt with under the Civil Electronic Document Protocol.
- There have been a lot of removal of requirements of paper documents.
- Electronic documents are now preferred.

#### *5 Judicial Review Procedure Act 2016*

- Governs the process of judicial review.
- Modernises the style and language of provisions governing judicial review procedure.
  - Provides the architecture for a judicial review.
- It does not change the effect of the Judicature Amendment Act 1972.
  - Application for judicial review is still dealt with under the High Court Rules.
- Section 15 governs the making of interim orders.
  - Section 15(3) gives different rules if the Crown is a respondent.
    - (b) Gives the court the authority to declare that the Crown ought not to take any further action or ought not to institute or continue any proceedings in connection with any matter to which the application relates.

### *III Inherent Jurisdiction*

#### **A Overview**

- The inherent jurisdiction is the power of the court to grant relief.
- All courts have a jurisdiction.
- Jurisdiction stems from a number of sources:
  - o Legislation.
  - o The common law.
  - o The inherent jurisdiction.
    - This is the jurisdiction of the court which comes by the court simply being a court.

#### *1 I. H. Jacob "The Inherent Jurisdiction of the Court"*

- The inherent jurisdiction is a part of the general jurisdiction.
- The contrast is not between common law power and statutory power.
- Defines the inherent jurisdiction as:
  - o "... residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them".
- Defines six key characteristics of inherent jurisdiction:
  1. It is exercised as part of the administration of justice and is therefore procedural.
  2. It is exercised by summary process rather than a full trial.
  3. Its nature as part of the machinery of justice means it can be exercised against anyone, whether party to the proceedings or not.
  4. It is distinguishable from the exercise of judicial discretion.
  5. Rules of Court provide powers additional to the inherent jurisdiction.
  6. The inherent jurisdiction is possessed only by the superior courts.
- It primarily arose as a means to deal with contempt.
- The jurisdiction is inherent because it exists due to the fundamental nature of the court as a court of law and enables it to administer justice effectively.
- The inherent jurisdiction can be exercised primarily in two ways;
  - o In contempt cases, to punish the offender.
  - o In abuse of process cases, to stay or dismiss the action, or to give judgment or impose terms as the court sees fit.
- Inherent jurisdiction can be enforced through summary process.
  - o It can deprive the defendant of the right to trial by jury, meaning it can be a serious deprivation of rights. It is therefore used sparingly.
- Inherent jurisdiction can be exercised in three overarching types of cases;
  - o Regulating process and proceedings;
    - Largely administrative, the right to make rules, the ability to regulate the process of the court etc.
    - The making of High Court Rules does not destroy this jurisdiction, only limits it somewhat. The court is free to make rules outside the jurisdiction.

- Also the right to appeal and the right to appear before a superior court as a barrister.
  - Gives the power to make conditional orders or stay proceedings until something has been done.
- Abuse of process:
  - The court has the ability to summarily terminate proceedings based on them being vexatious, frivolous or an abuse of process.
  - Will not allow the law to be used as a tool for oppression.
  - Abuse of process may include proceedings which are;
    - Involving a deception of the court, are frivolous, or constitute a mere sham.
    - Using the processes of the court unfairly, dishonestly or for some ulterior and improper motive.
    - Manifestly groundless.
    - Numerous proceedings which are likely to cause vexation or oppression.
  - The Court cannot prevent litigants commencing proceedings which may turn out to be vexatious, however it can be used to restrain a vexatious litigant from commencing or continuing any proceeding without leave.
    - Where a litigant brings two proceedings where one would do, that it prima facie, vexatious.
- Compelling observance of process:
  - Compels observation through contempt of court.
  - Can also terminate proceedings against the non-compliant party. This power is derived from the inherent jurisdiction.
- Inherent jurisdiction can be used in control of persons.
  - Controls and protects solicitors and barristers in ensuring they meet their obligations to the court.
  - Can be done through methods like ordering the payment of fees etc.
- It grants control over powers of inferior courts and tribunals.
- Inferior courts and tribunals all have some form of inherent jurisdiction, however a lot of them are given by statute, as well as the jurisdiction of the superior courts.
  - This statute given jurisdiction is called limited jurisdiction.
- The Rules of the Court are supplementary to the inherent jurisdiction.
  - They provide greater precision of regulation.
  - Inherent jurisdiction allows the court to act in situations for which the rules do not prescribe.

## 2 *Dockray “The Inherent Jurisdiction to Regulate Civil Proceedings”*

- The inherent jurisdiction gives powers to courts which are not explicitly granted by statute.
- The phrase first started being used in the contempt context.
- There are three predominant meanings;
  - The general powers of the old superior courts.
  - Powers which a court possesses by virtue of being a court.
  - Incidental powers which arise out of or because of the work the court undertakes.
- Inherent jurisdiction has developed from being a feature only of the superior courts to being possessed by some lower courts and tribunals as well.
  - Largely powers such as the ability to exclude the public. General powers designed to ensure the administration of justice.

- Inherent powers arise independently of statute.
- It can be limited by statute and explicitly or implicitly constrained.
- The cases indicate that inherent jurisdiction is not something from which new rules can be made up at will.
- The overarching focus is good governance and the administration of justice.
- It is unclear whether there is a general principle of inherent jurisdiction or whether there is simply a collection of inherent powers.

### 3 Ferrere “*The Inherent Jurisdiction and its Limits*”

- Rejects Jacob’s definition.
  - o It is insufficiently specific and amorphous, does not assist in actually understanding the nature of the inherent jurisdiction.
- Inherent jurisdiction has since changed, it is now possessed by all courts to a certain degree.
- Ferrere argues Jacobs has conflated inherent jurisdiction with inherent powers.
  - o Jurisdiction is an inherent power to hear and determine a matter.
  - o Powers are inherent devices used to effect the jurisdiction.
- Superior courts have a different jurisdiction to inferior courts, namely the ability to hear cases the inferior courts do not.
- Inherent jurisdiction and inherent powers both lack a statutory basis.
- There is a significant difference in the English context between a court having inherent jurisdiction and exercising it.
- New Zealand upholds the inherent jurisdiction and sees it as a key part of the courts’ ability to do justice.
  - o Quite a flexible approach.
- Three key principles govern the exercise of inherent jurisdiction:
  - o 1. The exercise of the inherent jurisdiction will occur only where and when necessary.
  - o 2. The ultimate aim is to ensure justice is done. This may require the balancing of the rights and responsibilities of all involved.
  - o 3. The exercise of inherent jurisdiction cannot contravene legislative intention, but only explicit legislative intention will overturn inherent jurisdiction.
- There are constitutional limits to inherent jurisdiction.
- The rule of law is an important limit, the inherent jurisdiction exists to uphold the rule of law.
- Well established norms of practice, though implicit, also bind the court and limit the jurisdiction.
  - o Eg: It would be a breach to conduct an inquisitorial trial, even though it may be within the inherent jurisdiction.

## **B Case Law**

### 1 *Dairy Containers Ltd v NZI Bank Ltd* [1994] HC

Thomas J

#### *Facts*

- Mr Benjes was the financial controller of Dairy Containers Ltd. The company lost several million dollars and sued the auditors to recover the money.
- However, only one member of Dairy Containers was called as a witness, Mr Benjes was not called.

#### *Held*

- Thomas J stated that the inherent jurisdiction allowed him to call Mr Benjes as a witness and examine him himself.
- He asked Counsel to prepare submissions on whether this was case, if not, why not, and if no answer could be given, if there was any reason for Thomas J not to call Mr Benjes himself.

## 2 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] CA

Richardson J

### *Facts*

- Quality Pizzas Ltd refused to provide the Union with a list of employees covered by the NZ Tea Rooms and Restaurant Employee Awards.
- The company was fined by the Arbitration Court and still failed to provide the list.
- Also failed to obey the order to produce the list.
- The Union applied to the High Court to order Quality Pizzas to comply with the order.
- An order was made to sequester the business.
- Quality Pizzas appealed.

### *Held*

- The High Court has inherent jurisdiction to make orders to punish contempts of inferior courts.
- Inferior courts do not have an inherent jurisdiction to punish for contempt.
- A writ of sequestration was a drastic step to take, a severe financial penalty was warranted instead. Nevertheless, the High Court had the ability to act as it did.
- Quality Pizzas were given some time to change their mind and avoid contempt penalties. They complied.

## 3 *Mike Pero Mortgages Ltd v Pero* [2014] HC

Associate Judge Matthews

### *Facts*

- Buddle Findlay acted for Mr Pero and his companies. In 2013 the firm filed proceedings on his behalf.
- BF then accepted instructions from a company against Mr Pero.
- Mr Pero applied to have Buddle Findlay constrained from acting against him.

### *Held*

- The High Court has the inherent jurisdiction to restrain solicitors or firms from acting in a particular matter in order to uphold the wider interests of justice.
- Due to the knowledge Buddle Findlay would have of Mr Pero, and the fact that he is a current client, there is significant risk of a conflict of interest and injustice.
- Buddle Findlay were ordered not to act in this matter.

## 4 *Harley v McDonald* [2001] PC

Lord Hope

### *Facts*

- Ms Harley was a barrister who represented a client to recover from the insurers of a defalcating lawyer.
- A senior partner at Renshaw Edwards had a gambling problem. He stole money from clients and gambled it.
- Mr McDonald was a client of Renshaw Edwards, he obtained a summary judgment against the firm but the partners were insolvent.
- He sued the Law Society fidelity fund and FAI (Renshaw Edwards' insurer).
- Engaged Ms Harley.

- He won the case against the Law Society, but lost the case against FAI.
  - o His case against FAI was hopeless, there was no chance of ever winning it
- The court awarded FAI's costs against Mr McDonald and considered whether to award costs against Ms Harley personally.
- An order was made in the High Court against Ms Harley.
- This was upheld in the Court of Appeal.

*Held*

- The High Court has the inherent jurisdiction to award costs against a barrister personally. As officers of the court, solicitors and barristers are both officers of the New Zealand court and therefore are subject to awards of costs against them.
- As officers of the court, barristers have a duty to ensure that they upheld the process and prestige of the court.
- The award of costs is a summary process. However, in this case evidence was inferred and assumptions were made about Ms Harley's conduct which was largely unsubstantiated.
  - o The court can only rely on facts which are easily verifiable.
- All matters dealt with by the inherent jurisdiction must be matters outside the court, however the High Court and Court of Appeal inferred evidence of conduct outside the court.
- The purpose of awarding costs against a practitioner is to punish a failure of the practitioner to uphold their duty to the court, not to compensate the other party.
  - o It is not appropriate for the court to deal with matters of breaches of duty or negligence.
  - o If such orders are made, the court must confine its judgements to evident facts.
- More than a simple mistake or oversight is required, there must be gross neglect, inaccuracy or incompetence.
- It was quite possible that Ms Harley had advised that the case was hopeless and Mr McDonald had nevertheless instructed her to act.
  - o In this case, she would be bound to act.
  - o She also could not give evidence of these instructions as they are covered by legal professional privilege.
  - o The pursuit of hopeless cases even if the barrister may not appreciate the case as hopeless is not necessarily serious incompetence. Litigants have a right to have their cases heard and it's important for the interests of justice that this right be upheld.
- The appeal was allowed.

## *IV Advocacy*

### *A Legislative Requirements*

#### *1 Lawyers and Conveyancers Act 2003*

- Sets out all ethical rules and boundaries for lawyers in New Zealand.
- Section 3: Purposes
  - (a) To maintain public confidence in the provision of legal services.
  - (b) To protect the consumers of legal services.
  - (c) To recognise the status of the legal profession.
- The fundamental purpose is to uphold public confidence in the legal profession.
- Part of the purpose of lawyers is to ensure separation of powers and maintain the rule of law.
- Section 4: Fundamental obligations of lawyers
  - (a) Uphold the rule of law and facilitate the administration of justice in New Zealand.
  - (b) Be independent in providing regulated services to clients.
  - (c) Act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients.
  - (d) Protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her client.

#### *2 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*

- Rule 2: A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.
  - o 2.1: The overriding duty of a lawyer is as an officer of the court.
  - o 2.2: A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice.\
- Rule 13.1: A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.
- 13.2: A lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary.
- 13.3: Subject to the overriding duty to the court, a lawyer must obtain and follow a client's instructions.
- 13.4: Lawyer must keep client informed of alternatives to litigation which are reasonably available.
- 13.5: Lawyers must maintain their independence.
  - o 13.6: Lawyers who are members of the same practice must not act for two or more parties in the same dispute where they do not share the same interests.
- 13.8: A lawyer must not attack a person's reputation without good cause in court or in documents filed in court proceedings.
- 13.9: A lawyer must ensure the discovery obligations are fully complied with by the lawyer's client. The lawyer cannot continue to act if there has been a breach of discovery obligations and the client refuses to remedy the breach.
- 13.10: A lawyer must not adduce evidence knowing it to be false.
- 13.11: The duty to the court includes a duty to put all relevance and significant law known to the lawyer before the court, whether this material supports the client's case or not.
  - o You must present it, then argue why it should not be followed or is distinguished from the current case.



## **B Case Law**

### *1 Chou v ANZ*

#### *Facts*

- Ex parte injunction application to stop the sale of a house going through.
- Counsel for the Chou's told the court that sale for the property was to be settled later that day.
- In fact settlement had occurred the previous day.

#### *Held*

- Judge held that Mr Middleton (counsel) knew the settlement had already taken place.
- Took the view that Mr Middleton had lied.
- Overturned the injunction and ordered a copy of the judgment to be sent to the Law Society for potential disciplinary action.

### *2 Gazley v Wellington District Law Society (WDLS)*

#### *Facts*

- Mr Gazley represented the appellant in a criminal matter before the Court of Appeal.
- The judgment was handed out in court. There was a page missing from it where the court dealt with one of Mr Gazley's arguments.
- Gazley tried to argue the decision as it was handed down was the full decision.
- He then decided to sue the judges on the Court of Appeal and accused them of fraud.

#### *Held*

- The High Court found that the case had no merit and dismissed it.
- Referred the case to the WDLS.
- Gazley was found to have made allegations against the judges of the High Court without proper foundation and was found guilty of misconduct.

### *3 Vernon v Bosley*

#### *Facts*

- The plaintiff was a father who witnessed the nanny drive a car containing his children into a river.
- He then witnessed multiple failed attempts to rescue the children.
- He claimed nervous shock.
- Won in the High Court, nanny appealed to the Court of Appeal, the Court of Appeal heard the case and withheld their judgement.
- After the arguments on the case had concluded but before the judgement was given, new evidence emerged from a concurrent custody trial that in fact the plaintiff's mental state was not as bad as he made it out to be.

#### *Held*

- Not allowing the information to be disclosed is akin to a breach of discovery and misleading the court.
- The new evidence was allowed to be admitted.
- The duty to disclose information continues right until the point that the judgment is given.
- The evidence was allowed, which led to the quantum of damages being reduced.

## *V Commencing Proceedings*

- When commencing proceedings, you need two things.
  - o A notice of proceeding.
  - o A statement of claim.
- At the outset, the above ways were the only way to initiate proceedings, but other ways have since opened up under parts 18 and 19 of the rules.
  - o Part 18 provides a list of special proceedings which requires different originating applications.
  - o Part 19 deals with proceedings which must be dealt with my originating application.
- First step is to check whether your type of claim comes within the types of special claim listed in parts 18 or 19, and look at how to commence them.

## *A The High Court Rules 2016*

- 5.1: Relates to the identification of the proper registry.
  - o 5.1(1): The proper registry is listed.
    - (a) When a defendant is resident or has a principal place of business in New Zealand, the registry of the court nearest to that location is the proper registry.
  - o There are a number of other factors given under the rule.
- 5.3 – 5.16 deal with the minutia of detail of paper and formatting.

### *1 Rules Relating to the Commencement of Proceedings*

- 5.17: Distinct matters must be stated separately.
- 5.19: Denying a contract requires the party specifically pleading the substance of the denial of the contract. A bare denial of the contract will be treated as denying only the making of the contract.
- 5.21: Grants parties the ability to give notice to request more information. This can be an effective delaying tactic or used to genuinely obtain more information.
- 5.22 – 5.24: Deals with the requirements of notice.
  - o 5.22: Notice must be filed with every statement of claim.
- 5.25: A proceeding must be started by filing a statement of claim in the proper registry.
- 5.26: A statement of claim must show the nature of the claim.
  - o The specifics which need to be listed are given under this rule.
- 5.27: The statement of claim must specify the relief sought.
- 5.28: Multiple causes of action can be included under a single statement of claim.
- 5.31: The relief sought must be claimed specifically.
  - o Special damages: Liquidated damages, where the amount can be identified. These types of damages relate to an identifiable harm causing a specific dollar amount of damage.
  - o General damages: Damages where the amount is not specifically identifiable. Defamation, emotional harm etc.
- 5.33: If the plaintiff is seeking special damages, he must state their details.
- 5.36: A solicitor must be authorised by the party to act for them.
  
- 5.45 An application can be made by the defendant for security of costs.
  - o This rule sets out the test for making an order for security of costs.

- If there are reasons to believe that the plaintiff would be unable to pay costs if they lose, the defendant can make them present evidence showing that they are able to pay costs.
  - This can be used as a delaying tactic.
- 5.47: A defendant who intends to defend a proceeding must file a statement of defence to the plaintiff's claim.
  - This rule sets out the specifics of this statement.
  - 5.47(2)(b) Deadline of 25 working days.
- 5.48: Requirements for a statement of defence.
- 5.49: Defence can lodge an objection to jurisdiction.
  - If a defendant intends to object to jurisdiction, they should not file a statement of defence as that would confer jurisdiction onto the court.
- 5.50: A defendant can appear for an ancillary matter, if they do not oppose the claim but wish to be heard on a different matter (eg costs).
  - No need to file a statement of defence.
- 5.51: Appearance reserving rights.
  - Can appear without filing a statement of defence reserving the rights to later mount a defence.
- 5.52: Outlines what forms need to be filed.
- 5.53-5.61: Governs rules around counter-claims.

## **B Limitations**

### *1 The Limitation Act 2010*

- Outlines the limits which exist to potential civil claims.
- Section 3: Purpose is to encourage claimants to make claims for monetary or other relief without undue delay by providing defendants with defences to stale claims.
- Section 11(1): It is a defence to any money claim if six years have passed between the claim being filed and the date of the act or omission on which the claim is based.
- 11(2): Subsection (3) applies if the claimant has late knowledge of the claim, giving the claim a late knowledge date, and the claim is made after the primary period (6 years).
- 11(3): It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least;
  - 11(3)(a): 3 years after the late knowledge date; or
  - 11(3)(b): 15 years after the date of the act or omission on which the claim is based.

### *2 High Court Rules on Limitation*

- Interpretation Act 1999:
  - Section 35: Defines time. An event is deemed to take place on the first day on which the event takes place.
- Rule 1.3: A working day is defined. It's any way other than the weekend or a public holiday.
- Part 1; Subpart 4: Time
  - 1.17: Calculating periods of time.
    - Limitations are dealt with specifically under the Limitations Act.
  - 1.18: If the registry is closed, the act is done on time if it is done on the next day on which the registry is open.
  - 1.19: The court has the discretionary power to extend or limit any period of time the court thinks just.

### 3 *Roose v Taylor-Ruiterman* [2016] CA

Mallon J

#### *Facts*

- Claim against Ms Roose for negligent advice given over tax liability.
- Ms Roose created a company which is essentially herself to enter into a transaction with this company.
- She seeks a GST refund on the price paid for the property because, as a property developer, buying a house is a business expense.
- Ms Roose wants to protect the property from relationship property claims.
- She creates a trust, the DMR Development Trust.
- Transfers the property to the trust in return for \$2m.
- She then should have paid the GST back to the IRD as the \$2m is technically profit on the house.
- She claims the respondents were negligent in their audit and did not give her accurate advice.
- She had to pay a significant amount of money to the IRD, including costs of the audit. She had to sell part of the property to cover these.
- Sues the auditors to recover this money.
- The agreement was entered into on the 14<sup>th</sup> April 2008 and settled 2<sup>nd</sup> May 2008.
- Claim was filed 1<sup>st</sup> May 2014.

#### *Held*

- The issue was whether the cause of action arose when the agreement was entered into or when the agreement was settled.
- A cause of action accrues when every fact exists that would be necessary for the plaintiff to prove their right to a judgment.
- The tax liability arose at the point where the transfer of money from the trust to the company (DDL to DMR) took place. Up until that point, no income had been derived from the sale of the land.
  - o The tax obligations exist from when the money “comes home to roost”.
- The cause of action therefore arose on the 2<sup>nd</sup> May 2008.
- The claim was therefore within the limitation period and Ms Roose can sue.

## *VI Service*

- Service is how the court gets jurisdiction over a matter.
- It exists to let people know that they're being sued, by whom, and why.

### *A Requirements for Service*

#### *1 High Court Rules*

##### *Part 5 Subpart 14*

- 5.70: Except as provided under the Act, the statement of claim and notice of proceeding must be served on every defendant and every person direct to be served with it.
- 5.71: Personal service is required except where the court directs otherwise.
- 5.72: Service must be given as soon as practicable after the statement of claim and notice of proceeding are filed.
  - o (2) If service is not effected within 12 months, the proceeding will be treated as discontinued.
- 5.73: An extension of time for service can be given by the court.

##### *Part 6: Service*

- 6.1: Lists acceptable methods of service.
- 6.5: A document is served by being left at an address for service between 9am and 5pm.
- 6.8: Describes the circumstances in which a party can apply to the court for permission for substituted service.
  - o Can have service in a method agreed upon by both parties.
- 6.11: A document must be personally served by leaving the document with the person to be served or by putting it down and bringing it to the notice of that person.
  - o If the documents are in an envelope, you must inform the person being served of the contents of the envelope and not seal the envelope.

#### *2 Body Corporate 85115 v Middlemiss [2017] HC*

Peters J

##### *Facts*

- The Body Corporate was suing a large number of parties and had to serve them all.
- They got special permission to serve the documents by email to the defendants.
- They served them by attaching a link to the email which linked to a Google drive folder.
- The link was faulty, many defendants were unable to open the link or see the documents.

##### *Held*

- Service by email is not the same as service through linking a Google drive.
- This breached the agreed upon forms of service and therefore the service was invalid.

#### *3 Invercargill City Council v Hamlin [1994] CA*

Richardson J

##### *Facts*

- The documents were served to the defendant through fax.
- Hamlin argued that this was not sufficient to constitute service.
- The documents were also left at the address for service, but it was left on the floor of the building where the firm had its offices at 7:41pm.

*Held*

- If service is deemed not to have taken place, the case will be dropped.
- The irregular methods of service did not prejudice the defendant in any way.
- In the interests of justice, the court can allow irregular methods of service after the fact.
- This discretion was exercised and service was deemed to have occurred.

4 *WSA (NZ) Ltd v Bond Cargo Ltd* [1999] HC

Laurenson J

*Facts*

- The defendant applies for the case to be struck out based on the statement of claim being filed too late. This question turned on whether service was effected on the 21<sup>st</sup> or 22<sup>nd</sup> of April.
- The strike out power is to be used sparingly and only where it is clear the plaintiff's case cannot succeed.
- The defendant's law firm was given the notice, and it did not come to the attention of the partner responsible for this matter until the following morning.
- Notice was left in a sealed envelope with reception without adequately informing the receptionist of the contents.

*Held*

- Leaving the envelope with reception is insufficient.
- The document must be drawn to the attention of the person being served, and the nature of the document must be explained.
- It is only served when it is brought to the attention of the partner concerned, leaving it with the firm is not enough.
- Service is therefore made when it is brought to the attention of the person whom it concerns.

5 *GBR Trust v GBR Investment Ltd* [2017] HC

Associate Judge Matthews

*Facts*

- A claim was filed on the last day of the limitation period in order to keep the case active.
- Not all parties were served with the document, and those that were served may have been served improperly.
- The defendants applied for the case to be struck out.

*Held*

- The rules require prompt service.
- There was no explanation for the delays in service.
- Therefore the case would be struck out for delay in service.
- However rule 1.5 requires that, where a party intends to apply to strike out a claim for delayed service, they must apply to the court before taking any other step.
- The applicants served a notice requiring more information and a statement of defence.
- Therefore, as the defendant took other actions, the case is not struck out and can proceed.

## *VII Statements*

### *A Statements of Claim*

#### *1 Lyn Stevens and Andrew Beck “Pre-Trial Issues – Civil”*

- The lawyer needs to have a proper understanding of the client’s position to advise in the best possible way.
- Careful records must be made of all instructions received in case conflict arises at a later stage.
- Preparation is a key step.
- Always try to get a written, signed, sworn affidavit.
- Once all factual inquiries have been made, a summary of relevant facts should be written up.
- Advise your client on the chances of success.
  - o There can be cases where not going to trial, even if the prospect of winning is good, or taking a lesser settlement offer is in your client’s best interest.
- Pleadings should be accurate, clear and intelligible.
- Anticipate and address the broad legal issues.
- Plaintiffs should make their pleadings broad enough to include all potential relevant evidence.
  - o It should contain all relevant detail and anticipate the defendant’s likely counter-arguments.
- Defendant’s pleadings should attempt to pin the plaintiff to make their arguments as narrow as possible, giving the defendant the least amount possible to plead.
  - o Also look for other defendants who the plaintiff could sue in order to make it more costly for the plaintiff.
- Do not take a scattergun approach.
- Don’t include evidence, simply state what your case relies upon, the evidence will come out at trial.
- Ensure your client understands the full scope and nature of the judicial process and their rights.
- The defendant must consider whether to admit or deny each allegation, and answer the point in substance.
- Argue any substantive defences.
- Consider matters of jurisdiction, correct registry, strike-out applications, etc.
- Neither party can add a new cause of action that falls outside the period in the Limitations Act.
- Summary of the article on page 149.

#### *2 David Goddard “Drafting Better Court Documents”*

- Ask why you are writing this particular document and what purpose does it serve.

#### *3 High Court Rules*

- 5.23: Gives the requirements of a notice of proceeding.
- 5.26: Gives the requirements for a statement of claim.

#### *4 Anthony Morris QC “Seven Deadly Sins of Pleading”*

- Pleading conclusions while setting them out as “particulars”.
- Using the subheading “particulars”.
  - o Contentious, Daniel disagrees.
- “Admitting” allegations which are not pleaded.
- The expression “at all material times”.

- Pleading documents.
- The expression “repeats and relies upon”.
- Numbering of paragraphs.

## 5 *Thomson v Westpac [1986] HC*

Eichelbaum J

### *Facts*

- The defendant applied for an order that the plaintiff file a more specific statement of claim.
- The overarching case is over negligent loans. Thomson alleges that Westpac loaned him money negligently, knowing he would be unable to pay it back.
- Application made under rule 38(2) (now rule 5.21).
- Claimed that Westpac’s statement of claim was nebulous and unclear.
- Westpac filed an amended statement, but the defendants claimed that statement was also insufficiently detailed.

### *Held*

- The function of a statement of claim is to clarify and define the issues for the court and opposite party.
- Held that the statement does indeed infringe on the modern rule 5.17. Reasons are given:
  - o The statement contains numerous lengthy, diffuse narratives. It is insufficiently direct.
  - o It pleads matters of evidence and quotes documents in full.
  - o Contains irrelevant information and are, in the technical sense “embarrassing”.
    - This means it would force the disclosure of sensitive personal matters without just cause.
  - o There are insufficient particulars given.
  - o Several causes of action are not stated separately and clearly. Separate causes of action must be listed separately and identified clearly.
  - o It is unclear which allegations are relevant to which defendant.
  - o Relief is not clearly spelt out.
  - o Matters of evidence are improperly set out and argued at this stage.
- A new statement of claim was ordered.
- Statements of claim should follow a format;
  - o General facts, followed by specific facts under a heading showing the additional facts are relevant to only one cause of action.
  - o The remark should be addressed towards the elements of the statement of claim.
- Rule 5.26: Statement of claim must show the nature of the claim.
  - o Lists requirements which must be made clear in a statement of claim.

## ***B Statement of Defence***

### 1 *Dougall & Co Ltd v Copeland [1981] HC*

Quillam J

### *Facts*

- Dougall is a finance company. It is trying to recover a mortgage from Copeland.
- Applying for a liquidated demand, the amount owed to Dougall is known exactly.



- Copeland argued that he has a pending claim against Dougall. Dougall is the nominee company of a law firm and Copeland is suing the solicitors for negligent advice.
- Copeland requested that this action should not proceed while an appeal remains to be heard on a prior matter.
- Dougall has applied for summary judgment.

*Held*

- The statement of defence was evasive.
  - o It did not contain any substantive points, only a denial of the claims outlined in the statement of claim.
- The court must consider whether granting or not granting a stay will be injurious to either party. In this case, it was not.
- The rule in question was current rule 5.48.
- The motion for a stay is declined, the statement of defence was sent back to the defendant for them to amend and send back.

2 *Walker v Bennet* [2009] HC

Miller J

*Facts*

- Plaintiffs seek a strike out application on the grounds that the defendant's statement of defence is evasive and does not plead to particulars in the statement of claim.
- Defendants argued that there was no need to use the specific heading of particulars.

*Held*

- Defendants are not required to plead to the particulars in the statement of claim.
- They need only respond to the allegations of material facts, not the ones under the heading of particulars.

3 *Writing Statements of Defence*

- A point is admitted when it is not responded to or explicitly admitted.
- Accompany any denial with an argument from your client's perspective.
  - o Admit what you can admit.
  - o Deny the rest.
  - o Add anything helpful.
- An affirmative defence is where there are separate reasons to deny the plaintiff's claim.
  - o Examples: Limitation provision, unconscionable bargain etc.
  - o Goes before a counter-claim.
- Counter-claim: A denial which includes allegations around the plaintiff having committed a wrong.
- Rule 5.53: A defendant must file a statement of counterclaim.
- 5.54: Takes the same form as all other forms but must be headed up 'counterclaim'.
- 5.55: Must be filed in court and served on the plaintiff.
- 5.56: A plaintiff must file and serve a statement of defence.
- 5.62: If a statement of defence asserts an affirmative defence, the plaintiff must respond to it within 10 working days.
  - o If an affirmative defence is not denied, it is treated as being admitted.

4 *Young v De Lautour Partners* [1992] HC

Doogue J

*Facts*

- The defendants applied during the trial to amend their statements of defence and counterclaim.
- New evidence came out during the trial that an employee stole some product under cross-examination.

*Held*

- Pleadings can be amended pre-trial under rule 7.77.
- This is subject to rule 7.7.
  - o 7.7: No statement of defence or amended pleading can be filed after the close of pleadings date without leave.
- Amendments can be made to a statement of defence throughout the trial.
  - o The issues only arose during cross-examination, it would therefore be contrary to the interests of justice if the defendant was not allowed to raise them during the course of the trial.
  - o Weight was put on the fact that the amendment would solely be for the purposes of clarification.
- Leave to amend the counterclaim was declined as it was only a clarification of an earlier point and would give rise to issues to which the plaintiff would have a valid cause to call an adjournment or retrial to address.

## VIII *Joining Parties*

### A *High Court Rules: Part 4*

- 4.1: There is no numerical limit on parties. But they must be limited to persons whose presence before the court is necessary to determine the issues arising and persons who ought to be bound by the judgment.
- 4.2: Persons may be joined jointly, severally, or in the alternative as plaintiffs.
  - o (2) A defendant may apply to have the court consider whether a joinder may prejudice or delay the hearing.
- 4.3: Persons may be joined jointly, individually, or in the alternative as defendants.
  - o (2) It is not necessary for every defendant to be interested in all relief claimed or every course of action.
- 4.4: A defendant can add a third party with notice if the defendant claims a number of things listed under the rule.
- 4.8: On an application seeking leave to serve a third, fourth, or subsequent party notice, and the court must have regard to all relevant circumstances, including delay to the plaintiff.
  - (2) On making an application, the court may grant or refuse leave, or grant leave on just terms.
- 4.11: A third party notice must be filed in the court with a statement of the defendant's claim against the third party.
- 4.13: The defendant must serve the third party notice on the plaintiff within 25 working days.
- 4.16: A third party may apply to the court to have a third party notice set aside.
- 4.56: A Judge may order at any point that a party be struck out or joined because;
  - (a) The name of the party to be struck out was because the party was improperly mistakenly joined; or
  - (b) The name of a person be added as a plaintiff or defendant because-
    - (i) The person ought to have been joined; or
    - (ii) The person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.

### B *Case Law*

#### 1 *Paccar Inc v Four Ways Trucking Inc* [1995] HC

##### *Facts*

- Parallel importing case, where the plaintiffs (truck manufacturers) were bringing a claim against the defendants alleging they were parallel importing trucks in breach of copyright.
- Defendant said they're not the only party doing this and sought to join other defendants to the proceedings.

##### *Held*

- The purpose of allowing third parties to be joined is to ensure justice can be done. Third parties should therefore be added when it would be impossible to do justice between the existing parties without the joinder.
- There was no evidence the plaintiffs have any proof against the additional defendants.
- This is an ambitious attempt by the defendant to make the plaintiff sue someone else.
- There is a presumption that the plaintiff can sue whoever they wish. There needs to be sufficient amounts of evidence to displace that presumption which is not present in this case.

#### 2 *Smith v Noble Investments Ltd* [2017] HC

Associate Judge Osborne

##### *Facts*

- Smith filed an amended statement of claim attempting to add Gold Band finance and other defendants.
- These parties argued that filing an emended statement of claim is not enough to add parties.

- Smith submitted that they are allowed to add parties as one of nine causes of action relates to this party.

*Held*

- Rules 4.1-4.3 set out the principles guiding when a party can be added to the proceedings.
- The rules did not give the plaintiffs the right to add parties as they wished.
- They instead had to apply to the court for permission to add additional parties to the proceeding.
- Under rule 1.8, parties can be joined by consent after the commencement of proceedings and the court can then make a formal order of joinder recognising that consent.
  - o This order is still discretionary, the court does not have to recognise the parties consent to be joined.
- Rule 1.2 requires that the court's objective must be the just, speedy and inexpensive determination of issues.
- To that end, joining the parties will avoid undue delay and expense without unfairly prejudicing anyone's interests.

3 *EAW Trust v Papworth* [2008] CA

Harrison J

*Facts*

- The trustees of the EAW trust own a residential property in Raglan.
- They bought the house and discovered it was leaky.
- Mr Bryce was engaged by the original owners to build the house and is joined as a third party.
- The Sayer family trust sold the house to the EAW trust.
- The Sayer family trust had previously bought the property from Mr and Mrs Papworth.
- Mr Sayer then separated and entered a relationship with Ms Elizabeth Woodgate.
- Mr Bryce attempted to join Mr Sayer as a defendant.

*Held*

- The third party process is not designed to test speculative claims.
- There is no evidence to suggest that Mr Sayer has breached a duty or was even aware of the defects with the property.
- Rule 5.56 was therefore applied to strike out Mr Bryce's claim against Mr Sayer.
- The third party notice is set aside.
  - o Under 4.16 the Court can set aside the notice if it's done without leave of the court.
  - o The claim never should have been pleaded and there was no right to recourse.

4 *Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* [2009] CA

Robertson J

*Facts*

- Warin claimed to have received title for Maori land. He tried to get the title registered through the Maori Land Court process.
- Warin brought a High Court proceeding and gets an order that the land be transferred to him.
- An amicus curiae was appointed to represent the owners of the Maori land who were not parties.
- After the Court decided in Warrins favour, the amicus sought to appeal the judgement.

*Held*

- An amicus is not a party to the proceeding, they are appointed to assist the court.

- Amici are not actually parties in the proceeding and therefore they do not have the same rights as parties would. They have no right of appeal.
- The court does not have the power to add parties to a proceeding in order to allow it to initiate an appeal.
- The rights of an amicus in a proceeding expires at judgment.

5 *Enza Ltd v Apple and Pear Export Permits Committee* [2001] HC

Doogue J

*Facts*

- Application from the Attorney-General for leave to intervene in reliance on 4.27(e).
- Argued that the proceedings relate to the apple and pear industry which is a significant part of the New Zealand economy and therefore there are strong public policy and interest reasons to allow the Crown to intervene and ensure these interests are properly reflected.

*Held*

- Public interest should be given a wide interpretation.
- In this case, it would be appropriate for the Attorney-General to intervene due to the public interest concerns.
- However it is not necessary for the Attorney-General to be made a defendant.
- It is more appropriate for the Attorney-General to be served with the relevant materials and treated as an intervener, allowing her to make submissions on relevant areas of law.

## *IX Interlocutory Applications*

### **A Introduction**

- Interlocutory applications include every application made from the start of proceeding to the end.
- Aim is to work towards the relief sought in the statement of claim.
- They can be divided into protective applications and procedural applications.
  - o Protective applications: Negative or positive orders for parties to do or stop doing something outside the court.
  - o Procedural: Orders about how the proceeding will be dealt with.

### **B High Court Rules**

- Part 7 Subpart 2: Interlocutory applications and interlocutory orders:
- 7.19: An interlocutory application must;
  - o (a) state the relief sought and the grounds justifying that relief; and
  - o (b) refer to any particular enactments or principles of law or judicial decisions on which the applicant relies.
- 7.20: Affidavit must be filed with the application.
- 7.22: It must promptly be served on every party.
- 7.23: Governs ex parte applications.
  - o (2) Lists the only acceptable grounds on which an application without notice is acceptable.
  - o (3) If the application is likely to be contested if it were made on notice, the applicant must file a memorandum which sets out all relevant information and all possible arguments both for and against the application.
- 7.24: If the application is to be opposed, the respondent must file a notice of opposition on all other parties.
- 7.39: The applicant must file a synopsis of their arguments on every other party.
  - o (6) lists what needs to be included.
- 7.40: If a party fails to attend, the Judge may determine the application, adjourn the application, or strike it out.
- 7.41: Some applications can be heard orally at a hearing.
- 7.44: A judge may make any interlocutory order deemed just, whether or not it has specifically been claimed.
- 7.46: The judge can determine the application can be dealt with without notice for the reasons given under (3).
- 7.48: The interlocutory order can be enforced through any means by which the Judge thinks just.
  - o Ranges from striking out a proceeding to sending a party to jail.
- 7.49: An interlocutory order can be rescinded or varied if it is shown to be wrong.
- 7.53: An application can be made after the commencement of the hearing for a proceeding.
  - o (2) The plaintiff may not make an application for an interlocutory injunction before the commencement of the proceeding unless in cases of urgency.
- 7.54: An applicant must file a signed undertaking that they will comply with any order for the payment of damages for damage sustained through the injunction.

## **C Case Law**

### **1 Lala v Preliminary Proceedings Committee [1993] HC**

Penlington J

#### *Facts*

- Lala is a doctor, being brought between the medical practitioners disciplinary committee.
- He applied for judicial review on the grounds that there had been a breach of natural justice.
- An application was made ex parte application for an injunction setting a later date for the proceeding due to matters proceeding in the High Court.

#### *Held*

- The “*Pickwick*” procedure requires ex parte applicants to fully disclose all information, for and against your claim, to the court.
- As a matter of courtesy, the other side should be informed when an ex parte application is made.
- A solicitor is under a duty to make full and frank disclosure of all matters, both for and against the plaintiff.
- The injunction was granted in the morning then rescinded in the afternoon based on breach of the *Pickwick* procedure.

### **2 National Commercial Bank Jamaica Ltd v Olint Corpn Ltd [2009] PC**

Lord Hoffmann

#### *Facts*

- The National Commercial Bank of Jamaica wanted to de-account a client who they feared was engaged in criminal activity.
- The Olint Corporation applied for an injunction to prevent this from happening.
  - o They did not give any notice, formal or informal, to the Bank that they were doing this.

#### *Held*

- A judge should not uphold an application for an injunction where no notice has been given unless giving notice would enable the defendant to take action to defeat the purpose of the injunction or if there is no time to give notice before the defendant’s act frustrating the purpose of the injunction would be carried out.
  - o The cases where notice is not required are very rare.
- The court should take whichever course of action is most likely to cause the least irredeemable damage to a party.

### **3 Love v Thwaites [2014] CA (Victoria)**

Warren CJ

#### *Facts*

- An injunction was granted preventing a corporation demolishing Love’s house.
- Mr Love gave an undertaking as to damages.
- He then lost the trial.

#### *Held*

- Mr Love had the opportunity to consent to the discharge of the injunction which advised that continuing the injunction would led to an increased amount of damages.
- As the injunction is responsible for the loss incurred by the construction company, Mr Love is responsible for the full amount.
- This amount totals approximately \$5.8 million.

#### 4 *Brash v Doe* [2006] HC

Mackenzie J

##### *Facts*

- Don Brash believed his computer was hacked and his emails were stolen.
- He did not know the identity of the hackers.
- He applied for an injunction to prevent the emails being published in any way.

##### *Held*

- The injunction was granted.
- It is not a barrier to an injunction that the defendants are not known, the injunction can attach to the information itself.

#### 5 *Slater v APN NZ* [2014] HC

Fogarty J

##### *Facts*

- Someone accessed Slater's email or Facebook accounts.
- He sought an injunction preventing any media outlet using any of the information.

##### *Held*

- There was a serious risk that the plaintiff's interests would be prejudiced if the information was published.
- He had an arguable case around issues such as breach of privacy, intrusion into seclusion etc.
- Again, no issue over the hackers not being known, the injunction can restrain usage of the information.
- The injunction was granted.

#### 6 *Earthquake Commission v Kriegar* [2013] HC

Collins J

##### *Facts*

- Kriegar took a spreadsheet which had the personal information of thousands of applicants for insurance after the Canterbury earthquake. It contained information about the likelihood of their claims succeeding and how the claims were being treated.
- Kriegar leaked this spreadsheet.
  - o The party who gave the spreadsheet to Kriegar was unknown.
- The EQC wanted any publication of the spreadsheet stopped.
- They sought a permanent injunction preventing further disclosure of the spreadsheet.

##### *Held*

- By leaking the spreadsheet, Kriegar breached confidence.
- The EQC is essentially a part of the central government due to it being overseen by the executive and its functions being at the discretion of the minister.
- However the information contained within the spreadsheet is genuine commercial information.
  - o It also includes the personal and private information of a number of individuals.
- The information is not relating to government matters.
- The interest of the EQC and wider public have in keeping the information in the spreadsheet confidential outweighs the public interest in the information.
- Not granting damages would likely incentivise this sort of leaking.



- If the information has already been widely disseminated and an injunction would serve no real purpose, it should not be granted for the sake of it. However, this is not one of those cases.
- The permanent injunction was continued.
  - o Largely based on the concerns around individual privacy.

## *X Application for Interlocutory Orders*

### **A High Court Rules**

- The rules do not provide a lot of guidance on how to actually get an injunction.
- They only describe when and how to apply.

### **B Case Law**

#### *1 Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] HC*

Davison CJ

##### *Facts*

- Case on copyright infringement.
- Since 1979, Klissers has marketed their bread in polythene bags with a check pattern, tied at one end to produce a ponytail tassel.
- In 1985, the defendant started marketing white bread in bags featuring check patterns tied at one end.
- Klisser sued for passing off and breach of copyright.
- Applied for interim injunctions to prevent the defendant continuing to market their bread in this way.

##### *Held*

- The granting of an interim injunction is a discretionary exercise.
- There is a two stage test to an interim injunction:
  - o 1. Is there a serious question to be tried?
    - Only requires that the plaintiff may have a real chance of success in trial.
  - o 2. Assess the balance of convenience.
    - Ask whether the harm is possible to be compensated through damages.
    - Injunction is a serious action and should not be taken lightly.
  - o Overall question is where the overall interests of justice lies.
- There were serious questions of law to be tried on the copyright issue.
- There was also an arguable case on the passing off issue.
- The defendants argued that granting an injunction would force them to concede to the plaintiff's claim.
  - o But plaintiff had 65% of their packaging in these packages, only 5% of defendants.
  - o Defendants were knowingly testing the extent of the plaintiff's rights. They overstepped and must suffer the consequences.
- It would be possible for the defendant to flood the market with their packaging before trial if the injunction is not granted, interfering further with the plaintiff's rights.
- Injunction granted.

##### *Appeal*

Cooke J

- The serious question to be tried issue is not so high a threshold as whether they had a prima facie case.
- There is a question to be tried on these issues.
- Defendants offered a series of undertakings stating the defendant would not try to increase their market share if the injunction is lifted.
- The serious case to be tried is a low threshold.
- Therefore the balance of convenience test is a high threshold.

- At the end of proceedings, the judge should “stand back” and ensure that justice has been done.
- It would not be unduly arduous for the defendant to slightly change these bags.
- Appeal dismissed, injunctions continued.

## 2 *Internet Traders Ltd v Williams* [2014] HC

Heath J

*Facts*

- Mr Heale was a pharmacist, Ms Williams was a business woman.
- They set up an export business for medical supplies which would be done over the internet.
- Two businesses were created, Internet Traders Ltd and IT Pharmaceutical Supplies Ltd. Both parties were directors of both companies.
- Ms Williams resigned.
- Evidence that Ms Williams was intending to poach clients, steal corporate opportunities and compete with the businesses.
- The companies and Mr Heale seek an injunction to prevent Ms Williams from carrying on business in competition.

*Held*

- There is clear evidence of Ms Williams attempting to poach clients.
- There is a seriously arguable case that Ms Williams breached her fiduciary duties in using IT Pharmaceutical’s business contacts as a springboard for her own interests.
- Since Ms Williams left, the businesses have suffered a significant downturn of income.
- But it is unlikely any injunction would improve the businesses’ position.
- Ms Williams has assets which could be used to pay damages.
- The balance of convenience, and the overall interests of justice are in favour of Ms Williams.
- Therefore there is no injunction granted.

## 3 *Safe Kids v McNeill* [2010] HC

Asher J

*Facts*

- Essentially the same issue as in *Internet Traders*.
- Mrs McNeill was the master franchise owner with the plaintiff.
- She then split off from Safe Kids, with it being run by Mrs Engelbrecht and Mrs Parsons.
- Mrs McNeill proceeded to set up her own business.
- Safe Kids alleged that Mrs McNeill breached her supervision orders and was misusing confidential information.
- They sought an injunction.
- The franchise agreement contained arbitration clauses.

*Held*

- The arbitration clauses trigger the Arbitration Amendment Act 2007.
- Therefore the injunction application is not dealt with under the *Klissers* test.
- Art 9 of the Arbitration Amendment Act proves that;
  - o (1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure.
  - o (2) For the purposes of paragraph (1), the High Court or a District Court has the same powers as an arbitral tribunal to grant an interim measure.

- Article 17 sets out the arbitral test:
  - o 17A: Unless otherwise agreed, the arbitral tribunal may grant an interim measure.
  - o 17B: Conditions for granting interim measure
    - (1) If an interim measure of the kind described in subparagraph (a), (b) or (c) of the definition is requisition, an application must satisfy the arbitral tribunal that –
      - (a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and
      - (b) The harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and
      - (c) There is a reasonable possibility that the applicant will succeed on the merits of the claim.
- Issue on the meaning of ‘status quo’.
  - o It is an inherently flexible term.
  - o It can be the point of time prior to the proceedings, prior to the conduct complained of, the time of the issue, or even a point in the future.
- A “reasonable possibility” that the applicant will succeed at trial is akin to the “serious question to be tried” requirement.
  - o It is not a higher threshold.
- The only matters to be considered are those listed under art 17B.
- Art 17B(1)(a)-(b) are essentially balance of convenience tests.
- The plaintiffs harm could be adequately reparable by an award of damages.
- The balance of convenience favours the defendants.
- The application for interim injunctions are declined.

#### 4 *Carlton & United Breweries Ltd v Minister of Customs* [1986] CA

Cooke, McMullin, Somers and Richardson JJ

##### *Facts*

- Carlton Breweries were flooding the market with Fosters Beer.
- The Brewers Association lodged a complaint with the Comptroller of Customs that Carlton was dumping beer on the New Zealand market.
- The Minister of Customs imposed a dumping duty on Fosters beer.
- Carlton applied for judicial review, in the meantime applied for an injunction that the dumping duty not be applied.
  - o Their argument was based on the Minister of Customs miscalculating the duty as too high.
- The trial judge granted the injunction following the *Klissers* test.

##### *Held*

- Judicial review imports a somewhat different context.
- The old s 8 of the Judicature Amendment Act 1972 gave the test for an interim order in a review case.
  - o Modern version is Judicial Review Procedure Act 2016, s 15.
- A judicial review context imports a higher requirement for stage one of the test, the plaintiff must demonstrate a prima facie case.
  - o This is not a permanent requirement to all judicial review matters. Instead the plaintiff needs to show that the granting of the order is reasonably necessary, which may require the showing of a prima facie case.

- It is a balancing test of all relevant considerations which must be considered before granting interim relief, including whether it would frustrate government purposes etc.
- The injunctions were upheld.

## 5 *Kennedy v Boyle* [2015] HC

Dunningham J

### *Facts*

- Two schoolboys were banned by St Bede's College from attending the Maadi Cup rowing regatta.
- The boys were not interviewed by the Rector, nor were parents consulted before the ban was put in place.
- The parents of the two boys applied for an injunction of the Rector's order and allow the boys to row.

### *Held*

- Section 76 of the Education Act provides that schools must comply with any enactment or the general law, which means that any disciplinary action had to be exercised reasonably, fairly, and taking into account the rights of the applicants.
- There is a serious question to be tried on whether the school breached natural justice in the proceeding and whether they took all relevant factors into consideration such as the impact on other team members.
- The balance of convenience also heavily favours the plaintiff.
  - o The impact on the team and on the boys' chances of being selected for representative teams is a serious effect.
  - o The school can impose other disciplinary measures after the regatta.
  - o The damage to the plaintiffs could not be compensated in any other way.
- The injunction was granted.

### *Comments*

- Bizarre decision.
- Applied the normal injunction test in a judicial review proceeding, which should not have been the case.
  - o If the higher threshold had been applied, it is unlikely that the plaintiffs would have a prima facie case.

## 6 *TV3 v Fahey* [1998] CA

Richardson P

### *Facts*

- Dr Fahey was running for Mayor of Christchurch.
- TV3 aired a programme which accused Dr Fahey of sexual misconduct.
- A number of women subsequently contacted TV3 alleging sexual misconduct.
- TV3 sent in an ex-patent equipped with a hidden camera and confronted Dr Fahey about her alleged sexual abuse, they intended to air this video.
- Dr Fahey applied for an injunction to prevent this video being shown.
- TV3 argued this is a case on freedom of expression, which requires a higher threshold for the injunction to be granted.

### *Held*

- The High Court applied the *Klissers* test.
- This was incorrect. In a case involving the restraint of freedom of expression, a higher threshold test is required.

- Restraining the publication of potentially defamatory material can only be done if there are exceptional circumstances which mean the plaintiff cannot be compensated in damages.
- The test is whether there are “clear and compelling reasons” which warrant the restriction of the publication, making this situation more serious than the standard defamation case.
- The motives of the defendant must be considered.
  - o Malice may make an injunction more likely, however integrity will make the injunction less likely to be granted.
- The public interest in receiving the information must be made a relevant consideration.
  - o Dr Fahey is a public figure and doctor, and he is accused of sexual impropriety with his patients.
  - o These are serious allegations.
- The lawfulness or unlawfulness in the ways in which the information is collected is a relevant, but not determinative, factor.
- The impact on freedom of expression and public interest outweighs the harm of Dr Fahey’s reputation. An action in trespass and defamation will enable Dr Fahey to recover, this case is not exceptional.
- Injunction refused.
- Leave to appeal to the Privy Council refused.

7 *Donald v Ntuli (Guardian News & Media Ltd Intervening)* [2010] UKCA

Maurice Kay LJ

*Facts*

- The plaintiff is a successful musical who had a relationship with the defendant.
- He obtained an interim “super-injunction” preventing any details of the case being released.
- The injunction was later modified to allow disclosure and discussion of any information already in the public domain, but restraining any discussion of sexual or identifying information.
- The defendant appealed.

*Held*

- There was no real chance of any serious damage to Donald as a result of disclosure.
- Cross appeal was made under the Human Rights Act 1998 alleging an infringement on the right to privacy.
- Any protection imposed should be the least restrictive measure possible in the circumstances.
- There was no significant risk that lifting the injunction would have serious or irreparable consequences on Donald’s private life.
- Continued anonymity was not necessary in the circumstances.
- Appeal allowed in regards to the anonymity requirements of the super-injunction and the anonymity requirements.

# *XI Undertakings for Damages, Freezing Orders, Ancillary Orders and Search Orders*

## *A Undertakings for Damages*

### *1 High Court Rules*

- 7.54: An applicant for an interlocutory injunction must file a signed undertaking that they will comply with any order for the payment of damages to compensate the other party for any damage sustained through the injunction.
- 7.55: Preservation of property
  - o (1) A Judge may order, subject to conditions, for the detention, custody, or preservation of any property.
  - o (2) An order may authorise a person to enter any land or do any other thing for the purpose of giving effects to the order.
  - o (3) The Judge may order that a fund be paid into court or otherwise secured if the proceeding concerns the right of a party to the fund.

### *2 Case Law*

#### *Silk Water Ltd v Mama's Soup Kitchen Ltd [2010] HC*

Fogarty J

#### *Facts*

- Silk Water is in liquidation.
- The plaintiff purchased property from Mama's Soup Kitchen for \$8.5m.
- Silk Water have paid a total of \$6.5m to date. They are now insolvent and cannot pay any more.
- Defendant said they will refund the money paid and then sell the property to someone else.
- Silk Water didn't want the property sold on at that point. They applied for an order that the money from the sale be paid into the court under rule 5.55(3).

#### *Held*

- The question turns on what rights the plaintiff has to the money.
- An order is not granted just because the plaintiff has a good claim to it. It needs to be shown that the property is at risk of being disposed of or the defendant may not be able to pay.
- The plaintiff does have a right to be paid back from the proceeds of the sale. This test conveys jurisdiction under r 7.55(3).
- Next part of the test is whether the judge should exercise their discretion to make the order.
- Makes a preservation of property order over the money.
- There is no reason to make an order for undertakings of damages.
- Advises the parties to settle the matter as quickly as possible.

## **B Freezing Orders**

### **1 High Court Rules**

- Dealt with under part 32.
- 32.2: Freezing order
  - o (1) Can be made with or without notice.
  - o (2) A freezing order may restrain a respondent from removing any assets located in or outside New Zealand or from disposing of, dealing with, or diminishing the value of, those assets.
  - o (3) An applicant for a freezing order without notice must inform the court of all arguments for and against their position.
  - o (5) Requires an undertaking for damages be filed.
- 32.4: Respondent doesn't need to be a party to the proceeding.
- 32.5: Order against judgment debtor or prospective judgment debtor or third party
  - o (1) The rule applies when judgment has already been given in favour of the applicant or if the applicant has a good arguable case.
  - o (4) A freezing order or ancillary order can be made against a judgment debtor or prospective judgment debtor if the court is satisfied in the circumstances that;
    - (a) The real or prospective judgment debtor might abscond; or
    - (b) They might move the assets or dispose of them or cause them to be diminished in value.
  - o (5) An order can be made against someone other than the judgment debtor if the court is satisfied that;
    - (a) There is a danger the judgement will be wholly or partially unsatisfied because
      - (i) The third party has powers over the assets; or
      - (ii) The third party has powers over the assets of the judgment debtor.
- 32.6: Form and further terms of freezing order.
  - o (3) The freezing order must not prohibit the respondent from paying living costs, legal expenses, or continuing their good faith business ventures.
  - o (4) Applicant must give appropriate undertakings, including an undertaking as to damages, unless there are special circumstances.
- 32.7: A freezing order must have an end date as early as practicable after the freezing order is made.
  - o (3) The onus is on the applicant to prove the freezing order should be continued.

### **2 Case Law**

*Oaks Hotels v Body Corporate 358851 [2013] HC*

Asher J

#### *Facts*

- Case about the Canterbury earthquake.
- Oaks Hotels sought a freezing order to prevent the Body Corporate from dealing with certain insurance proceeds.
- Oaks managed resort rooms owned by individual title holders who are represented by the Body Corporate.
  - o The plaintiff leased the rooms.
- Oaks wants to repair the rooms and continue to run the hotel. The Body Corporate wants to sell the rooms to the Crown at the price offered under the Earthquake Recovery Act.
- Oaks alleges the Body Corporate must undertake the repairs and seeks a freezing order preventing the insurance money being distributed to the unit title holders.



### *Held*

- There is little doubt that Oaks would not be able to recover a judgment debt, if necessary the Body Corporate could be put in receivership and receivers would pursue the individual unit title holders for their small part of the debt.
- Nefarious intent is not required.
- All rule 32.5 requires is that, in consideration of all the circumstances, there is a real risk the judgement will be wholly or partly unsatisfied.
- Freezing orders are not designed to provide the plaintiff with pre-judgment security.
- Rule 32.6(3)(c) limits the court's jurisdiction as it requires the plaintiff be able to continue to deal with their assets in good faith business.
- There is no risk the judgment debt would not be able to be satisfied.
- The Body Corporate paying the money to the title holders is a perfectly normal step in the course of business.
- Enforcement may be inconvenient, but that is not enough.
- The test is essentially whether the actions of the defendant are or are not reasonable in the course of their business.
- Freezing order not granted.

### *Hannay v Mount [2011] CA*

Stevens J

#### *Facts*

- Plaintiffs are investors who engaged the defendants as investment advisors and financial consultants.
- The defendants have been criminally charged for dishonesty offences, including some against many of the defendants.
- Allegations that the directors are keeping money from the investors and were misstating the amount of money that they had already claimed.
- Investors trying to get a freezing order over the remainder of the money and the assets.

#### *Held*

- The requisite standard for a freezing order to be granted is a good arguable case. This requires an approximately 40-50% chance of success to be demonstrated. It is a higher requirement than a serious question but less than a prima facie case.
- This is shown based on the prior litigation, the Mount's conduct and the criminal charges.
- There is a risk of the assets being dissipated.
  - o The Mounts sold a beach house and cars and have been transferring money into their company which is not in the Mount's names.
- This is clear evidence of a risk of dissipation.
- Freezing order made.

### *Holyoake v Candy [2016] UKHC*

Nugee J

#### *Facts*

- The claimants applied for a notification order.
- They wanted the defendants to have to give the claimant's solicitors seven days' notice before engaging in any transaction of more than \$1m.

- Holyoake alleges the defendants engaged in a campaign of bullying and intimidation resulting in him having to sell the property at significant loss.

*Held*

- Due to the infringement on rights caused by a freezing order, a higher standard of proof is needed than for an interim injunction.
- The claimant needs to demonstrate a good arguable case.
  - o This does not necessarily mean a greater than 50% chance of success but it is a higher threshold than the capable of serious argument test.
- A court has the power to grant a notification injunction.
- This order is precautionary and can serve as a prelude to a freezing order.
- The entire jurisdiction of a freezing order is intended to prevent the disposition of assets rendering the enforcement of a potential judgment impossible. A notification order serves that purpose with less infringement on the respondent's rights.
- There still needs to be a risk of dissipation for a notification injunction to be made.
- The conduct in question must be unjustifiable.
- The use of offshore structures is not in itself giving rise to a risk of dissipation.
- Reputation is largely irrelevant.
- There is a real risk of dissipation of assets.
- Notification order made.

## ***C Types of Order and Variants***

### *1 Necessary Thresholds*

- Serious question to be tried.
  - o 30% chance of success.
  - o Threshold for an interim injunction.
- Good arguable case.
  - o 40-50% chance of success.
  - o Freezing order.
- Prima facie case.
  - o Threshold for an interim injunction in a judicial review proceeding.
  - o Judicial Review Procedure Act 2016 s 15.
- Strong prima facie case.
  - o High chance of success.
  - o *Anton Pillar* order.

### *2 Notification Injunction*

- Requires the appellants to be notified whenever the defendant tries to use their assets.
- The defendants cannot use their assets without the appellant's consent.
- Avoids the need for an undertaking as to damages.

### *3 Unless Order*

- Requires the party to act or face censure.
- Usual censure is case being dismissed etc.
- Can be enforced through contempt proceedings.

## **D Ancillary Orders**

### *1 High Court Rules*

- 32.3: Ancillary order
  - o (1) An ancillary order can be made in addition to a freezing order at the court's discretion.
  - o (2) Can be made for any purpose, including but not limited to;
    - (a) Getting information about the assets which the freezing order will apply to.
    - (b) Determining whether the order can be made.
    - (c) Appointing a receiver.

### *2 Case Law*

*Twentieth Century Fox v Dotcom* [2014] HC

Courtney J

#### *Facts*

- Application for an ancillary order to a freezing order already in place seeking more information.
- It appeared Dotcom had additional undisclosed assets.
- He has been funding the Internet Party and offering bounties for whistle-blowers.

#### *Held*

- These payments clearly show a potential for the assets to be dissipated.
- There is a good arguable case and the continued dissipation of assets may make Dotcom unable to comply with a judgment order.
- The ancillary order is made, ordering Dotcom to set out all his assets in full.

## ***E Anton Pillar Search Orders***

### *1 High Court Rules*

- 33.3: An order can only be made if the court is satisfied that:
  - o (a) An applicant has a strong prima facie case; and
  - o (b) The potential or actual loss or damage to the applicant will be serious if the order is not made; and
  - o (c) There is sufficient evidence in relation to a respondent that –
    - (i) The respondent possesses relevant evidentiary material; and
    - (ii) There is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.
- 33.5: Applicant must give undertakings to pay reasonable costs and disbursements and an undertaking for damages.
- 33.6: Gives the possible terms of the search order.
- 8.30: Use of documents
  - o (4) A party who obtains a document by way of inspection or who makes a copy of a document under this rule-
    - (a) May use that document or copy only for the purposes of the proceeding; and
    - (b) Except for the purposes of the proceeding, must not make it available to any other person (unless it has been read out in open court).

### *2 Case Law*

*Busby v Thorn EMI Video Programmes Ltd* [1984] CA

Cooke J

#### *Facts*

- Plaintiffs alleged the defendants were making pirated video copies of their movies.
- Applied and got a search order.
- Included terms making the defendants disclose a significant amount of information about their activities and the videotapes in their possession.
- A sizeable amount of videotapes and documents were seized by the plaintiffs.
- The defendants objected to provisions in the order requiring them to disclose some information, claiming it amounted to an order for them to incriminate themselves.

#### *Held*

- The search order jurisdiction should be exercised cautiously, it amounts to a serious infringement of the defendant's rights.
- The disclosure requirements of the search order would require the defendants exposing themselves to a very real risk of prosecution for conspiracy to defraud.
- Any information obtained through an Anton Pillar order which could incriminate the defendant should only be obtained for the purpose of the civil proceeding.
- It should only be obtained on the condition that it not be used to then criminally prosecute the defendant.
- An order was made that the information be inadmissible as evidence in a criminal proceeding.
- The plaintiffs were required to give undertakings that they would not use the information in a criminal proceeding, directly or indirectly.

## *XII Strike Out and Summary Judgment*

### **A High Court Rules**

#### *1 Part 12: Summary Judgment*

- Summary judgment involves demonstrating that the defendant's case is simply untenable, it cannot be proved.
- It's a less dramatic action than a strike out, while achieving the same result.
- It is not appropriate where there are contested material facts.
- It's argued on affidavit evidence.
- 12.2: Judgment when there is no defence or when no cause of action can succeed.
  - o (1) Summary judgment can be given against a defendant if the plaintiff satisfied the court that the defendant has no defence to a cause of action or to a particular part of any such cause of action.
  - o (2) The court may give summary judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.
- 12.3: The court can give summary judgment on liability and direct a damages hearing if the plaintiff satisfies the court that the only issue is about the amount claimed.
- 12.4: Interlocutory application for summary judgment.
  - o (1) Application for summary judgment must be made by interlocutory application.
  - o (2) An application can be made at the time the statement is served or later with leave.
  - o (2A) Deals with the Australian jurisdiction.
  - o (3) Same rule as (2) as relevant to the defendant.
  - o (4) Lists what must be included in the application.
  - o (5) Gives requirements for the affidavit.
- 12.9: Defendant who wishes to oppose a summary judgement must file an opposition form and an affidavit at least 3 days before the hearing.
  - o (3) If these documents are not filed, the party may not be heard.
- 12.11: Affidavits in reply can be filed by the applicant.

#### *2 Part 15: Disposal other than by trial*

##### *Subpart 1: Dismissal or stay without trial*

- 15.1: The court can dismiss all or part of a pleading if it:
  - o (a) Discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the proceeding; or
  - o (b) Is likely to cause prejudice or delay; or
  - o (c) Is frivolous or vexatious; or
  - o (d) Is otherwise an abuse of process of the court.
- 15.2: All or part of a proceeding can be dismissed if there is a lack of prosecution by the plaintiff or lack of defence by the defendant.

## **B Case Law**

### *1 Intelact Limited v Fonterra [2017] HC*

Venning J

#### *Facts*

- Fonterra was wrongfully using Intelact's trademarks.
- The parties went into mediation and reached a settlement.
- A clause of this settlement was that the parties would engage in good faith negotiation over toll manufacturing.
  - o Toll manufacturing is where a party with manufacturing facilities provides the service to a commercial customer at a discounted price.
- Intelact did not accept Fonterra's final offer for the toll manufacturing.
- Intelact sued Fonterra for breach of the toll manufacturing clause of the settlement agreement.
- Fonterra applied for strike out on the basis that the actions in tort were discharged in the settlement agreement and summary judgment on whether there could be a breach of the settlement agreement.

#### *Held*

- There are four key principles governing strike out applications:
  - o (a) Based on the assumption that the facts pleaded in the statement of claim are true.
  - o (b) The cause of action must be so clearly untenable that it cannot possibly succeed.
  - o (c) The jurisdiction is to be exercised sparingly and only in a clear case.
  - o (d) That the application may raise difficult questions of law and may require extensive argument does not exclude jurisdiction.
- The principles of summary judgment are:
  - o (a) The defendant must show to the civil standard that none of the plaintiffs' causes of action can succeed.
  - o (b) The court may take a robust and realistic approach to the evidence but must also be fair. The applicant must show there is no real counter-argument available.
  - o (c) Summary judgment will not be appropriate where defects identified by the application may be remedied by pleading amendment.
- Clause 8 of the settlement agreement only mandates the parties give their best efforts to address the toll manufacturing issue, it does not require that they reach a settlement.
- The plaintiffs are attempting to resurrect the dispute which was settled in the settlement agreement.
- The settlement was full and final, it has not been breached.
- Therefore Intelact does not have an arguable case to sue, their cause of action is struck out.
- Fonterra argued that the "best endeavours" "good faith" obligations of clause 8 are unenforceable. They cannot be enforced as there is no demonstrable certainty.
- The court agreed, due to the lack of any details in the section, no obligation for future endeavours, and no possible way to measure compliance, the section is void for uncertainty.
- Summary judgment granted for the defendant.

### *2 ANZ v Holt [2013] HC*

Associate Judge Bell

#### *Facts*

- ANZ is suing the Holts for unpaid loans against their farm.

- Holts allege that they had an arrangement with the bank that the bank would not pursue the outstanding amount after they sold their farm, plant, equipment and livestock.
  - o Point to a series of letters as evidence.
- The bank does not dispute this agreement, but they allege that the Holts did not comply.
  - o Based on the fact that the Holts did not provide a schedule of all livestock and do not believe all livestock have been sold and accounted for.
- ANZ applies for summary judgement.
- Note: Associate Judge Bell is known for looking out for the little guy.

*Held*

- To avoid a summary judgement, the respondent must show there is a reasonably arguable case.
- The letters between the parties formed a binding contract, whereby the Holts would sell all the above assets and in return the bank will not pursue them.
- The Holts breached their contract by not complying with the bank's request to have a schedule of all livestock and the relevant accounting information.
- This terms was essential to the bank.
  - o It was a key component of the sale and a crucial part of them reclaiming the money that they had lost.
- However, the contract did not make time of the essence. The onus is therefore on the bank to make time of the essence. It would be necessary to show time to be of the essence in order for the bank to be able to cancel the contract.
- To make time of the essence, a party must;
  - o (a) Give a reasonable time for compliance;
  - o (b) State with reasonable explicitness what must be done;
  - o (c) State that if it is not done within a time period, the party giving the notice will cancel.
- The bank's letter is ineffective as it does not give a reasonable time and does not give notice of cancellation.
- The bank did not make time of the essence, the Holts therefore have an arguable defence to the bank's claim, satisfying the threshold to resist a summary judgment.
- Application for summary judgement dismissed.



## *XIII Interim Payments and Interrogatories*

### **A High Court Rules**

#### *1 Interim Payments*

- Part 7, subpart 5.
- 7.68: Interim payment means a payment on account of any damages, debt, or other sum (excluding costs) that the defendant in a proceeding may be held liable to pay to, or for the benefit of, the plaintiff in that proceeding.
- 7.69: Application for interim payment.
  - o (1) The plaintiff may apply for an interim payment order.
  - o (2) An application must be supported by an affidavit giving reasons and documentary evidence.
  - o (3) Must be served on the defendant 10 days before the hearing date.
  - o Subsequent applications can be made if justified, even if a previous order has been made or refused.
- 7.70: Order for interim payment in respect of damages.
  - o (1) A judge may make an order if the judge is satisfied that:
    - (a) The defendant has admitted liability for the plaintiff's damages; or
    - (b) The plaintiff has a judgment against the defendant for damages to be assessed; or
    - (c) On a trial, the plaintiff would obtain judgment for substantial damages against the defendant.
  - o (2) The amount which can be ordered is whatever the judge thinks just.
  - o (3) The amount must not exceed a reasonable proportion of the damages the plaintiff is, in the opinion of the Judge, likely to recover after taking into account-
    - (a) Any relevant contributory negligence; and
    - (b) Any set-off, cross-claim, or counterclaim on which the defendant may be entitled to rely.
- 7.71: Can apply in respect of sums other than damages.
- 7.72: Outlines the method of payment, normally paid into court.
- 7.74: Cannot bring up an interim payment order at trial.

#### *2 Interrogatories*

- Part 8, subpart 2.
- 8.34: After a statement of defence has been filed, a party may serve on any party a notice requiring them to answer specified interrogatories relating to any matter in question.
- 8.35: A party must then answer the interrogatories within the period specified.
- 8.36: A judge may order that answers to the interrogatories are not required or they that they only need certain answers.
  - o (3) The judge must prevent unnecessary or oppressive interrogatories.
- 8.38: A judge may order any party to respond. Order can only be made if the judge is satisfied it's necessary at the time it is made.
  - o Order can be made for an answer to be through affidavit.
- 8.39: The answers must respond to the substance of the interrogatories without evasion or state why they object to answering.
- 8.40: Objection to answer;
  - o (1) A party may object to answer an interrogatory only on the following grounds:
    - (a) It does not relate to a matter in question.

- (b) It is vexatious or oppressive.
  - (c) That information being sought is privileged.
  - (d) The sole object of the interrogatory is to ascertain the names of witnesses.
- (2) It is not enough to object that an interrogatory will determine a substantial issue.
- (3) A judge may require the applicant to state on what grounds they object and determine the sufficiency of the objection.
- 8.42: If an answer is insufficient, the judge can order them to make a further answer by affidavit.
- 8.44: Answers can be entered into evidence.
- 8.45: An answer can be withheld if answering it would be injurious to the public interest.
- 8.47: A party who has served an interrogatory notice may serve a notice requiring another party to admit, for the purposes of the proceeding only, the facts specified in the notice.

## **B Case Law**

### *1 Eeles v Cobham Hire Services Ltd [2009] UKCA*

Smith LJ

#### *Facts*

- Eeles suffered a serious head injury as a nine-month old baby.
- He has serious cognitive disabilities.
- He will always require some supervision and care.
- The parents have received interim payments to date of \$450,000.
- They have decided they should buy Brightlingsea Hall which would be suitable. The costs of the property with renovations would be \$1.2m.
- They apply for that amount as an interim payment.
- Difficulty was that the quantum of the full award was not yet determined.

#### *Held*

- In awarding an interim payment of damages, the claimant must show that he has or would at trial obtain judgment for a substantial amount of money.
- The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.
- Judges are not required nor can they assess what the money will be spent on.
- However they must ensure that they are not creating an unreasonable status quo and must consider whether the award will best meet the claimant's needs.
- The purpose of interim payments is not to provide lump sums at the claimant's convenience. It is designed to fairly compensate and must never exceed the potential quantum of damages.
  - Held that the full quantum of damages could be as low as \$590,000.
  - The scarcity of large properties in Brightlingsea is not a sufficient reason to award the damages.
- Application for the \$1.2m declined.

### *2 Bank of New Zealand v Gardner [1990] HC*

Master Hansen

#### *Facts*

- The defendant served an interrogatory order to the plaintiff and seeks an order requiring them to answer.

- Plaintiff argues that the interrogatories do not have to be answered as they are unnecessary and the information they would will be given by witnesses during the trial.
- Transaction between Forsyth Barr and ANZ in dispute.

*Held*

- Just because a witness will give the information does not mean the interrogatory is unnecessary.
- Interrogatories can be used to get the other side to admit some of their evidence before trial.
- Fundamental requirement is that the interrogatories are relevant.
- Oppressive can mean highly inconvenient for the information to be found out. It can mean burdensome.
- It is not permissible if the sole purpose of the interrogatory is to adduce the name of a witness.

## *XIV Case Management*

### **A High Court Rules**

- Part 7, subpart 1.
- 7.1AA: Sets out how different types of proceedings are to be managed.
  - o There will be multiple case management conferences depending on the type and level of proceeding.
- 7.1: Proceedings subject of case management.
  - o (1) Purpose of case management is to promote the just, speedy and inexpensive determination of proceedings.
  - o (3) The purpose of a case management conference is to enable the Judge to assist the parties-
    - (a) To identify, define and refine the issues requiring judicial resolution; and
    - (b) To determine what steps need to be taken in order to prepare the proceeding for hearing or trial; and
    - (c) To decide how best to facilitate the conduct of the hearing or trial; and
    - (d) To ensure that the costs of the proceeding are proportionate to the subject matter of the proceeding.
- 7.2: Case management conferences can be held at any time, at the judge's initiatives or on the application of one of the parties.
- 7.3: Directs the parties on what must be discussed at each proceeding.
  - o (2)(a) links to schedule 5, which provides a list of matters to be discussed at each conference.
- 7.6: Allocation of key dates.
  - o The dates for hearing or trial are established at a case management conference when the judge believes the case can best be readied for hearing or trial.
- 7.7: No statement of defence, amended pleading or affidavit can be filed and no interlocutory application may be made after the close of pleadings date without leave.
- 7.8: The judge or registrar may order a pre-trial conference.
  - o (2) Any matter can be discussed, provides a list of potential topics.
    - (b) deals with the agreed bundle of documents which is the most important part of the proceeding.

### **B Main Changes to the Rules under the High Court Rules 2016 Amendment (No. 2) 2017 Act**

- 5.11(1)(b): Requires use of *te reo* in the heading on the statement of claim and counterclaim.
- 5.35A: A plainly abusive proceeding could be sent to a Judge for consideration under r 5.35B.
- 5.35B: (2) A Judge may make orders or give directions to ensure the proceeding is disposed of.
  - o (a) This can include the proceeding being struck out.
  - o Associate judges do not have this power.
- 6.8: Subject to both procedural and technical reform around substituted service, allows for the increased use of technology in service.
- 7.1AA: Now subject to a case management review. This may make the rule subject to a case management conference.
- 7.3(2): Memorandum addressing the matters listed must be filed no later than 15 working days after the filing of the statement of defence.
  - o (5) The memorandum is referred to the Registrar for the suitability to be checked.
  - o (6) If the Judge is satisfied, the trial date could be allocated immediately.

- 7.23: (2) Gives the categories on which a without notice application can be made.
- 9.7(2): Gives the requirements of all information which must be included on a witness brief.
- 9.52: Dictates the use of Form G25 for a subpoena.
- 9.85: Requires that an affidavit is sworn before a lawyer who has and appears to have full independence to this proceeding.

## *XV Discovery*

- The principle of discovery is that both parties should be on a level playing field when they come into court.
  - o Ensures the courts and the parties have the most information possible to ensure just and speedy determination of the issues.
  - o And ensures no one is ambushed.

### **A High Court Rules**

- 8.1: Interpretation
- 8.2: Co-operation
  - o (1) The parties must co-operate.
  - o (2) The parties must make a number of considerations which are designed to ensure efficiency throughout the discovery process.
- 8.3: As soon as a proceeding is reasonably contemplated, a party must take all reasonable steps to preserve documents that are likely to be discoverable.
- 8.4: Initial disclosure.
  - o (1) After filing a pleading, a party must serve a bundle consisting of all documents referred to in that pleading.
  - o (5) No privileged or confidential documents have to be disclosed.
  - o (8) Can be electronically or in hard form.
- 8.6: Discovery can be either standard or tailored.
- 8.7: Standard discovery is any documents which are documents;
  - o (a) On which the party relies; or
  - o (b) That adversely affect that party's own case; or
  - o (c) That adversely affect another party's case; or
  - o (d) That support another party's case.
- 8.8: Tailored discovery must be ordered when the interests of justice require an order involving more or less discovery than standard discovery would involve.
- 8.9: It is presumed that the interests of justice require tailored discovery in proceedings-
  - o (a) Where the costs of standard discovery would be disproportionately high in comparison with the matters at issue in the proceedings.
  - o (c) that involve one or more allegations of fraud or dishonesty; or
  - o (d)- (e) Where the value of sums or assets in issue exceeds \$2.5m.
  - o (f) Where the parties agree.
- 8.11: Outlines what the parties must do in preparation for the first case management. They must discuss discovery matters and endeavour to agree on the appropriate order.
  - o (1) No more than 10 working days before the first case management conference, the parties must discuss and endeavour to agree on an appropriate discovery order.
- 8.12: Gives lists of potential orders which may be made concerning discovery.
- 8.13: A solicitor must ensure that their client understands and fulfils their obligations.
- 8.14: A party may make a reasonable search for documents.
  - o (2) Gives a list of factors which affects what is reasonable in the circumstances.
- 8.17: Parties may apply for a variation of a discovery order.

- (2) Gives the test a Judge must consider before granting the order.
- 8.18: Discovery is a continuing obligation.
- 8.19: If it becomes apparent during a proceeding that it seems a party has not discovered a document which should be discovered, the judge can order the party to produce it or take other action.
- 8.22: Costs of discovery.
- 8.25: A party can challenge a claim made to privilege or confidentiality.
- 8.28: A party is not obligated to make privileged documents available for inspection.
- 8.31: If a document has failed to be included, it may only be produced with the consent of the other party or the leave of the court.
- 8.33: Every person who does not comply with a discovery order is guilty of contempt of court.

## **B Case Law**

### *1 Compagnie Financiere du Pacifique v Peruvian Guano Co [1882] UKCA*

#### *Facts*

- Contract between the parties for the supply of guano.
- The plaintiff alleged the contract had been breached and sued for specific performance.

#### *Held*

- Documents are material to the matters in question if it is not unreasonable to suppose that they contain information directly or indirectly relevant to the case in question.
- Every document which relates to the matter in question which not only would be evidence upon any issue but also which it is reasonable to suppose contains information which may either directly or indirectly enable a party to advance their case or damage the case of their opponent can be requested in discovery.
- This is called the *Peruvian Guano* Rule.

#### *Notes*

- This gives the relevance test, which is broad.
- But rule 8.7 replaces this test and substantially narrows the scope of discovery by restricting relevance to the documents listed in the rule.

### *2 Nisha v LSG Sky Chefs [2014] NZEmpC*

Chief Judge Colgan

#### *Facts*

- Deals with a disputed documents.
- Employment dispute. The plaintiff is an employee of the defendant.
- She claims shortly before she was transferred, the plaintiffs increased her salary and leave entitlements as part of a collective agreement with the union.
- The plaintiff sought access to all information held in relation to payroll matters and data logs of the usage of her swipe card and other digital records.
- This would require a search of the defendant's computer systems.
- Issue arose over to what degree such a search is or must be reasonable.

#### *Held*

- The High Court Rules are essential government rules in litigation.
- If tribunal rules are not enough, they can turn to the High Court Rules.

- Stresses the importance of proportionality. This cause is uneconomic.
- The infringement on the rights of the party being searched must be proportional to the potential benefit to the other party.
- Broad electronic searches are not required.
- The parties should co-operate, this is an essential part of the rules.
- The judge examined all the materials and gave the relevant search terms and described how the search should be conducted.

## **C Pre-Commencement Discovery**

### *1 High Court Rules*

- 8.20: Order for particular discovery before proceeding commenced.
  - o (1) This rule applies if it appears to a Judge that-
    - (a) The intending plaintiff may be entitled to claim relief against the intended defendant but that would be impossible or impracticable for the intending plaintiff to formulate their claim without reference to documents; and
    - (b) There are grounds to believe that the documents may be or may have been in the control of a person who may or may not be the intended defendant.
  - o (2) The Judge may, on application of the intending plaintiff, order the person-
    - (a) To file an affidavit stating-
      - (i) Whether the documents are or have been in the person's control; and
      - (ii) If they have been but are no longer in the person's control, the person's best knowledge and belief as to when the documents ceased to be in their control and who has them now; and
    - (b) Serve the affidavit on the intending plaintiff.
    - (c) If the documents are within their control, make them available for inspection under r 8.27.
  - o (3) An application under (2) must be an interlocutory application made on notice.
- This rule could be instigated by the filing of a draft statement of claims with the gaps for which the document is needed highlighted.
- The intending plaintiff would have to explain why they need the documents.
  - o They'd need to file an affidavit explaining the background to set out the case.
- The intending plaintiff would have to cover the reasonable costs of the preparation of this document.

### *2 Case Law*

*Norwich Pharamacal Co v Customs and Excise Commissioners* [1974] HL

Lord Kilbrandon, Lord Cross, Lord Reid, Viscount Dilhorne, Lord Morris (majority) Lord Denning MR, Buckley LJ; Lord Roskill (dissenting)

#### *Facts*

- The plaintiffs were importing a chemical.
- They understood that someone else was also importing the chemical, in breach of the plaintiff's rights, and possibly illegally.
  - o They sought the names and addresses of all people importing this chemical.
- Statute said that the Customs and Excise Commissioners couldn't release the information.



- Norwich therefore could not identify the defendant and sought discovery for an order that the list of people importing this chemical be released.

*Held*

- The minority argued that allowing disclosure would make importation more ambiguous and lead to people trying to hide what they were bringing in, giving rise to fraud and forgery.
- Public policy is an important factor in deciding whether or not something should be disclosed.
- Where someone, albeit innocently and without incurring any personal liability, became involved in the tortious actions of others, he comes under a duty to assist the person injured by disclosing the identity of the wrongdoers.
- It doesn't matter if the involvement in the affairs was voluntary or under statute.
- The party are under a prima facie duty to disclose.
- There are obvious concerns around confidentiality and the defendant's privacy and commercial freedom.
- These concerns are addressed by ordering the information only be used for the purposes of the litigation and cannot be used for any other purpose.
  - o This is reflected in r 8.30(4).

**D Discovery against Non-Parties**

*1 High Court Rules*

- 8.21: Order for particular discovery against non-party after proceeding commenced
  - o (1) The rule applies if it appears to a Judge that a person who is not a party to a proceeding may be or may have been in the control of 1 or more documents that the person would have had to discover if they were a party.
  - o (2) The judge may, on application, order the person-
    - (a) To file an affidavit stating-
      - (i) Whether the documents are or have been in the person's control; and
      - (ii) If the documents were but no longer are in the persons control, the person's best knowledge and belief as to when the documents ceased to be in the person's control and who now has control of them; and
    - (b) To serve the affidavit on parties specified in the order; and
    - (c) If the documents are in their control, make them available for inspection under r 8.27.

*2 Case Law*

*Vector Gas Contracts Ltd v Contact Energy Ltd* [2014] HC

Kos J

*Facts*

- The plaintiff were parties to the Kapuni Gas Contract, with the gas being sold by Shell and Todd Petroleum.
- The contract contained an arbitration clause saying that a fair and reasonable price should be set by arbitrators.
- The plaintiff sought discovery of documents from Contact Energy about matters relating to supply and purchase agreements about natural gas and other purchase and supply agreements.

*Held*

- Art 27 of the Arbitration Act 1996 imports r 8.21 of the High Court Rules.
- The ordering of a non-party discovery is a discretionary order and that Court does not undertake an assessment of ultimate admissibility.

- The test is whether the documents are required to assist the parties to the arbitration to advance or defend their cases.
- A non-party discovery order will only be made if it is necessary in that;
  - o Other sources of evidence are unlikely to be sufficient because they are materially incomplete or unreliable; and
  - o That the documents sought may make a real difference, not merely marginal.
- Controlled disclosure of sensitive commercial information is a risk associated with market participation.
- Section 69 of the Evidence Act protects confidential information from being discovered, but only where there is a public interest in protecting the disclosure, not a private interest.
  - o Legal professional privilege etc are protected, not commercial information generally.
- The order can be made conditional such that the release of the information will not put the discloser at the risk of a commercial disadvantage.
- The non-party discovery order was made.

***E The Use of Technology in Court***

- Suggestion that a user could register an account at the Court which would enable electronic filing of documents.
- “Document dumps” are now more common as information is stored electronically, allowing everything to be sent through.
- Rule 9.4 sets out the requirements of a common bundle. It would appear that this could be far easier if it were electronic.
- The higher courts have all gone electronic.

## *XVI Preparation for Trial*

### **A Case Management Process**

- The judge gives directions over pre-trial steps.
- This will cover the necessary chronology, evidence and the details of the common bundle.
- These matters are addressed under Part 9.

### **B High Court Rules**

- Part 9 Subpart 1 – Briefs, oral evidence directions, common bundles, and chronologies.

#### *1 General Rules*

- 9.1: Objective and scope.
  - o (1) The parties must apply these rules to ensure the just, speedy, and inexpensive determinations of proceedings.
  - o (2) The briefs and common bundle must be commensurate with the goal of keeping the cost of the proceeding proportionate to the subject matter of the proceeding.
- 9.2: Gives definition of document.
  - o (2) When a party discloses documents, they must ensure any list is the most current version to the other party's list is always up to date.
- 9.3: Timing
  - o (1) Unless otherwise ordered, a common bundle must not be prepared until all briefs have been served.
  - o (2) The common bundle must be prepared by the plaintiff and filed and served by a date fixed by the court at a case management conference.
- 9.4: The parties must co-operate in the preparation of the common bundle.
  - o (2) Lists the requirements of the duty to co-operate.
  - o (5) Gives formatting requirements of the common bundle.
  - o (6) The common bundle must be served no later than 15 working days after the date when the last brief of any party is served.
- 9.5: Gives a list of assumptions about documents included in the common bundle.
- 9.6: Consequence of not incorporating document in the common bundle.
  - o (1) A document not incorporated in the common bundle may be produced only with the leave of the court.
  - o (2) The court may grant leave to produce a discovered document not so incorporated unless its production would cause an injustice.
  - o (3) The court may refuse leave to produce an unincorporated document if its production might cause an injustice.
- 9.7: Gives the formatting requirements of briefs of evidence.
- 9.8: Supplementary briefs must be served as soon as possible and their acceptance and use are at the discretion of the trial judge.
- 9.9: Exchange of chronology of facts intended to be relied upon at trial or hearing.
  - o (1) The plaintiff must, not later than 15 working days after the common bundle has been served, file and serve a chronology of the facts it intends to rely upon at the trial or hearing.
  - o (2) Gives the requirements of preparing the chronology.
- 9.10: Oral evidence directions

- (1) After the preparation and service of the chronologies, the parties must bring significant disputed facts to the attention of the court.
- (3) The court may order that evidence be given orally.
- 9.11: Any challenge to the admissibility of a brief must be notified to the party concerned within 20 working days after receipt of that brief.
- 9.12: Evidence-in-chief at trial
  - (1) A witness brief must be read by the witness in trial as the witness's evidence-in-chief.
  - (2) The evidence read only becomes part of the evidence-in-chief once it is given orally.
    - Note: Can take the evidence as read, but it's tactically a better option to have them familiarise themselves with the brief to better be comfortable for cross.
- 9.13: If briefs have not been given in evidence by the time of trial, the party may only refer to the brief with the leave of the judge.
  - (2) Obligation to put your case to the witness.

## 2 *Expert Evidence Rules*

- 9.36: The court may appoint its own independent expert to assist it.
- 9.41: The court expert pay must be fixed by the court.
- 9.43: The expert must follow the code of conduct set out in Schedule 4.
  - The critical value of a witness is impartiality.
  - Questionable how this works in reality as the expert is being paid by one of the parties.
- An expert witness is giving opinion evidence on the area of their expertise.

## C *Subpoenas*

- A subpoena is where a person is compelled by the court to come and give evidence.

### 1 *High Court Rules*

- 9.52: Subpoena orders may be obtained by either party at any point after the statement of claim.
  - (2) The party must file a written request.
  - (3) The names may be included on the order, but it is not necessary to show the names on the written request.
    - This would allow the other side to figure out why you might want this witness.
- 9.53: Must be served personally on the witness. The party subpoenaing the witness must pay their reasonable travel expenses.
- 9.54: Provides that an order for a person in custody to give evidence under s 65 of the Corrections Act 2004 can be made without notice.

## D *Advocacy*

### 1 *General Points*

- It's important to develop your own style of advocacy.
- It's important to win your cases, but equally important to win within the bounds of the rules.
  - Ethics.
  - Rules of procedure.

- General law.
- Rules of evidence.
- There are three key ethical guidelines which lawyers should strive to live by;
  - 1. Never mislead the court.
    - This includes bringing the Court's attention to cases which contradict your own argument.
  - 2. Never employ "sharp practice" with your colleagues.
    - Be direct and honest with everyone you work with.
    - Don't mislead people or allow them to be misled.
  - 3. Always try to think like the court.
    - Be perceived as focussed on the issue, even though in reality you're pushing for your own client.
- Invite the judge to agree with you, be unobtrusive and polite.
- Know your place and ensure in all situations that the judge doesn't lose face. If you can make something your fault to save the judge, do so.
- Persuasiveness comes a lot to appearance and personality. Allow your personality to come through, and be brief and simple.
- Only cross-examine when you have to.
- Keep your closing simple, direct, to the point and appealing to common sense.

## 2 *Antonin Scalia "General Principles of Argumentation"*

- Argue to a human instead of a bench.
- Trial judges are concerned with coming to a proper result in one particular case, appellate judges are concerned with crafting a rule of law which will do justice in the majority of cases.
- Ask yourself what you would do if you were on the other side and counter those arguments.
- Cite a case where the outcome was what you desire and compare it to your own.
- Argue the easiest ground, and go as narrow as possible.
- Be even handed and concede facts which you are unable to answer.
- Be concise.
- State the issues before the facts.
- An appeal to emotions is resented and should not be done.
- An advocate should be a deferential intellectual colleague with the bench, not assume a lesser role.
- Terminology is important, control the language used.

## 3 *Justice Cull*

- Reputation is everything, especially in litigation.
- Check Schedule 5 to ensure all requirements are met when you're going into case management.
- Tailored discovery is not an excuse not to disclose something.
- If there is a conflict or something is happening which you feel is unethical, put it in writing.
- Do not file anything without serving the other side, and do not mislead opposing counsel.

## *XVII Appeals*

- There are two ways to start an appeal;
  - o 1. Where leave to appeal is required.
  - o 2. Where there is a right of appeal without leave.

### **A High Court Rules**

- Part 20: Appeals
- 20.3: Application for leave to appeal to court.
  - o (1) An application for leave where there is no right to appeal without leave must be made;
    - (a) To the decision-maker or, as the case requires, the court; and
    - (b) Within 20 working days after the decision is given.
  - o (2) An application for leave to appeal must be made within 20 working days after the refusal of the decision-maker if-
    - (a) An enactment provides the court may grant leave to appeal to it after the decision-maker refuses leave; and
    - (b) The decision-maker refuses leave.
  - o (7) An application under this rule must be made on notice to every party affected by the appeal.
- 20.4: When there is a right to appeal, it must be brought within 20 working days unless there is an enactment which says differently.
  - o (3) By special leave, a court may extend the time prescribed.
- 20.5: This 20 working day period begins when the judgment is handed down regardless of whether reasons are given or whether the judgment is sealed.
  - o This leaves counsel with two options;
    - 1. File the appeal based on suspected grounds or just say the judgment is plain wrong; or
    - 2. Do nothing and rely on an application for special leave based on the judgment being sealed.
    - First option is generally better.
- 20.6: An appeal is brought when the appellant:
  - o (a) Files a notice of appeal in the court; and
  - o (b) Files a copy of the notice of appeal in the administrative office; and
  - o (c) Serves a copy of the notice of appeal on every party directly affected by it.
- 20.8: Gives requirements for filing.
  - o (1)(a) Must be filed in the registry of the court nearest to the place where the hearing took place of the matter under appeal.
- 20.9: Sets out what must be contained within the notice of appeal.
  - o (1)(b): Specify the decision or part of the decision appealed against;
  - o (1)(c): Specify the grounds of the appeal in sufficient detail to fully inform the court, the other parties to the appeal, and the decision-maker of the issues in the appeal; and
  - o (d) Specify the relief sought.
- 20.10: An appeal does not stay the order of the proceedings appealed against.
- 20.11: Sets out the requirements of cross-appeals.

- 20.14: The court may order, on application, that a transcript of all or part of the evidence given at the hearing is made.
- 20.15: Report by decision-maker
  - (1) If the court directs, the decision-maker must provide the Registrar a report setting out-
    - (a) Any considerations, other than findings of fact, not set out in the decision to which the decision-maker had regard in making the decision appealed against.
    - (b) Any information about the effect that the decision might have on the general administration of the enactment under which the decision was made;
    - (c) Any other matters relevant to the decision or to the general admission of the enactment under which the decision was made that should be drawn to the attention of the court.
  - Note: This power is very rarely used.
- 20.16: Further evidence
  - (1) A party may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal without leave.
  - (2) In all other cases, leave must be sought.
  - (3) Leave can only be granted if there are special reasons.
- 20.18: Appeals are by way of rehearing.
  - The evidence is taken as read.
- 20.19: Powers of court on appeal.
  - (1) After hearing an appeal, the court may do any 1 or more of the following:
    - (a) Make a decision it thinks should have been made:
    - (b) Direct the decision-maker-
      - (i) To rehear the proceedings concerned; or
      - (ii) To consider or determine (whether for the first time or again) any matters the court directs; or
      - (iii) To enter judgment for any party to the proceedings the court directs;
    - (c) Make any order the court thinks just, including costs orders.
  - (2) Court must state its reasons for any order made under (1)(b).
  - (3) The court may give the decision-maker any direction it thinks fit.
- 20.20: Repayment of judgment sum and interest
  - (1) Subclause (2) applies when-
    - (a) A party to proceedings before a decision-maker has paid an amount to another party in accordance with a judgment or order of the decision-maker; and
    - (b) On appeal, the effect of the appeal is that some or all of the amount did not need to be paid.
  - (2) When this subclause applies, the court-
    - (a) May order party B to repay party A some or all of the amount; and
    - (b) May order party B to pay interest at a rate no greater than the prescribed rate.
- Part 21: Appeals by way of cases stated.
- Part 26: Appeals from arbitrators.
  - These types of appeal are becoming more and more common as arbitration becomes more popular.

## **B Case Law**

### *1 Austin, Nichols & Co Inc v Stichting Lodestar [2007] SC*

Elias CJ

#### *Facts*

- Stichting Lodestar asked to register a “wild geese” trademark.
- Austin Nichols stated that it offended its own trademark of a wild turkey.
- An Assistant Commissioner of Trade Marks allowed the registration.
- Appeal to the High Court led to the decision being reversed.
- Court of Appeal allowed an appeal, partly on the ground that the High Court Judge had failed to give sufficient deference or weight to the Assistant Commissioner’s decision.

#### *Held*

- A general appeal is an appeal against all aspects of a decision. This allows the appellate court to reach its own view based on the merits of the case.
- The appellant has the burden of proof, they must show why the appeal should be allowed.
- The level of deference which is to be given to the prior decision-maker is a matter for the appellate court to decide themselves, on the merits of their own judgment.
- No deference is required beyond the customary caution appropriate for a tribunal which may have a particular advantage such as technical expertise.

### *2 Kacem v Bashir [2010] SC*

Elias CJ, Tipping J, William Young J

#### *Facts*

- Family Court proceedings.
- Both parents are muslim who had migrated to Australia. The mother and her children was a legal immigrant, the father and his first wife was an illegal immigrant.
- The father and his first wife, as well as the children from that marriage escaped and made it to New Zealand where they were granted refugee status. The mother followed to live as his ‘second wife’.
- They had a child together, then separated while the wife was pregnant with the second child of the marriage.
- The mother wanted to permanently relocate to Australia, the father opposed this.

#### *Held*

- The Court of Appeal was not wrong as;
  - o It could not be shown that the Court of Appeal had allowed their erroneous observations of law to affect the evaluation of the case (per Tipping J); or
  - o The Court of Appeal had not stated the law incorrectly.
- When appealing an exercise of discretion, it is much harder to win. It is necessary to show that the decision maker:
  - o 1. Made an error of law; or
  - o 2. Took irrelevant considerations into account; or
  - o 3. Did not take account of relevant circumstances; or
  - o 4. Is plainly wrong.



### 3 *Murphy v Murphy* [1989] CA

Richardson J

#### *Facts*

- There was a judgement in the District Court about Matrimonial property.
- The husband appealed to the High Court and applied for part of the evidence to be reheard.
- The High Court judge declined to hear the evidence.
- The husband applied to the Court of Appeal under s 66 of the Judicature Act 1908, which empowers the Court of Appeal to hear and determine appeals from any judgment, decree, or order subject to provisions in the Act.
- Section 67 of the Judicature Act states that appeals to the High Court from inferior courts shall be treated as final and appeals to the Court of Appeal require leave.

#### *Held*

- The ruling by the Judge in the High Court was not a “judgment, decree or order” under s 66, and therefore there was no jurisdiction for the Court of Appeal to hear the appeal.
- It was held that s 67 overrides s 66. Section 66 is a general principle, however s 67 is more specific. Specific principles override general provisions, therefore leave is required.
- All orders must be appealed as part of the entire judgment, with leave. Leave in this case was declined.

### 4 *Riddell v Porteous* [1996] HC

Tipping J

#### *Facts*

- The Riddells commissioned Porteous to carry out construction work on a labour only basis.
  - o Paid an hourly wage, materials etc must come out of that.
- The work was defective, and the Riddells were sued in the District Court by the purchasers.
- They joined Porteous and the Dunedin City Council as third parties.
- The District Court found in favour of the Riddells, the High Court found against them.
- The Riddells applied for leave to appeal to the Court of Appeal.

#### *Held*

- An important factor in deciding whether leave should be granted is whether it is required in the interests of justice.
- Where the District Court and High Court decisions conflict, this may suggest that there are questions to answer which makes the appeal more likely.
- This was a case about the duties owed by a City Council to house builders. Therefore leave to appeal was granted.
- There is a three stage inquiry which should be carried out;
  - o 1. Have the previous judgments differed?
  - o 2. Does the Court of Appeal consider that there is an arguable case that the High Court was incorrect?
  - o 3. Is it a matter of general public importance?

### 5 *LFDB v SM* [2014] SC

McGrath J

#### *Facts*

- Relationship property proceeding.
- The husband failed to pay costs which he was ordered to pay.
- Priestly J made an “unless order”. Unless he paid the costs and complied with other directions, he would be debarred from continuing proceedings.

- He did not comply with the order and Ellis J debarred him.
- The husband then paid the costs order with interests. He applied for an extension of time to comply with the costs order and a discharge of the order debarring him.
- Ellis J rescinded the unless order.
- The wife appealed, and the Court of Appeal reinstated the order, citing a lack by the High Court to take into account the husband's deliberate flouting of the rules.
- The husband was granted leave to appeal to the Supreme Court for the unless order to be removed.

*Held*

- It came to light that the husband was again in breach of orders to pay costs.
- The Supreme Court Act 2003 s 13 gives the criteria for leave to appeal. It states that the Supreme Court must not give leave to appeal unless it is satisfied that it is necessary in the interests of justice.
- Given the continued and new failure to obey the costs order, the Supreme Court revoked the leave to appeal, deeming that hearing the appeal was no longer in the interests of justice.

6 *R v Clark* [2005] SC

Elias CJ

*Facts*

- Clark sought leave to appeal to the Court of Appeal from two pre-trial rulings by the District Court on evidentiary matters.
- The Court of Appeal granted leave on one matter by declined leave on the other.
- Clark appealed to the Supreme Court over the declination to hear the appeal on that matter.

*Held*

- Section 379A of the Crimes Act permits only one appeal from a pre-trial ruling. Normally that is to the Court of Appeal, in exceptional cases it can be directly to the Supreme Court.
- It is not intended to be used to appeal decisions of the Court of Appeal.
- Leave for an appeal to the Supreme Court from the Court of Appeal would be granted only in exceptional circumstances.
- The policy for this rule is to balance the interests of justice with the need for avoiding delay and avoiding undue strain on complainants and witnesses.

7 *Reekie v Attorney-General* [2014] SC

McGrath, William Young and Glazebrook JJ

*Facts*

- Reekie sought leave to appeal against a decision declining to review the Registrar of the Court of Appeal refusing to waive security for costs.
- O'Regan P declined the appeal as one where the benefits are substantially outweighed by the costs of the exercise.

*Held*

- The proposed appeal does not involve a matter of general or public importance and there is no substantial miscarriage of justice.
- Leave to appeal declined.

## 8 *Dotcom v Twentieth Century Fox* [2014] CA

Stevens and White JJ

### *Facts*

- Dotcom applied for a stay of the High Court judgment pending appeal.
- Appeal of the decision ordering Dotcom to file an affidavit disclosing all his assets.
- Under the Court of Appeal rules, an appeal does not operate as a stay of proceedings.

### *Held*

- In determining whether to grant a stay, the appellant must convince the Court that that balance of factors favour such an outcome.
- The Court must consider the competing considerations of allowing the successful litigant the right to a judgment and the need to preserve the position of the appellant in case the appeal is successful.
- A range of factors need to be considered, including;
  - o (a) Whether the appeal may be rendered nugatory by the lack of a stay.
  - o (b) Whether the appellant will suffer any prejudice.
  - o (c) Whether the successful party will be injuriously affected by the stay.
- The order does not have any prejudicial effects on Dotcom's financial assets, therefore the appeal would not render his appeal rights nugatory.
- The disclosure can only be used for the purpose for which it is made, Dotcom's privacy rights are protected.
- The respondents could be injuriously affected if a stay were granted.
- Appeal dismissed.

## 9 *Hawke v ACC* [2014] CA

White J

### *Facts*

- Acclaim Otago Inc applied for leave to intervene in the appeal.
- The appeal dealt with matters concerning people with long term disabilities being covered by ACC.
- ACC argued that the matter is one of statutory interpretation, not public interest.

### *Held*

- The principles as to whether a party can intervene are;
  - o (a) The power is broad but should be exercised with restraint to avoid the risk of expanding issues, elongating hearings and increasing litigation costs.
  - o (b) In an appeal involving issues of general and wide importance, the Court may grant leave when satisfied that it would be assisted by submissions from the intervener.
  - o (c) The power may be exercised more liberally in appeals involving the Court's special jurisdiction (eg Employment Relations Act powers).
  - o (d) Leave will not be granted when the appeal is essentially one of statutory interpretation and is unlikely to involve broad policy questions.
- In this case, it was an exercise of statutory interpretation where the issue was not one of wider public importance.
- Leave to intervene was declined.

## ***C Appellate Advocacy according to Koc P***

### *1 Rules of Written Advocacy*

1. Think, not ink.
2. Identify the issue and the bedrock of the case, all else should flow from there.
3. The structure of the written submissions is important, make them easy to read.
4. Make the written submissions a synopsis of arguments.
5. Use colour, but sparingly.
6. Select your authorities carefully, use only the most accurate, recent and relevant.

### *2 Rules of Oral Advocacy*

1. Don't weary the judge.
2. Be flexible.
3. Don't read from your submissions.
4. Don't be afraid to go short.
5. Use colour, allow personality to shine through, but the focus should be on the argument.
6. Aerate the skunk; address the argument against you.
7. Don't speed.
8. Listen to the judge and answer directly.
9. Rejoice in questions as an opportunity to best further your case.

## *XVIII Judicial Review, Declaratory Judgements and the Commercial Panel*

### **A Judicial Review**

#### *1 Overview*

- The High Court has the power to supervise the way in which decisions are made.
- This comes from both common law and legislations.
  - o Section 5 of the Judicial Review Procedure Act 2016 grants the power of review only to powers exercised under statute.
- The common law subsumes this power and includes all judicial decisions.
- The Courts have the power to review any decision which they deem have significant public consequences.
- Precedent shows a deep reluctance of the Courts to intervene in the decisions of Ministers and public officials.
  - o The concern is over having the judiciary interfere with the actions of the other branches of government.
  - o These review decisions are traditionally strictly limited to review of the procedure by which the decision was made.
- This habit has been relaxed in recent times, the courts involve themselves in a wide range of decisions.
- The High Court also has the power to review private bodies if there is a public interest component in the decision.
  - o That includes breaches of natural justice, as following natural justice processes is in the public interest.
- This is an extremely nuanced and fact specific area of law. The stringency of the level of review can shift slightly depending on the possibly outcome.
- It is common sense based and focused on the process.

#### *McGechan*

- The purpose of judicial review is to protect a fair and equitable process.
- There are a number of common complaints which trigger a review:
  - o No opportunity to seek counsel or advice.
  - o The decision-maker is biased or has pre-determined the outcome.
  - o There is a problem with the deliberation process.
  - o The reasons why the decision was made are wrong.
    - This is a less stable ground of review, as traditionally the High Court can only review the process.
    - It needs to be shown that the decision-maker considered all relevant factors and did not consider any irrelevant factors.

#### *2 Legislation*

##### *A High Court Rules*

- Part 30.
- 30.3: An application for judicial review under the Judicial Review Procedure Act 2016 must be commenced by a statement of claim and notice of proceeding in accordance with Part 5 of the HCR.
- 30.4: When an application is made for an extraordinary remedy, the court may make an interim order on whatever terms and conditions the court thinks just.
- These provisions apply to both statutory and common law judicial review.
- Cross-examination in judicial review can occur only with leave of the judge.

- Judges are reluctant to grant it as it may well involve a Minister being cross examined on a decision.

### *B Judicial Review Procedure Act 2016*

- S 5: Statutory power is defined.
- S 8: Gives the requirements for commencing an application.
  - (2) Applied Part 5 of the HCR.
- S 9: The following persons must be named as respondents:
  - (a) The person whose act or omission is the subject matter of the application; and
  - (b) If the application relates to any decision made in proceedings, every party to those proceedings.
- S 10: A respondent must file a statement of defence.
  - (2) If a court or tribunal is named as a respondent, the presiding officer whose act or omission is the subject of the application may file a statement on behalf of the court or tribunal.
  - (3) Part 5 of the HCR applies.
- S Proceedings for declaration or injunction may be treated as application for review.
  - (1) This section applies if-
    - (a) Proceedings are commenced for a declaration or injunction, with or without a claim for other relief; and
    - (b) The exercise, refusal to exercise, or proposed or purported exercise is an issue in the proceedings.
- S 13: A judge may direct a case management conference be held, to ensure that any application is determined effectively, conveniently and expeditiously.
- S 15: At any time before the final determination, a court may make an interim order of any of the following kinds if it considers it necessary to do so to preserve the position of the applicant.
  - (2) The court can make the following interim orders-
    - (a) Prohibiting a respondent from taking any further action that is, or would be, consequential on the exercise of the statutory power;
    - (b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application relates;
    - (c) Declaring that any licence that has been revoked or suspended continues.
  - (3) If the respondent is the Crown, the court may not make an order, but instead declare that the Crown ought not to take further action.
- S 16: Gives the remedies which the court may grant.
- S 17: Court may direct reconsideration of matter to which statutory power of decision relates
  - (1) This section applies if the court is satisfied that an applicant who has filed an application for judicial review is entitled to relief under s 16.
  - (2) The court may make a direction under (3) in addition or instead of any other relief.
  - (3) The court may direct any person whose act or omission is the subject of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any party of any matter to which the application relates.
  - (4) In giving a direction under (3), the court must-
    - (a) Advise the person of the reasons for the direction; and
    - (b) Give the person such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

- (6) If a matter is referred back under (3)-
  - (a) The act or omission that is to be reconsidered continues to have effect (subject to any interim order) unless and until it is revoked or amended by that person:
  - (b) The person has jurisdiction to reconsider and determine the matter in accordance with the court's directions despite anything in any other enactment:
  - (c) The person must have regard to-
    - (a) The court's reasons for giving the directions; and
    - (b) The court's directions.
- S 18: The court has the discretion to refuse to grant relief.
- S 19: The court has the discretion to refuse to grant relief if;
  - (1)(a) The sole ground of the appeal is a defect in form or a technical irregularity; and
  - (b) The court finds no substantial wrong or miscarriage of justice has occurred.
- S 20: Any party dissatisfied with any interlocutory or final order may appeal to the Court of Appeal under s 56 of the Senior Courts Act 2016.

### *C Senior Courts Act 2016*

- Section 27: Any party to any proceedings may appeal to the Court of Appeal against any order or decision of an Associate Judge in those proceedings.
- This is a deviation from the prior rule, where previously associate judges' decisions could either be appealed to the High Court or were subject to judicial review.
  - The prior rule was that decisions made in Court could be appealed, but decisions in chambers were only reviewable.
  - The reason for this was unclear.
- The rule appears clear, however;

### *Sutcliffe v Tart [2017] CA*

- Court of Appeal concluded that the Judicature Act applies to proceedings commenced before the Senior Courts Act came into effect (all cases commenced before 2 March 2017).
- The distinction remains until these cases are decided.

## **B Declaratory Judgments**

### *1 Overview*

- The common law is intensely practical.
- There is a general rule that the courts would not engage with theoretical questions.
- Someone who wanted advice on a point could not ask the court to give an indication how their case might be decided, they would have to wait until the facts manifested in reality.

### *2 Declaratory Judgments Act 1908*

- S 2: No proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment or order is sought.
- S 3: Anyone may apply to the High Court by originating summons for a declaratory judgment dealing with the construction or validity of any statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, article, or instrument or any part thereof.

- An originating application is commenced by an originating application under r 18.1(b) of the HCR.
- S 4: A declaratory order shall have the same effect as a judgment in an action and shall be binding on the person making the application, all persons served with the summons, and all other persons who would have been bound if the declaratory judgment was made as a proceeding.
- S 6: Declaratory judgment summons are subject to the High Court Rules and Senior Courts Act.
- S 8: Appeal can be made to the Court of Appeal.
- S 9: A declaratory judgment in anticipation of any future act or event has the same binding effect as if the act or event had already happened and the same judgment was given against it.
- S 10: The giving of a declaratory judgment is discretionary.
- S 11: Where the High Court cannot give relief, a declaratory judgment is not prevented from being made.
- S12: Declaratory judgments made by the Court of Appeal or Supreme Court are binding on all other courts.
- S 13: Costs are at the discretion of the court.

## ***C The Commercial Panel***

### *1 The Commercial List*

- The Lange government repealed a great deal of control over the economy and rapidly expanded it.
- This led to heavy commercial litigation.
- There was a great deal of frustrating over the means by which the Courts were dealing with these serious commercial matters.
- Barker J started an experiment with the Commercial List.
- This system meant that three High Court judges were appointed to hear the commercial list.
- Parties could apply to be on the list.
- If a party was added to the List, all pre-trial matters were dealt with very quickly.
- In the majority of cases, the pre-trial matters were dealt with extremely quickly, then the case ended up on the trail list where it languished for weeks or months.
- Chief Justice Elias strongly opposes the Commercial List or Panel, as New Zealand judges are traditionally generalists and there should not be one group of judges who deal with the majority of commercial matters.

### *2 The Commercial Panel*

- Section 19 of the Senior Court Act allows the creation of the Commercial Panel.
- It's the same system under a different name.
- It's questionable whether commercial matters are inherently so important that they warrant being put into a special class and deserve this expedited treatment.
- A flawed system.



## *XIX Costs*

### **A Purpose of Costs**

- Costs exist to vindicate the successful party, and recognise that enforcing their rights should not be met with undue financial hardship.
- This is the English rule of indemnity, where the successful party walks away without significant legal fees.
- The problem with this model is it makes losing extremely expensive for the unsuccessful party.
- In the USA, increasing costs orders to this degree is seen as unjust, as it would prevent parties who could not meet the costs orders from having their day in court.
- It recognises the freedom of all to have access to justice. If people are enforcing what they believe to be their right in good faith, they should only have to pay their own lawyer.
- Traditionally in America, there has been a no costs rule, whereby each party pays their own lawyers' fees.
  - o This has given rise to things like contingency fees.
- The purpose in New Zealand of awarding large amounts of costs is to encourage early settlement when one party sees they are likely to be unsuccessful.

### **B High Court Rules**

- 14.1: All matters of costs are discretionary.
- 14.2: Principles applying to determination of costs.
  - o (1) The following general principles apply to the determination of costs:
    - (a) The party who failed should pay costs to the successful party.
    - (b) An award of costs should reflect the complexity and significance of the proceeding.
    - (c) Costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application.
    - (d) An appropriate daily recovery rate should normally be two-thirds the daily rate considered reasonable in relation to the proceeding.
    - (e) What is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs.
    - (f) An award of costs should not exceed the costs incurred by the party claiming costs.
    - (g) So far as possible the determination of costs should be predicable and expeditious.
  - o (2) Despite (1)(f), costs for professional services provided in relation to a proceeding may be awarded to a party under this Part even though the services are provided under a conditional fee agreement.
- 14.3: Categorisation of proceedings
  - o (1) For the purposes of 14.2(1)(b), proceedings must be classified as falling within one of the following categories:
    - Category 1 Proceedings: Proceedings of a straightforward nature able to be conducted by counsel considered junior in the High Court.
    - Category 2 Proceedings: Proceedings of average complexity requiring counsel of skill and experience considered average in the High Court.
    - Category 3 Proceedings: Proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court.

- 14.4: Appropriate daily recovery rates: For the purposes of rule 14.2(1)(c), the appropriate daily recovery rates for the categories referred to in rule 14.3 are listed in Schedule 2.
  - o Schedule 2 appropriate daily recovery rates:
    - Category 1: \$1,480.
    - Category 2: \$2,230.
    - Category 3: \$3,300.
- 14.5: Determination of reasonable time
  - o (1) For the purposes of rule 14.2(1)(c), a reasonable time for a step is-
    - (a) The time specified in Schedule 3; or
    - (b) A time determined by analogy with that Schedule if Schedule 3 does not apply; or
    - (c) The time assessed as likely to be required for the particular step, if no analogy can usefully be made.
  - o (2) A determination of what is a reasonable time for a step under (1) must be made by reference-
    - (a) To band A if a comparatively small amount of time is considered reasonable; or
    - (b) To band B, if a normal amount of time is considered reasonable; or
    - (c) To band C, if a comparatively large amount of time for the particular step is considered reasonable.
  - o Example: If a matter was of average complexity but required a comparatively large amount of time, it would be deemed as coming under Category 2C.
- 14.6: Increased costs and indemnity costs.
  - o (1) Despite rules 14.2 – 14.5, the court may make an order-
    - (a) Increasing costs otherwise payable under those rules; or
    - (b) That the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).
  - o (3) The court may order a party to pay increased costs for any of the reasons listed under this subsection.
    - General for reasons if the proceeding took a significantly longer time under band C or if the losing party caused the proceeding to cost more than it should have.
  - o (4) The court may order a party to pay indemnity costs for any of the reasons under this subsection.
    - Generally for bad faith activity.
  - o Note: Costs can be increased by up to 50% but no more.
- 14.7: Refusal of, or reduction in, costs.
  - o (1) Despite rules 14.2 – 14.5, the court may refuse to make an order for costs or may reduce the costs otherwise payable under those rules for the reasons listed under this subsection.
    - Things such as the stakes of the proceedings being of little significance, taking time significantly shorter than band A, bad faith on behalf of the winning party etc.
- 14.8: Costs on an interlocutory application are generally fixed in accordance to the rules when the application is determined.
  - o (3) This does not apply to an application for summary judgment.
- 14.9: Costs may be determined by a different judge or associate judge.
- 14.12: Deals with the payment of disbursements (court fees). They may be included in the costs award.
- 14.14: Costs orders make parties jointly and severably liable.
- 14.15: Even with multiple defendants, generally only 1 order of costs is allowed.
- 14.17: Costs should be set-off if both parties prove a claim.

## 1 *Calderbank Offers*

- Governed by rules 14.10-14.11.
- These are offers made “without prejudice except as to costs” which are designed to settle the case early.
- The defendant still expects to lose money, but not as much as they’d lose in court with costs awarded against them.
- If the amount they offered the other party exceeds the award made against them, which may change the incidence of costs being paid. The defendant may have to pay less costs.
- Designed to increase the frequency of settlement offers and to penalise parties who insist on going to litigation despite a reasonable settlement offer.
- Rule 14.10: Written offers without prejudice except as to costs.
  - o (1) A party to a proceeding may make a written offer to another party at any time that-
    - (a) Is expressly stated to be without prejudice except as to costs; and
    - (b) Relates to an issue in the proceeding.
  - o (2) The fact that the offer has been made must not be communicated to the court until the question of costs is to be decided.
- 14.11: Effect on costs
  - o (1) The effect (if any) of an offer under 14.10 has on the question of costs is at the discretion of the court.
  - o (2) Subclauses (3) and (4)-
    - (a) Are subject to (1).
    - (b) Do not limit rule 14.6 or 14.7; and
    - (c) Apply to an offer made under rule 14.10 by a party (Party A) to a proceeding to another party (Party B) in it.
  - o (3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if Party A-
    - (a) Offers a sum of money to Party B that exceeds the amount of a judgment obtained by Party B against Party A; or
    - (b) Makes an offer that would have been more beneficial to Party B than the judgment obtained by Party B against Party A.
  - o (4) The offer may be taken into account if Party A makes an offer that-
    - (a) Does not fall within paragraph (a) or (b) of (3); and
    - (b) Is close to the value or benefit of the judgement obtained by Party B.

## C *Case Law*

### 1 *Glaister v Amalgamated Dairies Ltd* [2004] CA

Hammond J

#### *Facts*

- Costs were awarded in the High Court on a 3B basis (complex proceedings taking an average amount of time).
- The total award was about 33% of the actual costs incurred.
- The appellants claimed the award was too low and approximately 66% of actual costs should have been awarded.
- The actual costs exceeded \$200,000.

#### *Held*

- There is no presumption that a party is entitled to two-thirds of its actual and reasonable costs.
- The test is objective, has nothing to do with actual costs, and is based on the principle that a successful party should receive a reasonable contribution towards its costs.

- Costs orders are discretionary to allow the unexpected and unforeseen to be fairly accommodated, when a departure is made from the scheme, it needs to be done in a principled way.
- Whether counsel is more expensive or less expensive doesn't really matter.
- The court should instead follow the schedule set out in the rules with respect to the complexity and time scale, and the amount of days set out in the rules.

## *XX Sealing Judgments, Enforcement Options and Alternative Dispute Resolution*

### **A Sealing Judgments**

- Will appear with the facts of the case as per usual but then the judgment will only give the result with no reasons or background information.
  - o May be only one or two pages.
  - o It will just identify the outcome.
- There are two situations in which a need may exist to seal judgments.
  - o Interlocutory orders and final judgments.

### **1. High Court Rules**

#### *1 Interlocutory Applications*

- If you get a written judgment for an interlocutory order but the other side refuses to comply with it, then you will need to apply to get the judgment sealed.
- The Registrar will scrutinise the order clearly, it is not worth trying to get any more than was granted.
- 7.47: Drawing up and sealing interlocutory order.
  - o (1) A party may draw up an interlocutory order and submit it to the Registrar for sealing.
    - Note: The “may” is misleading as it depends on the other side disobeying the interlocutory which is extremely rare.
  - o (2) Despite (1), a party who obtains an interlocutory order must draw up the order and submit it to the Registrar for sealing if the order-
    - (a) Affects a person who is not a party; or
    - (b) Joins a person as a party; or
    - (c) Directs that it be served on a person.
  - o (3) If a party elects to have an order sealed, or is required by the court or by these rules to have an order sealed, the following provisions apply:
    - There is a list of procedural requirements and formatting of the document.

#### *2 Final Judgments*

- Judgments only need to be sealed for the purposes of enforcement or appeal.
- Same preparation requirements as for an interlocutory application.
  - o You have to draft the judgment yourself and then get it sealed.
- No obligation to confer with the other side but it is proper practice to do so.
- Sealed judgments also deal with costs and disbursements.
- 11.11: Judgments to be sealed, dated, and served.
  - o (1) A Registrar must seal judgments with the seal of the court.
  - o (2) A judgment must be sealed-
    - (a) In accordance with any direction given by the Judge relating to the sealing of the judgment; or
    - (b) If no direction is given, at any time after the judgment is given.
  - o (5) Obligation to serve the sealed judgment on all other parties.

- 11.12: A judgment takes effect when it is given.

## ***B Enforcement of Judgments***

- Judgment must be sealed to be enforceable.

### *1 High Court Rules*

- Part 17 deals with enforcement.
- There are many processes for enforcing judgment.
- 17.12: Order for examination.
  - o (1) Whether or not a notice has been served under 17.10, an examining party may apply for an order-
    - (a) At any time after the proceeding has commenced, if that party seeks a charging order under subpart 5 of this Part; and
    - (b) In all other cases, at any time after judgment is sealed.
  - o (2) An examining party may apply to the court for an order requiring the examinee to attend the court to be orally examined on oath about;
    - Essentially all assets or anything else of relevance.
  - o (5) An application can be made without notice.
- This is all for the purpose of enabling the court to make a judgment about how best to enforce the judgment.
- Subpart 4: Attachment orders.
- 17.32: Effect of attachment order
  - o (1) An attachment order directs the money due under a judgment is a charge on any salary or wages that are due and payable by an employer to the liable party.
  - o (2) The charge-
    - (a) Accrues from week to week; and
    - (b) Accrues by way of weekly payments of the amount specified.
    - (c) Attaches to all salary or wages that become due by the employer to the liable party at any time while the attachment order is in force, whether or not the contract of employment or contract for services under which the salary or wages become due existed at the date of the attachment order.
- 17.33: When attachment order may be issued.
  - o (1) If the liable party has been examined under 17.15, the court, on the application of the entitled party, may make an attachment order at any time after judgment is sealed.
  - o (2) An attachment order-
    - (a) May be made against a person who the court is satisfied is an employer of the liable party;
    - (b) May be made for a fixed period or until the judgment debt has been fully paid;
    - (c) Must specify the person to whom the amounts to be deducted must be paid;
    - (d) Must specify the protected earning amount.
- Subpart 5: Charging orders
- Attaches to land. It's somewhat similar to a security over the land.
- 17.40: A charging order charges the estate, right, title or interest of the liable party in the property described.
- 17.48: A charging order can be registered under the Land Transfer Act 1952.
- 17.52: The charging order is deemed as discharged after 2 years.

- Subpart 6: Sale orders and possession orders
- 17.62: A sale order authorises and requires an enforcing officer to seize all the liable party's personal property.
  - o (1)(a)(b) Subject to restrictions about necessary tools of the trade and furniture.
- Subpart 7: Sequestration order.
- 17.86: A sequestration order authorises and requires the sequestrator to enter and take possession of all the real and personal property of the party against whom it is directed.
  - o Limited to ensure no-one gets turfed out into the street.
- Subpart 8: Absconding debtors and imprisonment for debt.
- 17.88: The plaintiff may make an application without notice for an order to arrest and imprison a defendant under s 40 of the Act.
- This rule applies where it appears a debtor is attempting to flee the country to avoid having to pay their debts.
- If the debtor party is a company, the approach is generally different.
- You can commence winding up proceedings, under the Companies Act, claiming that the failure to pay as evidence of insolvency.
- This is how most debts against companies are dealt with.

## ***C Alternative Dispute Resolution***

### *1 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*

- Rule 13.4: A lawyer assisting a client with the resolution of a dispute must keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute.

### *2 Overview*

- Represents an alternative to litigation.
- Some possible alternatives are;
  - o More formal: Mediation, negotiation, arbitration, medarb (mediated arbitration), expert determination.
    - Medarb may compromise the ability to act traditionally given the opposite focuses of mediation and arbitration.
  - o Less formal: Sucking it up, informal conversations, mini-trials.
- A lawyer must remember from day one that there will be multiple ways to approach the dispute.
- Discuss the disadvantages of litigation to your client and educate them on the potential merits of other paths.
- Discuss the alternative methods.
- There is a danger in the lawyer putting their own motives, career promoting wins etc, in front of their client's interests.\

### *3 Mediation*

- This is the most popular form of alternative dispute resolution.

- Mediation is a decision making process where the parties are assisted by a mediator in order to assist the parties to reach a decision while preserving the relationship.
- Mediation works well if the parties feel that their co-operation could continue into the future.
- There's the selection of mediator/s, exchange of documents, the setting of date and place, a joint session identifying the issues and the interests of the parties.
  - o There will then be sessions where the mediator meets with one party then the other.
  - o The mediator then tries to bring the parties together.
- Mediation does not work particularly well where the concern is quantum or dollar figures.
- It works where there are underlying interests which should be preserved.



## XXI International New Zealand Litigation

### A Service Out

#### 1 General Comments

- Initiating international proceedings can be required in three situations;
  - 1. When a proceeding is started in New Zealand and you want the case to be tried in another jurisdiction.
    - Argument being that the case is being heard in the wrong jurisdiction.
  - 2. Judgment has been given in both New Zealand and another jurisdiction and it needs to be enforced in New Zealand.
    - Issues with res judicata and issue estoppel, the same case cannot be tried twice.
  - 3. Commence proceeding in New Zealand and another is started overseas and you want to sequence then.
    - Difference to jurisdictional issue is that jurisdiction isn't an issue, the question is only the order of the proceedings.
- Service is how jurisdiction is exercised over a person.
- The *forum non conveniens* test will be applied as to whether it is in the right jurisdiction.

#### 2 High Court Rules

- Part 6 subpart 4.
- 6.27: When allowed without leave
  - (1) This rule applies to a document that initiates a civil proceeding which under these rules is required to be served but cannot be served in New Zealand under these rules.
  - (2) An originating document may be served out of New Zealand without leave in the following cases:
    - (a) When a case is made in tort and-
      - (i) Any act or omission in respect of which damage was sustained was done or occurred in New Zealand; or
      - (ii) The damage was sustained in New Zealand.
    - (b) When a contract sought to be modified, enforced, or rescinded or for the breach of which damages or other relief is demanded in the proceeding is connected to New Zealand in the ways listed under this subsection.
    - (c) When there has been a breach of any contract in New Zealand.
    - (d) When the claim is for
      - (i) A permanent injunction relating injunction to compel or restrain any act in New Zealand; or
      - (ii) Interim relief in support of judicial or arbitral proceedings commenced or to be commenced outside New Zealand.
  - There are a number of other grounds listed under this provision.
- 6.28: When allowed with leave
  - (1) Whenever service is not allowed under r 6.27, an originating document may be served out of New Zealand without leave.
  - (2) An application for leave under this rule must be made on notice to every party other than the party intended to be served.

- (4) An application for leave under this rule must be supported by an affidavit stating any facts or matters related to the desirability of the court assuming jurisdiction under rule 6.29 including the place or country in which the person to be served is or may possibly be found.
- (5) The court may grant an application for leave if the applicant establishes that-
  - (a) The claim has a real and substantial connection with New Zealand; and
  - (b) There is a serious issue to be tried on the merits; and
  - (c) New Zealand is the appropriate forum for the trial; and
    - Note: This is the *forum non conveniens* test.
  - (d) Any other relevant circumstances support and assumption of jurisdiction.
- 6.29: Court's discretion whether to assume jurisdiction.
  - (1) If service of process has been effected out of New Zealand without leave and the court's jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes-
    - (a) That there is
      - (i) A good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and
      - (ii) The Court should assume jurisdiction by reason of matters set out in rule 6.28(5)(b) to (d); or
    - (b) That, had the party applied for leave under rule 6.28-
      - (i) Leave would have been granted; and
      - (ii) It is in the interests of justice that the failure to apply for leave should be excused.
  - (2) If service has taken place out of New Zealand under rule 6.28 and the court's jurisdiction is protested under rule 5.49, and it is claimed that leave was wrongly granted under rule 6.28, the court must dismiss the proceeding unless the party effecting service establishes that in the light of the evidence now before the court leave was correctly granted.
  - (3) When service has been validly effected in New Zealand but New Zealand is not the appropriate forum, the defendant may apply for the proceeding to be stayed or dismissed under rule 15.1.
- Rule 6.29 allows defendants to protest to jurisdiction whether served under rule 6.27 or 6.28.
- If you are representing a defendant who has been served overseas, you should remember to think carefully about filing a protest to jurisdiction.
  - If you do not protest to jurisdiction and just allow things to go on, you are deemed to have accepted the New Zealand jurisdiction.

### 3 Case Law

*A Johnson v Johnson* [2017] CA

Miller J

*Facts*

- The parties are a formerly married couple originally from Oregon.
- The husband commenced proceedings in Oregon, wife started in New Zealand, but neither protested the jurisdiction.
- The Oregon court found for the husband, the New Zealand court found for the wife.
- The wife is seeking to have the New Zealand judgment enforced.

### *Held*

- The litigation has miscarried as a direct consequence of the husband's election not to settle the question whether New Zealand was forum conveniens by making a protest to jurisdiction but instead participating in the New Zealand proceeding.
- The wife ignored the Oregon proceedings.
- The New Zealand court enjoy jurisdiction over movable property anywhere in the world provided one of the parties is domiciled in New Zealand.
- There are three options where there are parallel proceedings:
  - o 1. Do nothing about the proceedings.
  - o 2. Protest the jurisdiction of the New Zealand courts.
  - o 3. Participate in the New Zealand proceedings.
    - If you participate, it will be very difficult to later get the judgment ignored.
- The husband make a number of false declarations about the state of his proceedings and the nature of his marriage. This amounts to fraud, as he did not inform the Oregon courts accurately he obtained that judgment by fraud.
- As the Oregon judgment was obtained by fraud, the wife will not be estopped from continuing
- The appeal is dismissed, the New Zealand judgment is upheld.

### *B Wing Hung Printing Co v Saito Offshore Pty [2010] CA*

Randerson J

### *Facts*

- Saito initiated proceedings against Wing Hung and other companies incorporated in the United States and the Netherlands.
- They alleged seven different causes of action relating to contractual arrangements between the parties and the use of confidential information.
- The appellants entered into protests against the court's jurisdiction.

### *Held*

- When considering an application under r 6.29 of the HCR to dismiss proceedings, a two stage approach must be followed.
  - o 1. Consider whether, for each cause of action, there was a good arguable case that the claim fell wholly within one or more paragraphs under r 6.27.
  - o 2. Consider whether the court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b)-(d).
    - Meaning consider whether there is a serious issue to be tried on the merits, whether New Zealand is the appropriate forum, and any other relevant considerations.
- The presence of a cause of action which fell outside r 6.27 does not mean that the entire proceeding must be dismissed, as a party can still rely on r 6.29(1)(b).
- Alternatively, the cause could be dismissed requiring the plaintiff to file an amended statement of claim which excluded any specific cause of action.
- If you want to serve overseas:
  - o First, look at r 6.27 to see if you can serve without leave.
    - If service can be done without leave, the New Zealand courts have jurisdiction.
  - o If the other party protests jurisdiction, the courts have discretion under the forum non conveniens test under r 6.29(1).

- You have to satisfy either 6.29(1)(a) or (1)(b).
  - Otherwise is leave required under r 6.28?
    - If it is, the court must grant leave before you can serve the other party.
    - The defendant can still protest under r 6.29(2).
- The key question in all assessments is whether New Zealand is the appropriate forum for the proceeding as set out under r 6.28(5).
- The threshold of a “good arguable case” is similar to the “serious question to be tried” standard.
- In this case, the respondent was directed to file an amended statement of claim and the protest to jurisdiction was dismissed.
- On five of the seven claims, New Zealand was held to be the proper jurisdiction.

*C Spiliada Maritime Corporation v Cansulex Ltd* [1987] HL

*Facts*

- A Liberian owned vessel (*the Spiliada*) was chartered to carry a cargo of bulk sulphur from Vancouver to India.
- The shipowners allege the cargo was wet when loaded and this has caused severe corrosion to the vessel.
- They obtained leave to serve proceedings on the shippers in Canada as governed by English law.
- The ship owners sought leave to move the proceedings from the UK to Canada.

*Held*

- Where jurisdiction is founded as a right, meaning where the defendant has been served with proceedings within the particular jurisdiction, the defendant can apply to that court to exercise its discretion to stay the proceedings.
  - This is an application under forum non conveniens.
- The question in these cases is over which jurisdiction is most suitable for the proceeding, given the interests of all parties and the ultimate pursuit of justice.
- It is not merely an issue of practical convenience.
- The basic principle is that a stay will only be granted where the court is satisfied there is another, more appropriate jurisdiction.
- The general burden of proof lies on the defendant to persuade the court to exercise its jurisdiction to grant a stay.
  - The plaintiff will, in reality, have to prove the inverse.
- In New Zealand, r 6.29 requires the applicant affecting service must establish that New Zealand is the appropriate jurisdiction.
- The question is whether there is another jurisdiction which is more appropriate.
  - In investigating this, consider factors such as expense, the relevant law etc. Court can consider all relevant factors.
- There was a parallel case, the *Cambridgeshire* going on in England at the same time. This was taken into account as a highly relevant factor in these proceedings.
  - It was heavy litigation, with a large number of expert witnesses, and had been going on for a lengthy period.
  - The presence of this case may well have caused significant crossover with this case.
  - It was therefore in the interests of efficiency, expedition, and economy that this case take place in England.
- It was open to the trial judge to hold that the appropriate forum was England. Appeal allowed.

*D Reichhold Norway v Goldman Sachs International* [2000] UKCA

Lord Bingham

*Facts*

- Transaction which went wrong.
- The defendants were engaged by a Norwegian company to advise on a sale. The Norwegian company promised to indemnify Goldman Sachs against consequent liability.
- Goldman Sachs overstated the profitability of the company.
- Reichhold sought to sue Goldman Sachs and J.
- Goldman Sachs sought to get a stay of proceedings in England until the arbitration against J in Norway had finished.

*Held*

- Trial judge stayed the arbitration owing to the courts power to stay proceedings before it in the interests of proper management.
- He held that cost, convenience and the interests of justice were in favour of granting a stay.
- The judge was correct in his assessment, courts can exercise a greater degree of control over proceedings before them.
- The overwhelming considerations are the balance of efficiency, cost, convenience, and the overall interests of justice.
- The granting of a stay in a jurisdiction where an individual has a right to sue should only be done so in exceptional circumstances.
  - o This may be where the effect of a judgment against the party would render them unable to complete other proceedings elsewhere.
  - o Consider whether granting or not granting a stay would be materially injurious to either party's case.

*E Danone v Fonterra* [2014] CA

White J

*Facts*

- Centered on the Fonterra botulism scandal.
- Danone had to withdraw milk formula from the market. They sued Fonterra under their arbitration clause in Singapore which would take place under English law.
- They also tried to sue Fonterra's parent company in New Zealand.
- The High Court granted a stay of the suit until the arbitration was completed.
- Danone appealed.

*Held*

- All causes of action in Danone's statement of claim would have to be amended after the arbitration is resolved. It is therefore pointless in compelling Fonterra to file a statement of defence at this stage.
- This will affect necessary discovery.
- Fonterra and its subsidiaries have the right to avoid having to face two overlapping cases at the same time, especially when there are realistic prospects that the case which is first in time (the arbitration) will resolve all issues.
- Therefore the proceedings in the High Court are potential unnecessary.
- The timetable of the arbitration is tight, and it would result in a significant burden if Fonterra had to defend both cases at once.
- There would be a real risk of injustice if Fonterra was required to also answer the High Court proceedings in these circumstances.

- There is a general principle that a party should not be vexed twice in the same manner.
- This case shows how the rules cover what is happening and where jurisdiction can be shown. Here, there was jurisdiction, but Fonterra discharged the duty to show that the granting of jurisdiction is not in the interests of justice.

## ***B Forum non conveniens, stays and anti-suit injunctions***

### *1 High Court Rules*

- 7.81: Interim relief in support of overseas proceedings
  - o (1) On the application of a party or an intended party to judicial proceedings commenced or to be commenced overseas, the court may, if it is considered just, give interim relief in support of the overseas proceedings.
  - o (4) Before making this order, the court must be satisfied that there is a real link between the subject matter of the interim relief and the territorial jurisdiction of the court.
  - o (5) An order must not be inconsistent with interim relief granted in the overseas proceedings by the court outside New Zealand.

### *2 Case Law*

#### *A The Siskina v Distos Compania Naviera [1979] HL*

Lord Diplock

#### *Facts*

- There was a charter of a ship to transport cargo from Italy to Saudi Arabia.
- The charterers had not paid the charter freight to the ship-owners, and the ship-owners refused to take the ship through the Suez Canal unless they paid.
- They paid some but not all of the cost and the ship sailed to Cyprus and claimed the cargo in a lien for the unpaid freight.
- The cargo was arrested in Cyprus, the ship then sank in waters off Greece.
- The cargo owners are seeking a freezing order over the insurance pay out to the ship-owners.
- Question of whether the English court can assume jurisdiction to grant an injunction to preserve the fund for their lost cargo.
- Focused on the equivalent of NZ HCR 6.27; 6.29.
- A case had to fit within a 6.27 style jurisdictional gateway for the granting of jurisdiction.
- The cargo holders are trying to squeeze into an exception.
  - o In an action begun by a writ, an injunction is sought can be a way to come into jurisdiction.
- The cargo owners argued they are seeking an injunction stopping the cargo owners from doing something.
- 

#### *Held*

- It is conceded that the cargo owners could not claim damages for the ship owners dropping off the cargo in England as the contract was breached in Italy.
- No tort nor breach of contract was committed in England.
- The right to obtain an injunction cannot stand on its own, it depends on a pre-existing claim by the plaintiff against the defendant.
  - o The right to obtain an injunction is ancillary to that.

- There is no ability to grant a sympathetic interim injunction for an overseas proceeding where there would be no possibility of a substantive proceeding in England.
- Freezing order not granted.

*B Yos v Heng [2009] HC*

Miller J

*Facts*

- Mr Heng is the husband of Ms Yos.
- A freezing order was made without notice over some of Mr Heng's bank accounts.
- An order to the same effect was made in Australia against Mr Heng.
- The respondents refused to comply with the Australian order unless the order was registered in New Zealand.
- An interim freezing order cannot be registered under the Reciprocal Enforcement of Judgments Act 1934 and is unenforceable at common law.
- Case can be seen as a 'sympathetic interim injunction', an injunction to assist a foreign proceeding.

*Held*

- Part 32 of the HCR deal with freezing orders generally.
- Rules 6.27-6.29 and r 7.81 reverse the rule in *The Siskina*.
- New Zealand courts have historically been reluctant to grant service out of a jurisdiction where the parties would not have a substantive claim in New Zealand.
- Rule 7.81 does not apply to a freezing order.
  - o It requires there be some link between some assets overseas and New Zealand.
  - o Basically the assets or the activity you want stopped have to be in New Zealand.
  - o The New Zealand court will not be a roving policeman around the world.
- You can get a freezing order in respect of a proceeding brought overseas if;
  - o You show that you have a real chance of getting the order in New Zealand or overseas.
  - o There's a causal link between New Zealand and the overseas jurisdiction.
  - o Must be a link between New Zealand and the assets.
  - o The interim relief cannot be in conflict with the interim order of another court.
- Read
- This can only apply if there is jurisdiction over Mr Heng.
- Mr Heng would need to come under 6.27, and a freezing order is specifically excluded from 7.81, therefore 6.27(d)(ii) gives a gateway over interim relief, but not in the case of freezing orders.
- Therefore the plaintiff would have to go through r 6.28 and make an application for leave to serve out.
- However that is not necessary here, as the freezing order itself can be made against the respondent banks, and r 32.5(5) allows a freezing order to be made against a third party if the court is satisfied that the third party has control over the assets.
- Therefore the freezing order against the banks is made.

*C Alcatel-Lucent NZ Ltd v Juniper Networks Australia Pty Ltd [2009] HC*

Clifford J

*Facts*

- Alcatel is contracted by Juniper to provide telecommunications related services.
- Juniper is based in the USA.

- There are proceedings going on at the same time in the USA of a dispute in the contract between the parties.
  - o The contract states that services would stop being provided at the end of 2009.
  - o Alcatel argues that that is a mistake, and that the year should be 2011.
- Alcatel started substantive proceedings in New Zealand then discontinued them.
  - o They discontinued proceedings because there were specific dispute resolution proceedings in the contract.
- Alcatel applies to the New Zealand High Court to have the contract amended, Juniper applies for a permanent injunction against the New Zealand proceedings, citing California or New Jersey as the appropriate courts.
- Alcatel wants an injunction restraining Juniper from using any services other than Alcatel's.

*Held*

- It's a forum non conveniens protest, it could have been phrased as a need for an injunction to prevent them suing until the overseas proceedings were resolved.
- Whether the judge considers this in interim injunction terms or in terms of 6.28 or 6.29, the applicant must satisfy the court that there's a serious question to be tried.
  - o This test exists both under 6.28 and 7.81.
  - o So Alcatel would have to show that there's a serious question to be tried that the date should be 2011.
- In several places, Alcatel NZ simply forgot to address the court on the question of whether there was a serious question to be tried.
- Juniper said that they were only seeking interim relief to slow the proceeding down in order to have the issues tried in the United States first.

*D Republic of Kazakhstan v Mega Ltd [2016] HC*

*Facts*

- The government of Kazakhstan allege that some email accounts were hacked by unknown persons.
- A substantial number of these emails were later uploaded on a website hosted by Mega.
- Mega automatically encrypts all files on all websites it hosts and cannot see the content itself.
- Kazakhstan filed a civil action in the United States District Court against the persons who undertook the hackings.
- Kazakhstan seeks an injunction preventing the information being used on Mega.
- The USA Court send a letter to the New Zealand High Court requesting assistance in having the High Court order Mega to disclose the IP addresses of the persons who uploaded the files.
- Kazakhstan applies under ss 184 and 185 of the Evidence Act 2006.

*Held*

- The key issue was whether the requesting court was requesting the information for trial purposes or investigatory purposes. The former is authorised under the Evidence Act, the latter is not.
- Seeking essentially sympathy evidence.
- Could consider starting substantive proceedings in New Zealand and trying to make Mega disclose through that.
  - o That would have been an order for pre-commencement discovery.
  - o But that would require underlying proceedings showing the issues in New Zealand.
- Evidence can be obtained in sympathy for foreign proceedings provided it is not a fishing expedition, it needs to be specific and for use in a proceeding.
- This was held to be specifically narrow and therefore the order was made.



## **C Anti-suit Injunction**

### *1 Overview*

- An anti-suit injunction prevents a party from being sued in a particular jurisdiction.
- The injunction is directed at the defendant.
- You cannot obtain an injunction against another jurisdiction's courts. There are two options;
  - o You can obtain an injunction preventing the defendant from being able to sue in the jurisdiction in which you obtain the injunction.
  - o If the court's jurisdiction extends over the defendant, you can order the defendant to halt proceedings in another jurisdiction.
- New Zealand courts have jurisdiction over anyone who can be properly served in New Zealand.
- The jurisdiction rules are set out in r 6.27 and r 6.28.
- There are no specific rules which deal with an anti-suit injunction.
- The same rules apply to an anti-suit injunction as apply to any other injunction, outlined under r 7.53.

### *2 Texas Wrongful Death Statute*

- There was a statute passed which seemed to allow anyone in the world to sue in Texas in front of a Texan jury for wrongful death caused by negligent product manufacturing.

### *3 Case Law*

#### *A Société Nationale Industrielle Aerospatiale v Jak [1987] PC*

##### *Facts*

- Decided by the Privy Council sitting in right in Brunei.
- The case concerned a helicopter, manufactured by a French company, owned by an English company, operated and serviced by a Malaysian company, which crashed in Brunei.
- The crash killed the occupant.
- The accident appeared to be due to a gearbox failure.
- The family of the victim initiated proceedings in Brunei against the Malaysian company and the French company.
  - o Initiated proceedings in France against the French company.
  - o Initiated proceedings in Texas against the French company and the Malaysian company.
- The French company carried on business proceedings in Texas, granting jurisdiction.
- The proceedings in France were discontinued and the proceedings against the Malaysian company was settled.
- The French company applied to have to the High Court of Brunei for an order restraining the plaintiffs from continuing with Texan proceedings on the grounds of forum non conveniens.

##### *Held*

- In considering whether an anti-suit injunction should be granted, the court considers two factors;
  - o 1. Are the plaintiff's actions or the alternate forum itself, oppressive or vexatious?
    - Vexation includes conduct where the proceedings are so utterly absurd that they cannot possibly succeed. It also occurs when the plaintiff sues the plaintiff in two courts at the same time under the same jurisdiction.
    - It is not vexatious to bring a proceeding in two countries where there is substantial reasons to benefit the plaintiff. However this rule is likely outdated.

- 2. Would restricting the plaintiff to the natural forum unjustly deprive the plaintiff of advantages available in the foreign forum?
- The *Spiliada* factors played a significant role in establishing the forum non conveniens test.
  - The plaintiffs had to show that, with all factors considered, Brunei is the more appropriate forum.
  - This is a relatively low bar.
- The *Cambridgeshire* factors were considered here as supporting Texas as the natural forum.
  - Jak argued that due to the amount of preparation and work already done in Texas meant that Texas had become the natural forum.
  - This was not upheld, the level of work undertaken by the lawyers in Texas was not sufficient to make it the natural forum.
  - Distinguished from the *Cambridgeshire* and *Spiliada* as the level of complexity of the proceedings and the amount of work put in by the parties was significantly less than in this case.
- It would be oppressive for the plaintiffs to continue the Texas proceedings because there would be serious injustice done to the plaintiff in preventing them from claiming indemnity or contributory damages from the Malaysian company for any liability.
- There were myriad factors connecting the proceedings with Brunei. The victim was from there, his business was conducted there, any discussion over damages would require the evidence of people resided in Brunei. There was nothing connecting the events to Texas.
- Further, the French company would seek contribution from the Malaysian company.
  - If the proceedings continue in Texas, the Malaysian company will not be added, and therefore the plaintiffs will have to commence additional proceedings in Brunei to join them to the proceedings, requiring duplicity of proceedings.
  - Due to a Brunei statute, if judgment was made in Texas, the French company may not be able to recover contributory damages from the Malaysian company.
    - This could lead to serious injustice and would rightly be described as oppressive.
- The undertakings entered into by the French company were sufficient to ensure that any advantage available to the plaintiffs in Texas would also be available in Brunei.
- An injunction was granted, barring the proceedings in Texas from continuing.

### *B Airbus Industrie v Patel* [1999] HL

Lord Goff

#### *Facts*

- An Airbus A-320 crashed when it was coming to land in Bangalore.
- Two families who were British citizens of Indian decent died or were injured in the crash.
- Their relatives sought to sue on their behalf.
- A court of inquiry in India found the cause of the crash was pilot error. A claim was settled in India.
- The defendants commenced proceedings in Texas including Airbus claiming fault with the aircraft.
  - Texan courts found sufficient jurisdiction based on the fact that Airbus had done past business with a Texas based corporation.
- The Bangalorian court made an anti-suit injunction order restraining the plaintiffs from acting in proceedings anywhere other than India or Bangalore.
- The plaintiffs initiated proceedings in England to enforce the Bangalore judgment and restrain the defendants from continuing the proceedings in Texas.

- The Court of Appeal allowed the plaintiffs appeal, issuing an anti-suit injunction.

*Held*

- As a general rule, it is contrary to comity for an English court to grant an anti-suit injunction to restrain proceedings in a foreign jurisdiction unless the English forum had a sufficient interest in or connection to that matter in question to justify such interference.
- Texas does not recognise the doctrine of forum non conveniens.
- Difference between European and common law forum non conveniens rule:
  - o Europe is rigid and can be prone to injustice.
  - o The common law world is a “jungle of separate, broadly based jurisdictions”.
  - o Forum non conveniens seeks to curtail the potential excesses of the common law system.
  - o It is “a self-denying ordinance under which the court will stay (or dismiss) proceedings in favour of another clearly more appropriate forum”.
  - o The Brussels Convention and forum non conveniens serve the same purpose, the aim is to find the jurisdiction most appropriate for the decision to be made.
  - o Parallel proceedings may not necessarily be seen as unacceptable.
  - o The focus is on practical justice.
- The anti-suit injunction.
  - o The broad principle underlying this feature is that it will be exercised when the needs of justice require it.
  - o Generally speaking, this will occur when the foreign proceedings are vexatious or oppressive.
  - o The fundamental basis of the injunction is the principles of comity.
- Where the English court has no interest in the matter, the grant of an anti-suit injunction was inconsistent with comity, notwithstanding that India, the natural forum for the dispute was unable to grant the plaintiffs effective relief and the Texas proceedings might be seen as oppressive.
- There are commonly two types of cases involving the need for an analysis of comity:
  - o Single forum cases:
    - These are cases where there is only really one place where the case should be held. The question turns on whether the suit taking place in that jurisdiction would be unconscionable.
  - o Multi-forum cases:
    - Cases where there are valid grounds to sue in jurisdiction A or B.
- No aspect of the present case which would make the intervention of the English courts consistency with comity. The application was dismissed.

## **D Enforcement of Foreign Judgments**

### *1 High Court Rules*

- Part 17 deals with general enforcement.
- In order to enforce a foreign judgment in New Zealand, you need to get the judgment recognised and accepted as enforceable.
- Part 23: Enforcement between jurisdictions.
- There are three ways to get foreign judgments enforced:
  - o 1. Through the Reciprocal Enforcement of Judgments Act 1934.
  - o 2. Under common law.
  - o 3. Section 172 of the Senior Courts Act.
  - o Note: Different rules apply for Australian judgements.
- Part 23 subpart 1 deals with the Reciprocal Enforcement of Judgments Act 1934 and sets out formatting and procedural requirements for applications under the Act.

### *2 Reciprocal Enforcement of Judgments Act 1934*

- S 3: Application of this Part
  - o (1): This Part shall extend to the United Kingdom.
  - o (1A): Nothing in this Part applies or extends to a judgment that is given in or by a senior court or an inferior court of Australia.
  - o (1B): (1A) does not prevent an Australian judgment being registered under the Trans-Tasman Proceedings Act 2010.
  - o (2): If the Governor-General is satisfied that substantial reciprocity of treatment will be assured as respects the enforcement of money judgments, she may make an Order in Council to direct:
    - (a) That this Part shall extend to that nation.
    - (b) That such courts as specified shall be deemed senior courts for that country.
  - o Note: This part largely applies to commonwealth countries.
  - o (3): Any money judgment of a senior court of a country to which this Part extends, other than a money judgment of such a court given on appeal from a court, not being as specified inferior court, which is not a senior court, shall be a judgment to which this Part applies, if:
    - (a) It is final and conclusive between the parties; and
    - (b) There is a payable sum of money; and
    - (c) It is given after the coming into operation of the Order of Council.
  - o Note: Essentially means that it applies to money judgements of a foreign senior court provided the judgment was made after an Order in Council was made direct that this Part extends to the country in question.
  - o (4) For the purposes of this section, a judgment can be deemed as final whether or not there is an appeal pending against it or that it may be subject to appeal in the courts of the original country.
- 4: A person can apply to the High Court at any time within 6 years after the date of the judgement to have the judgment registered in the High Court. The judgment shall not be registered if at the date of application-
  - o (a) It has been wholly satisfied; or
  - o (b) It could not be enforced in the country of the original court.
- 6: Parties may apply for a registered judgment to be set aside.
  - o (1) On application, the registration of the judgement shall be set aside if the High Court is satisfied-

- (a) That the judgement is not a judgement to which this Part applies or was registered in contravention of the foregoing provisions of this Act; or
    - (b) That the courts of the country of the original court had no jurisdiction in the case; or
    - (c) That the judgement debtor did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings; or
    - (d) That the judgment was obtained by fraud; or
    - (e) That the enforcement of the judgement would be contrary to public policy in New Zealand; or
    - (f) That the rights under the judgement are not vested in the person by whom the application for registration was made.
  - (2) On application, registration of a judgment may be set aside if the court is satisfied that the matter in dispute in the original court had been subject to a final and conclusive judgment by a court having jurisdiction.
  - (3) The courts of the original country shall be deemed to have had jurisdiction-
    - (a) In the case of an *in personam* judgment-
      - (i) If the debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for purpose of opposing the seizure of property; or
      - (ii) If the judgment debtor was a plaintiff or counterclaimant in the original court; or
      - (iii) If the debtor was a defendant and had agreed to submit to the jurisdiction; or
      - (iv) If the debtor was a defendant was resident in the country of the original court or was a body corporate that had its principle place of business in that country; or
      - (v) If the judgment debtor was a defendant and had an office or place of business in the country of that court and the proceedings were in respect of a transaction effected through that office or place.
    - (b) In an *in rem* judgement, if the property was at the time of the proceedings situated in that country.
    - (c) In any case, if the jurisdiction of the original court is recognised by the law of the registering court.
  - (4) Notwithstanding (4), the courts of the original country will not be deemed to have jurisdiction-
    - (a) If the subject matter of the proceedings was immovable property outside the country of the original court; or
    - (b) Except as mentioned in (3)(a)(i)(ii)(iii) or (c), if the bringing of the original proceedings was contrary to an agreement under which the dispute was to settled somewhere else or somehow else.
    - (c) If the debtor has public immunity under international law.
- 7: Powers of High Court on application to set aside registration
  - (1) If, on an application to set aside the registration, the applicant satisfies the High Court than an appeal is pending, or that he is entitled and intends to appeal, it may if it sees just, set aside the registration or adjourn the proceedings until a later time when it appears to the High Court that the applicant has had a reasonably sufficient period to take necessary steps to have the appeal disposed of by a competent tribunal.
  - (2) Where the registration of a judgment is set aside under the last preceding subsection, or solely for the reason that the judgment was not at the date of the application enforceable in the country of the original court, the setting aside of the registration shall not prejudice a further application to register the judgment when the appeal has been disposed of or if and when the judgment becomes enforceable in that country.

- (3) Where a registration is set aside solely for the reason that the judgment was registered for the whole sum payable, the High Court shall, on application, order judgment to be registered for the balance remaining payable at that date.
- (8) Judgments which can be registered under this Act are not to be enforceable otherwise.

### 3 Case Law

*A Hunt v BP Exploration Company (Libya) Ltd* [1980] HC

Barker J

*Facts*

- The English High Court ordered Hunt to pay the defendant over NZD30m.
- The issue arose over oil exploration in Libya.
- The contract was governed by English law and there was no connection to New Zealand.
- An appeal to the English Court of Appeal was pending.
- Hunt was domiciled in Texas.
- Hunt has substantial assets in New Zealand.
- BP applied without notice for a freezing order over Hunt's New Zealand assets.
  - They also want a charging order which largely has the same effect.
- Hunt applied to set aside the orders.
  - Did not attack the jurisdiction of the High Court, instead went for the orders on the basis that the case was under appeal.

*Held*

- The High Court has the power to register the judgement under the Reciprocal Enforcements of Judgments Act 1934. There is no question on this.
- Hunt's appeal in England is clearly bona fide and his application to set aside registration was adjourned until after the determination of the appeal. This operates as a stay of proceeding.
- The High Court has jurisdiction to grant an interlocutory injunction prior to trial to prevent a foreign defendant disposing of assets within New Zealand.
  - BP had a registerable judgment, there was sufficient justification for the freezing order.
  - The standard test under the HCR applies to the freezing order.
- However the charging order was set aside. BP has no right to issue a charging order until it had obtained a final judgment.
- Hunt was entitled to security for damages.

### 4 Senior Courts Act 2016

- Section 172: Memorials of judgments obtained out of New Zealand may be registered.
  - (1) This section applied to any judgment obtained in any court of the Commonwealth for the payment of money.
  - (2) A person in whose favour the judgment was obtained may file in the High Court a memorial containing the specified particulars that is authenticated by the seal of that court.
  - (3) The memorial must be signed by a party in whose favour the judgment was obtained, and must contain a list of details such as the nature of the proceeding and the amount ordered.
  - (8) This section is subject to s 13 of the REJA.

- The key feature with this provision is twofold;
  - o 1. It applies to inferior commonwealth courts, which are unable to be enforced under the REJA.
  - o 2. S 172(8) makes this provision subject to s 13 of the REJA, which mandates that if a judgment can be enforced under REJA, it must be and cannot be unenforced through any other method.

## 5 Case Law

*A Autoterminal.com UK Ltd v Croy* [2006] HC

Ellen France J

### *Facts*

- The plaintiff obtained judgement in the Southhampton County Court in England.
- The Southhampton Court had ordered a sum remaining from the damages to be paid in partial satisfaction.
- Issue was over the High Court has the power to order execution of these terms.

### *Held*

- The High Court has the power to order execution of the whole but not part of a judgment, unless the party is severable.
- Where part of the judgment debt has been paid, the Court can make an order for execution of the balance.
- An undertaking that the plaintiff can give credit for the amount admitted should be given.

## 6 The Common Law Method

- Part 5 of the HCR set out the filing requirements, which are the same as starting a domestic proceedings.
- Part 12 sets out the application for summary judgment.
- To enforce a foreign judgment with the common law method, you would start a proceeding with a statement of claim and likely an application for summary judgment.

## 7 Case Law

*A Reeves v OneWorld Challenge LLC* [2006] CA

O'Reagan J, William Young J dissenting

### *Facts*

- OneWorld Challenge LLC was a company incorporated in Washington State to manage a challenge against Team New Zealand for the 2003 Americas Cup.
- Reeves was a New Zealander who worked with Team New Zealand during two prior Americas Cups.
- He then left Team New Zealand to work as OneWorld's operations manager then left OneWorld.
- Subsequent to Mr Reeves leaving, OneWorld received information from another Americas Cup syndicate that a former member of OneWorld's team has offered to sell OneWorld's confidential yacht design information.
- The person appeared to be Mr Reeves.
- OneWorld obtained an order for Mr Reeves to turn over all of OneWorld's confidential information in his possession and to cease and desist from disclosing any of OneWorld's confidential information without OneWorld's consent.
- There was a 'smoking gun' email suggesting that someone was trying to sell the information to Oracle.
- The District Court of Seattle made a judgment for \$1m against Reeves.

- OneWorld sought enforcement of this judgment in New Zealand and successfully obtained an order for summary judgment in the High Court.
  - o Reeves opposed on the grounds that public policy would oppose the registration of the judgment.
- Mr Reeve's consistent defence was that the information of which he allegedly breached confidence was misappropriate from Team New Zealand by OneWorld and that it had only been disclosed to Team New Zealand. Therefore confidentiality provisions would enable OneWorld to reap the benefits of its own misconduct and would be contrary to public policy.
- An associate judge granted summary judgment. Reeves appealed.

*Held*

- The public policy defence is not available in this case. This defence is not to be used lightly, it has a high bar.
  - o The test is whether the actions likely would shock the conscience of the reasonable New Zealander.
  - o Here we have Reeves breaching the confidentiality requirements of his contract.
  - o Not enough.
- Simply because a case would be decided differently in New Zealand is not enough to invoke the public policy exception.
- The US judgment was prima facie indicative of support for OneWorld's claim, therefore the onus was on Reeves to show an arguable defence. He was unable to do so.
- The requirements for a foreign judgment to be enforceable are:
  - o 1. The foreign Court must have had jurisdiction to give judgment;
  - o 2. The foreign judgment must be for a definite sum of money; and
  - o 3. The foreign judgment must be final and conclusive.
- There are two limited exceptions;
  - o 1. That enforcement of the foreign judgment would be contrary to public policy; and
  - o 2. That the proceedings in which the judgment was obtained were opposed to natural justice.
- The onus was on Reeves to displace the summary judgment assumption. He has to raise a tenable defence. He only submitted an affidavit which was did not satisfy a minimum threshold of credibility. No evidence corroborated his version of events.
- Appeal dismissed.

*Dissent*

- Holds that there should be a public policy exception allowing people to breach their contracts for certain types of conduct. Essentially a whistle-blower exception.
- If a party acts in a grossly inequitable way, there should be protection for people disclosing this. It would be seen by many New Zealanders as doing their moral duty.
- There is a smoking gun suggesting that OneWorld did indeed copy Team New Zealand's designs. This would suggest that there may be question to answer.
- Held that it is arguable that OneWorld stole the designs from Team New Zealand.



## ***E Trans-Tasman Proceedings***

### *1 Trans-Tasman Proceedings Act 2010*

- Deals with all aspects covered by the common law method, Senior Courts Act and REG.
- Based on a treaty, the Australian and New Zealand versions have basically the exact same provisions.
- Section 3: Purpose of, and guides to, this Act
  - o (1) The purpose of this Act is to-
    - (a) Streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; and
    - (b) Minimise existing impediments to enforcing certain Australian judgments and regulatory sanctions; and
    - (c) Implement the Trans-Tasman Agreement in New Zealand law.
  - o (3) This Act provides for the following matters:
    - (a) Service in Australia.
    - (b) New Zealand courts declining jurisdiction and, by order, staying proceedings in New Zealand on the grounds that an Australian court is the more appropriate forum to determine the proceedings.
    - (c) New Zealand courts giving interim relief in support of civil proceedings commenced in Australian courts.
    - (d) People in Australia appearing remotely in New Zealand proceedings.
    - (e) People in New Zealand appearing remotely in Australian proceedings.
    - (f) – (i) concern the recognition and enforcement in New Zealand of Australian proceedings.
- Part 2 Subpart 1: Service in Australia of initiating documents for civil proceedings commenced in New Zealand courts and tribunals.
- 11: Guide to this subpart
  - o (1) This subpart is about serving defendants in Australia with initiating documents for certain civil proceedings in New Zealand courts or tribunals.
  - o (2) It allows defendants to be served in Australia.
  - o (3) Defendants must be given certain information when served. The New Zealand court or tribunal may set aside the proceeding or any step taken in it if defendants are not given that information.
  - o (4) Defendants must file an appearance or response document in the New Zealand court or tribunal within a particular period after being served with the initiating document in Australia.
- 12: Gives the situations in which this subpart applies.
- 13: Service of initiating documents in Australia
  - o (1) An initiating document for the proceeding may be served in Australia under this subpart.
  - o (2) However, the initiating document must be served in Australia according to the same procedural rules as would apply if the document was being served in New Zealand.
  - o (3) It is not necessary for the New Zealand court or tribunal-
    - (a) To give leave; or
    - (b) To be satisfied there is a connection between the proceeding and New Zealand.
- 14: Documents have the same effect as if they were served in New Zealand.
- 15: Information for defendant that must be in or with documents served under s 13.
  - o (2) Any information served on a defendant must include general information about-

- (a) Steps that the defendant must or may take in relation to the proceeding; and
  - (b) Consequences of the document being served on the defendant under s 13.
- 16: Failure to provide the above information does not invalidate the proceeding but it may allow the NZ court to wholly or set aside the proceeding.
- Subpart 2 – New Zealand courts declining jurisdiction on grounds that Australian court is more appropriate forum
- 21: Guide to this subpart
  - (1) It's about when a NZ court may stay a proceeding on the grounds that an Australian court is the more appropriate court to determine the matters in issue.
  - (2) The NZ court may only stay the proceeding if the defendant applies for it to be stayed. The defendant must make the application within 30 working days from receiving the application.
  - (3) The NZ court may only stay the proceeding if it is satisfied that an Australian court has jurisdiction to determine the matters in issue and that it is the more appropriate court to determine those matters. In determining whether the Australian court is the more appropriate court, the New Zealand court must take into account the matters set out in s 24(2).
  - (4) However, if the parties have made an exclusive choice of court agreement that designates an Australian or New Zealand court as the court to determine the issues in question, the New Zealand court's order as to whether or not to stay the proceeding must be consistent with that agreement.
- 22: A defendant to a proceeding commenced in New Zealand may apply to the court for an order staying the proceeding on the grounds that an Australian court is the more appropriate court for the proceeding.
- 23: Hearing on, or other determination of, application.
  - (1) The NZ court may determine the defendant's application under s 22 without a hearing.
  - (2) However, the NZ court must determine the application with a hearing if the plaintiff, defendant, or any other person who is permitted to be serve request it.
- 24: Order of stay of proceeding.
  - (1) On application under s 22, the New Zealand court may, by order, stay the proceeding if it is satisfied that an Australian court –
    - (a) Has jurisdiction to determine the matters in issue between the parties to the proceeding; and
    - (b) Is the more appropriate court to determine those matters.
  - (2) In determining whether an Australian court is the more appropriate court to determine the matters in issue between the parties to the proceeding, the New Zealand court must not take into account the fact that the proceeding was commenced in New Zealand, but must take into account the following matters:
    - (a) The places of residence of the parties or, if a party is not an individual, its principal place of business:
    - (b) The places of residence of the witnesses likely to be called in the proceeding:
    - (c) The place where the subject matter of the proceeding is situated:
    - (d) Any agreement between the parties about the court or place in which those matters should be determined or the proceeding should be instituted (other than an exclusive choice of court agreement):
    - (e) The law that would be most appropriate to apply in the proceeding:
    - (f) Whether a related or similar proceeding has been commenced against the defendant or another person in a court in Australia.
    - (g) The financial circumstances of the parties, so far as the New Zealand court is aware of them:
    - (h) Any other matters the New Zealand court considers relevant.

- 25: Exclusive choice of court agreements
  - o (1) On application under s 22 the NZ court-
    - (a) Must stay the proceeding if satisfied that an exclusive choice of court agreement designates an Australian court as the court to determine the matter; and
    - (b) Must not stay the proceeding if satisfied that an exclusive choice of court agreement designates a New Zealand court.
  - o (2) However, subsection (1)(a) does not apply to an exclusive choice of court agreement if any of the reasons given under this provision are met.
    - (c) Giving effect to it would lead to a manifest injustice or would be manifestly contrary to New Zealand public policy.
- 27: A New Zealand court cannot stay proceedings in Australia on forum grounds other than in accordance with this proceeding.
- 28: A New Zealand court must not restrain a person from commencing a civil proceeding in an Australian court on the grounds that the Australian court is not the appropriate forum for the proceeding.
- 32: On an application under s 31, the New Zealand court may give interim relief in support of the Australian proceeding if-
  - o (a) The court considers it appropriate to give the interim relief in support of the Australian proceeding; and
  - o (b) The court, if a proceeding similar to the Australian proceeding had been commenced in the court,-
    - (i) Would have had power to give the interim relief; and
    - (ii) Would have given the relief.

## 2 Evidence Act 2006

- Part 4 deals with evidence from overseas.
- Subpart 1 – Proceedings in Australia and New Zealand.

## 3 Case Law

### *A Martins v Gascoigne Wicks* [2015] DC

Judge Aim Tompkins

#### *Facts*

- The applicants are a husband and wife living in Australia. The respondents are a law firm in Blenheim.
- Mr Martins' brother hired Gascoigne Wicks to do extensive family law work for him.
- Gascoigne Wicks were not paid by Mr Martins' brother, they now seek to recover the debt from the Martins.
- They have not sued the brother.
- Gascoigne Wicks allege a fee indemnity agreement was made, the Martins deny it.
- The Martins seek an extension of time for filing, alleging the statement of claim they received had pages missing.
- They also apply for stay in proceedings.

#### *Held*

- Extension of time granted. The Martins did not act in bad faith, Gascoigne Wicks contributed to the delay in failing to serve a complete statement of claim and the respondents would incur not material loss if a delay is granted.
- It is agreed that Queensland has jurisdiction, issue of whether a stay should be granted pending the Queensland proceedings.
- Issue under the factors listed in s 24(2)(a) to (h) of the Trans-Tasman Proceedings Act 2010.

- The Martins live in Queensland, the firm is in Blenheim. (a) is neutral.
- Availability of witnesses is neutral. There is no great expense or benefit in either country.
- The key issue is the indemnity agreement, which is alleged to have been made in New Zealand. This factor favours New Zealand.
- New Zealand law seems somewhat more appropriate.
- Mrs Martins has bowel cancer, and it would be expensive for the Martins to travel to New Zealand. This factor strongly favours Australia.
- New Zealand is the marginally more appropriate court, however Mrs Martin's cancer and their financial circumstances mean the most suitable court is Australia.

*B Neville v Neville* [2016] Family Court of Australia

*Facts*

- Matrimonial dispute. The wife wants proceedings heard in Australia, the husband wants them heard in New Zealand.
- The wife submits that New Zealand trust law is in a state of disarray.
- Applies for an order that the Australian proceedings be stayed.

*Held*

- Juridical advantage is not a valid ground of consideration under the TPP Act.
- The New Zealand court has full jurisdiction, therefore the potential differences in outcome based on the jurisdiction are of little significance.
- The decision is discretionary and can be made upon broad appreciation of all relevant factors.
- The application for a stay of proceeding was upheld, the wife's appeal dismissed.

## ***F Enforcing Trans-Tasman Judgements***

### *1 Trans-Tasman Proceedings Act 2010*

- Part 2 Subpart 5 deals with enforcement
- S 52: Guide to this subpart
  - o (1) This subpart is about the enforcement in New Zealand of specified judgments of Australian courts and tribunals.
  - o (2) To be enforceable, the judgement has to be registered in a New Zealand court. To be registered, the judgment must be a registrable Australian judgment as defined in s 54 and an application for its registration must be made.
  - o (3) Once registered in a New Zealand court, the judgment has the same force, and may be enforced in the New Zealand court, as if the judgment had been given by the New Zealand court.
- S 53: When registrable Australian judgments are enforceable in New Zealand.
  - o (1) A registrable Australian judgment cannot be enforced in New Zealand if it is not registered in a New Zealand court under s 57.
- S 54: Registrable Australian judgment defined.
  - o (1) A judgement is a registrable Australian judgement if-
    - (a) The judgement is a final and conclusive judgement that is given in a civil proceeding by an Australian court; or
    - (b) Both of the following are satisfied:
      - (i) The judgement is a final and conclusive judgement given in a civil proceeding by an Australian tribunal listed under s 55(1)(a).
      - (ii) The judgment is an order declared under s 55(1)(b) to be an order to which this subpart applies; or
    - (c) The judgement is a final and conclusive judgment that is registered in an Australian court under the Foreign Judgments Act 1991 (Aus).
  - o (2) Lists circumstances in which a judgement is not a registrable Australian judgement.
  - o (4) For the purposes of (1), a judgment may be treated as final and conclusive even if-
    - (a) A person may appeal against it in an Australian court; or
    - (b) An appeal against it in an Australian court has not been fully determined.
- 56: Gives formulative requirements.
- 57: On an application under s 56, the Registrar in the High Court may register the judgment as a registrable Australian judgment.
- 60: If only parts of a judgment are registrable in New Zealand, those parts can be registered, but the others cannot be.
- 61: Setting aside registration
  - o (1) The section specifies the only situations in which a New Zealand court can set aside the registration of a registered Australian judgment.
  - o (2) The New Zealand court must, on application by a liable person set aside the registration of the judgement if satisfied that-
    - (a) The judgement was registered in contravention of this Act; or
    - (b) Enforcement of the judgment would be contrary to the public policy in New Zealand; or
    - (c) Both the following subparagraphs apply:

- (i) The judgement was given in a proceeding the subject matter of which was immovable property or was an *in rem* judgement on moveable property; and
  - (ii) That property was, at the time of the proceeding in the original court or tribunal, not situated in Australia.
- (3) An application must be made within 30 working days after the liable person was given notice of registration.

## 2 Case Law

### *A LFDP v SM (No 3) [2017] FCA*

#### *Facts*

- *LFDP* case as above. Repeated failure to pay judgment orders.
- Ended up in the New Zealand Court of Appeal who debarred the defendant, Supreme Court withdrew leave to appeal.
- The applicant (husband) seeks to set aside the registration of two judgements in Australia.

#### *Held*

- The husband attempted to argue that the registration of the judgment was a breach of public policy by denying his access to justice and a denial of natural justice.
- Although gross denial of procedural fairness is a just reason for refusing to register a judgment, that is not present here.
- *LFDP* abused the process of the court in New Zealand. They were right to debar him.
- Unless orders are unknown in Australia, but this is not enough to prevent the defendant from getting a fair trial.
- Australian courts understand the issue of vexatious litigants and the need to ensure compliance with court proceedings. Therefore no gross procedural unfairness took place sufficient to trigger the public policy exception for the registration of New Zealand judgments in Australia.
- The proceeds of a sale are moveable property, therefore a judgment against them are an order *in personam*.
- The husband's application as dismissed.