UPDATE ON THE SUPREME COURT

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One hundred years ago this year, on Saturday 25 April 1903, Court of Appeal held a special sitting of the Court at which the Chief Justice, Sir Robert Stout and Edwards J were present, along with members of the Bar. The purpose of the sitting was to protest the decision of the Judicial Committee of the Privy Council in *Wallis v Solicitor-General* delivered in February of that year. In that decision the Judicial Committee had been very critical of the Court of Appeal and had made observations which seemed to cast doubt on the Court's probity.

The Privy Council had said:

> "The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand or even to the intelligence of the Parliament. What has the Court to do with the Executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the Executive? Why should the Executive Government take upon itself to instruct the Court in the discharge of its proper functions?"

The inference in the judgment was clear – the Privy Council was suggesting that the Court lacked independence and was subservient to the Executive. The Privy Council also criticised the conduct of the Solicitor-General.

These remarks were widely circulated in New Zealand and were obviously damaging to the reputation of the Court. Sir Robert Stout, who had not sat in the Court of Appeal in *Wallis*, convened the special sitting to respond. He hoped to show that the Privy Council's criticisms of the Court of Appeal were unwarranted.

The sitting commenced with a lengthy speech from Sir Robert. Having gone through the Privy Council's judgment highlighting what he believed to be important misunderstandings of New Zealand law, the Chief Justice said that although the Privy Council had not criticised his role in the case he felt compelled to respond to the attack and to explain the Court's position to his fellow colonists. He concluded:

> "Unfortunately this is not the only judgment of the Privy Council that has been pronounced under a misapprehension or an ignorance of our local laws. I may briefly refer to three in which personally I was not in any way concerned."

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His Honour then briefly discussed three further decisions before concluding:

> "The matter is really a serious one. A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's subjects must be weakened. At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present in my province to suggest."

The Chief Justice then read a speech prepared by Williams J, the presiding Judge on the Court of Appeal in *Wallis,* which was followed by a speech from Edwards J. This was followed by an impromptu speech from Mr Travers, whom the report describes as the doyen of the local Bar. He expressed the Bar's complete confidence in the integrity of the Bench and said:

> *"Humanum est errare* is common to every institution in the world, and the acts and dealings of all classes of persons, and it was not surprising if some of the decisions had not been upheld. We are quite willing that Your Honours should treat the protest made by the Judges of the Court of Appeal as though it were supported in every point by members of the Bar."

Word of this protest seems to have reached England quite quickly because in the July 1903 edition of the Law Quarterly Review there is an editorial note about it. The writer noted that there had been "an authoritative declaration that Their Lordships had no intention of being personally offensive to the New Zealand Court" and defended Their Lordships from the charge of ignorance of local law by saying that they could not be expected to know the statute law of every country in the Empire and it was the task of counsel to draw all relevant local law to Their Lordships attention. Otherwise Their Lordships would assume that the local law was the same as the law of England.

The following year, in 1904, the Chief Justice published an article in the Commonwealth Law Review in which he called for the abolition of the right to appeal to the Judicial Committee and suggested as an alternative either using the existing Court of Appeal or establishing a new Court of final appeal. In some respects, it is obvious that the article was written a hundred years ago – the style of language, the references to Empire and the exclusive use of the male pronoun all illustrate this. In other respects, however, the article could have been written yesterday – the various arguments that the Chief Justice makes in favour of abolishing the right of appeal to the Privy Council, and his responses to the

contrary arguments, are essentially the same as the points being made in New Zealand today.

There is one exception to this. The article makes no reference to the Treaty or the Maori dimension. But it is interesting to note that even at that time some Maori supported at least limited abolition. In *Assets v Mere Roihi* [1905] AC 176 the Privy Council had overturned a judgment of the Court of Appeal which was in favour of certain Maori plaintiffs. Following the Privy Council's decision, the Maori plaintiffs, together with other Maori, petitioned Parliament to end appeals to the Privy Council, at least in respect to Maori land issues. The petition read in part:

> "That your petitioners object to the decisions of the New Zealand Judges upon Native Land Laws being referred to a Court in England whose Judges know nothing of the Laws they are thus called upon to interpret, and who are entirely ignorant of the circumstances surrounding Native Legislation and the wrongs and remedies proposed to be dealt with therein.
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> ….
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> That your petitioners object to the titles to their lands and their interests therein being referred to any Court outside of New Zealand, or to any tribunal composed of Judges who know nothing about New Zealand law and the Native people."

Ultimately none of this went anywhere. But over the past 25 years the question whether or not New Zealand should retain appeals to the Privy Council has arisen numerous times. The issue was raised in the 1978 Report of the Royal Commission on the Courts and again in 1989 in the Law Commission's Report on the Structure of the Courts. The latter report suggested that "the final New Zealand Court responsible for developing and clarifying the law of New Zealand should be composed of senior New Zealand Judges who are part of our community and are closely familiar with our historical, social and legal history."

Following a Cabinet instruction, my predecessor produced a report on the future of appeals to the Privy Council in 1995. The following year Sir Douglas Graham, then Minister of Justice, introduced the New Zealand Courts Structures Bill into Parliament, the purpose of which was to end New Zealand appeals to the Privy Council. However, that Bill was withdrawn as a consequence of the 1996 Coalition Agreement between National and New Zealand First.

In early 2000 the Labour Alliance Government said that it was willing to review the role of the Privy Council. In December 2000 it issued a discussion paper entitled *Reshaping New Zealand's Appeal Structure*, and invited public comment on several options to replace

appeals to the Privy Council. While the submissions were evenly divided on the question whether appeals to the Privy Council should be abolished or retained, there was a clear consensus that, if appeals to the Privy Council were to be ended, a replacement stand alone Court sitting above the Court of Appeal should be established. This led to a further round of consultation, particularly with Maori, and then to the establishment of a Ministerial Advisory Group, which I chaired, to consider issues relating to a local court of final appeal as an alternative to the Privy Council. The Supreme Court Bill, as introduced, is based essentially on the work of that Advisory Group.

Work of Select Committee to Date

The Select Committee has finished its hearing of submissions. It received 315 submissions, 312 in writing, and heard over 100 submitters orally. The Committee sat for five days of hearings in Wellington, three days of hearings in Auckland and for one day in Rotorua. In addition, most members of the Committee attended the recent hui in Taupo on the courts system. Among the issues dealt with at the hui were appeals to the Privy Council and the proposed establishment of a Supreme Court.

Of the 315 submissions, about 40% favoured abolition of the right of appeal to the Privy Council, 54% opposed abolition and 6% expressed no view, preferring to comment on specific aspects of what was proposed in relation to the Supreme Court. The strength of the opposition varied, from adamant to qualified (i.e., if changes were made to, for example, the Supreme Court appointment process, the submitter would support abolition). About half of the submissions came from individuals, the other half from entities or groups. About a quarter of the submissions came from what might be described as legal interests and 12% from Maori.

As to the submissions from legal interests, the New Zealand Law Society did not argue for or against abolition because, as I understand it, it did not believe that it had a clear mandate either way. The Auckland Women Lawyers' Association took the same approach. A number of the District Law Societies did argue for retention on the basis of surveys or, in one case, of a motion passed at an AGM. One of the difficulties with the surveys, however, is that they had a low response rate – 16.5% in Auckland, for example, although the Bar Association achieved a better response at 37%.

The principal arguments for and against retention of the right to appeal to the Privy Council are, I am sure, well known to you, so that there is little point in outlining them

here. All I need say is that every conceivable argument either way seems to have been made.

In addition, there were numerous comments on specific aspects of the Bill.

Now that the submission process is complete, the Committee will deliberate, with the objective of delivering its report to Parliament by 25 September 2003.

International Developments

There have been two international developments recently which impact on the question of appeals to the Privy Council. I deal briefly with each.

First, on 12 June 2003 the British Government announced that it proposed to create a Supreme Court to replace the Appellate Committee of the House of Lords as a final Court of Appeal for England and Wales, Northern Ireland and Scotland. On 14 July, Lord Falconer, the (perhaps last) Lord Chancellor, issued three consultation papers, one dealing with the question of a Supreme Court for the United Kingdom, another dealing with a new judicial appointment process and a third dealing with the rank of Queen's Counsel.

In relation to the Supreme Court, the British Government's proposal is as follows:

- A new Supreme Court for the United Kingdom will be established. According to the consultation paper, "the intention is that the new Court will put the relationship between the Executive, the legislature and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of the judicial system."

- The current Law Lords will become members of the new Supreme Court. Future appointees, however, will not be members of the House of Lords. This is perceived as necessary to preserve the separation of powers.

- The new Supreme Court will take over the responsibility for devolution cases that currently fall within the jurisdiction of the Judicial Committee of the Privy Council. As the Privy Council's jurisdiction as an appeal body in relation to health related disciplinary tribunals was removed earlier this year, the consequence is that the Privy Council will exist simply for the purpose of dealing with appeals from those countries and dependencies which maintain a right of appeal to the Privy Council.

- The new Supreme Court will not be a constitutional Court in the sense that the American Supreme Court is, with the power to strike down legislation. Rather, it will continue to perform the functions that the House of Lords has been performing. Provision will be made to supplement the Supreme Court Bench for devolution cases if necessary.

Second, in addition to these announcements from the British Government, there have been developments in the Caribbean. The establishment of a Caribbean Court of Final Appeal has been mooted for many years. It is now clear that it will proceed within the next 12 months. On 4 July 2003 CARICOM Heads of Government signed four instruments relating to the establishment and operation of the Caribbean Court of Justice. This Court is to operate as a Court of final appeal for those Caribbean jurisdictions who sign up. The largest of the Caribbean jurisdictions, Jamaica, ratified the underlying convention in June 2003, and it now seems that most Caribbean countries will withdraw from the Privy Council in favour of the new Court. The necessary finance is in place, and it is anticipated that the Court will begin operating in the first half of 2004.

As a consequence of these various changes, the workload of the Judicial Committee will reduce to somewhere between one-quarter and one-third of its recent workload. New Zealand provides 10 - 12 appeals annually; other independent states (the Bahamas, Brunei, Mauritius, Kiribati and Tuvalu) provide about 6 appeals annually. British Overseas Territories provide about 5 appeals annually and there is on average about one appeal annually from other domestic sources.

Observations

It is not appropriate that I enter into the debate concerning the merits of the Supreme Court proposal. However, I do want to make two general observations about the debate.

First, one of the disappointing features of the debate is that much of what has been said has been badly misconceived. To illustrate that, I can hardly do better than quote the following extract from an editorial of a business paper strongly opposed to abolition. The editorial said:

> "Forget about the sanctity of contract in the new judicial set-up; judge-made law will steadily replace common law that has been the bedrock of the civil court system since the start of British settlement in New Zealand."

Obviously, the writer does not appreciate that the common law is judge-made law in the sense that it consists of the principles, standards and rules that emerge over time from individual judicial decisions dealing with particular fact situations.

More importantly, this editorial, and other commentaries, suggest that the Court of Appeal has tended to undermine the sanctity of contract and that this will be exacerbated if the Privy Council is replaced by the Supreme Court. Such comments ignore two important

facts, however, the first being that if there has been an undermining of the sanctity of contract in New Zealand it has come about largely as a result of legislative action, the second being that the evidence simply does not support the assertion that the Privy Council has a greater concern for commercial certainty than the Court of Appeal.

Dealing with the first point, in a series of statutes introduced through the 1970s and 1980s Parliament has replaced or supplemented the common law applying to contracts in important ways, and gave the Courts broad remedial discretions to do what they consider to be fair or just in the particular circumstances of individual cases, including in some instances the power to vary contracts. These statutes include the Illegal Contracts Act 1970 (which sought to litigate the harsh effects of the common law in relation to illegal contracts), the Contractual Mistakes Act 1977 (which gave the Courts the power to grant a greater range of relief than had been possible under the common law where contracts were entered into under mistake), the Contractual Remedies Act 1979 (which deals with pre-contractual misrepresentations and, subject to the individual contract, gives the Court discretion to grant a range of remedies in misrepresentation cases) and the Contracts (Privity) Act 1982 (which allows a person who is not a party to a contract to sue on the contract in certain circumstances). To these must be added the Fair Trading Act 1986, and in particular s 9, which creates a broad based liability for misrepresentation, enabling claimants to bypass the limitations of the law relating to misrepresentation in contract and in tort. Again, it gives the Court a broad power to grant remedies, including the power to vary contractual obligations.

An English academic, writing in 1982, said of the New Zealand contracts statutes that if they had been introduced in England they would "drive the world's merchants and their disputes away from the City of London". Professor Coote, who was one of the architects of the legislation, said in a recently published article, that these statutes had posed a significant threat to the security of contract in New Zealand, contrary to his expectation when they were introduced. If these statutes have not driven business away from New Zealand it seems unlikely that abolishing the right of appeal to the Privy Council will.

Second, in my view the evidence does not support the proposition that the Court of Appeal tends to undermine sanctity of contract while the Privy Council upholds it. Such dogmatic characterisations are not justifiable. For example, some of those opposed to the abolition of the right of appeal to the Privy Council cite the decision of the Privy Council in the *Dymocks* case as illustrating the need to retain access to the Privy Council. However, if the

preservation of commercial confidence is what concerns people, the following paragraph of Their Lordships' judgment must be noted:

> "However, before leaving this issue [the implication of a duty of good faith] Their Lordships wish to say a word or two about the Court of Appeal judgment on it. Although the Court of Appeal decided the point on the ground that the necessary expert witness was not before the Court, they made a number of comments suggesting that 'there is no room' for superimposing a general duty of good faith, that to do so conflicts with requirements of certainty in commercial contracts, and that franchise agreements are not analogous to employment contracts (where duties of good faith are implicit). These comments suggest that, in their view, the development of the law so as to make an obligation of good faith implicit in the relationship between franchisor and franchisee (as in the case of partnership and other joint venture agreements) is not desirable. Their Lordships proposed to express no concluded view on these comments and wish to reserve their opinion on the suggestion that the implication of an obligation of good faith in the relationship between franchisor and franchisee would be an undesirable development."

Such an approach plainly does not enhance commercial certainty.

Some have argued that the establishment of a Supreme Court will promote judicial activism. But again, Parliament has asked the courts to perform tasks such as interpreting generally worded Treaty clauses and developing and applying the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, and in so doing has required the courts to be "judicially active". And that will be so whether it is the Privy Council or the Supreme Court that is our final court of appeal.

My first point is then, that throughout the debate, and I am sure on both sides, much has been said that is rhetoric rather than reason, mythology rather than fact. Whatever decision Parliament ultimately makes, it should be principled, and based on an accurate appreciation of the facts.

Second I come to a more serious concern, namely the damage done to judicial institutions in the course of the debate, specifically to the High Court and Court of Appeal. Forceful comments have been made to the effect that New Zealand must retain the right to appeal to the Privy Council because New Zealand judges are simply not up to it, or because there are doubts about their ability to be truly independent.

The lack of competence argument takes a moderate and an extreme form. The moderate form focuses on size and says that a country like England with [54] million people will inevitably produce more and better Judges than a country like New Zealand with 4 million people. Sir Robert Stout addressed this point in the article to which I referred earlier.

Having noted the argument he said:

> "We do not suggest that our legislators should come from the United Kingdom, or that men should be appointed by the Sovereign, on the advice of his British Cabinet, to administer our affairs. Nor do we go abroad for our bankers or editors, or lawyers, or doctors, or miners, or farmers. Our varied industries can be guided and controlled by men who are Natives of Australasia. Can it be said that our race in these Southern Colonies is not able to produce men who possess the judicial faculty? We do not think so, for the vast majority of our law suits are decided by colonial Judges."

A more extreme version of the competence argument is reflected in the following submission to the Select Committee by a senior silk:

> "Most counsel consider the standard of the Court of Appeal is disappointing."

After commenting on the background of the existing members of the Court, the submitter went on:

> "The quality of the Court's judicial reasoning has suffered to a considerable extent from the members' lack of experience, a serious workload overload, and the perception of many at the Bar that some members' mental horsepower is not up to an appellate standard. Many recent decisions of the Court have been poorly reasoned and of an unacceptable standard."

The submitter then criticised the High Court:

> "The state of the High Court Bench is also a cause for concern at present. It is in the process of sustaining a large number of retirements…. Their replacement necessarily lack experience. It is a sorry fact that appointment to the Bench is no longer regarded as attractive to, or the pinnacle of the legal career of our top barristers. Appointments are being made from the second eleven."

It is true that over the past decade successive New Zealand Attorneys-General have brought a greater diversity of experience onto the High Court Bench (and also into the Court of Appeal). It is no longer the assumption that High Court Judges must be drawn simply from the ranks of senior barristers, and in any event it is clear that some senior barristers are not well suited to judicial life. Further, in England where judicial appointments have been made predominantly from the Bar, there is a clear recognition of the need to achieve greater diversity within the judiciary. The Lord Chancellor's discussion paper on *Judicial Appointments* notes that the current judiciary in England is overwhelmingly white, male, and from a narrow social and educational background, largely reflecting the makeup of the legal profession, and the Bar in particular. However, the nature of the legal profession is changing, and the Bench must change with it, subject always to the fundamental principle that the appointment of Judges must be based on merit.

That said, the High Court Bench should, of course, contain Judges who have been senior barristers, as indeed it does. It is true that some senior barristers are reluctant to accept judicial appointment, certainly outside their home cities. But the consequence is not that New Zealand's High Court consists of the "second eleven" or that there is at the Bar a significant group of barristers who would collectively comprise a better senior judiciary than currently sits. We should not forget what a former Canadian academic who had recently become a judge told an audience of academics shortly after one of his early decisions had been overturned on appeal - "it's not as easy as it looks".

The submitter then moved on to the question of independence. He said:

> "I join the chorus of my colleagues who have publicly stressed the importance to the decision of abolition, of the loss of independence that would occur if appeals to the Privy Council are to end. The Law Lords are not interested in the identity of the parties to the appeal or any political or reputational fall-out that may result from their decision. They truly fulfil the obligation of all Judges taken in terms of the judicial oath and do right to all manner of people after the laws and usages of New Zealand without fear or favour. In a small community like ours, where the Executive arm of Government, and the Court of Appeal whose work would be reviewed by the proposed Supreme Court, are all in the same town, it will be very difficult to have any confidence at the same level of independence would be possible."

The suggestion is that Judges of the Court of Appeal, and of the Supreme Court if it is established, are incapable of meeting their judicial oaths - that Wellington's small size and the co-location of important judicial, legislative and executive organs make judicial independence impossible. Presumably the High Court Judges who sit in Wellington are equally incapable of acting independently.

If that suggestion were true, it would strike at the heart of the judicial function, and of our capacity to live by the rule of law. Fortunately, the claim is nonsense. There is no sense in which Judges based in Wellington lack independence or in some way improperly favour the Crown's interests – I and other Crown Counsel bear the scars to prove it! As Mr Travers, the doyen of the Bar who spoke at the special sitting 100 years ago said, New Zealand judges, like the rest of us, undoubtedly make mistakes; but their integrity and their commitment to their oaths of office cannot fairly be challenged.

There is another version of the lack of independence argument. It says that because New Zealand is a small and comparatively isolated South Pacific community, access to the neutral, independent arbiter that the Privy Council represents is necessary to maintain the confidence of international commercial community in New Zealand. While this is a more

sophisticated version of the argument, again it does not reflect well on the capacity of our judges to judge. It is not clear why, for example, this analysis should apply simply to the judicial branch of Government. The true position is that in a small society, as in a large one, judges must be "self-aware" – that is, they must be conscious of their own values, beliefs and prejudices and must take them into account as they undertake their judicial decision-making.

I conclude by saying that in my period as Solicitor-General I have developed a much deeper appreciation of how robust, yet at the same time how fragile, important parts of our constitutional arrangements are. Powerful conventions operate at various points, in relation to the appointment of judges, for example. These conventions are robust, essentially as a result of the scrupulous way they have been understood and observed by the relevant actors over many years. They are fragile because they can easily be misrepresented and misunderstood, with a resulting loss of public confidence. And once lost public confidence is difficult to regain.

The debate about the Privy Council and the proposed Supreme Court is an important one. It seems to me that some members of the profession have been prepared to sacrifice the reputation of important judicial institutions to win the debate, with, I fear, a lasting effect on the institutions and those who serve in them. It is surely time that we as a profession take greater care to preserve and enhance public confidence in the conventions governing judicial matters and in those local judicial institutions which are so vital to the effective operation of the rule of law.

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