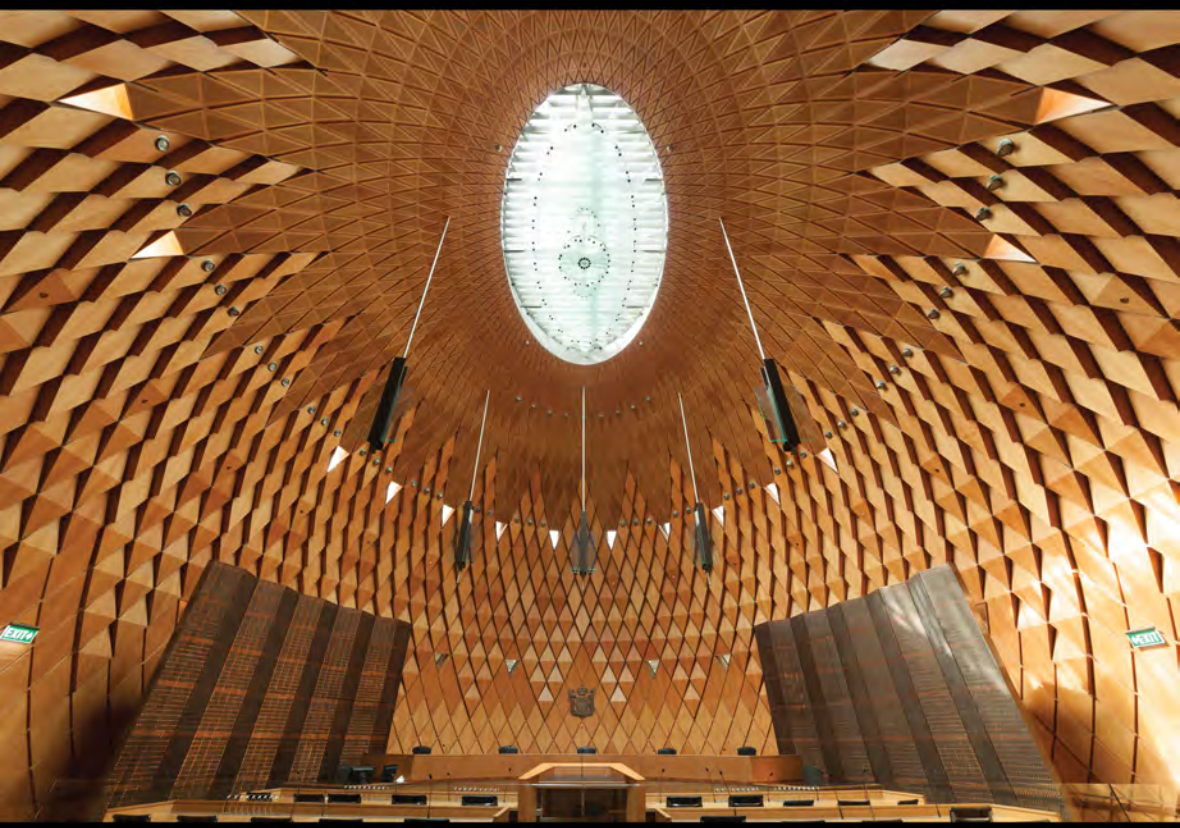
# THE SUPREME COURT OF NEW ZEALAND

## 2004–2013



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# *A Barrister's Perspective*

James Farmer QC[1]



## Introduction

The New Zealand Supreme Court has been operating now for a decade, time for the initial settling down period to have passed and for some judgements, albeit tentative, to be made about its performance. The question that many will naturally ask is whether the Supreme Court has improved the situation that previously existed in which the Privy Council was the final appellate body in the New Zealand Court hierarchy. The word "final" in this context needs to be viewed against the fact that, for whatever reason, the number of appeals that went to the Privy Council was relatively small (said to be about 11 a year).[2] For that reason, the Court of Appeal on a reasonably regular basis would sit as a Court of five, and occasionally even as a Court of seven,[3] judges in order to give that Court's judgments on important points of legal principle greater authority. That practice has been largely discontinued since the establishment of the Supreme Court.

When introducing the Supreme Court Bill in December 2002, the Attorney-General, the Hon Margaret Wilson, said that the new Supreme Court was expected to hear about five times the annual number of cases heard by the Privy Council. Leaving aside leave applications, the actual number of substantive appeals heard and disposed of currently is much smaller than that: 22 in 2012 and 16 in 2013. The main work of the Court currently appears to be in dealing with leave applications. In 2013, it disposed of 141 such applications (almost always, if not entirely, on the papers), of which over two thirds were declined.[4] Hearing around 20 substantive appeals a year the Court's work can be compared with the corresponding number of 60 in both the House of Lords (now Supreme Court)

1 My thanks to Michele Greenwood, barrister, for assistance in the legal research.

2 Margaret Wilson "Supreme Court Bill introduced to the House" (press release, 9 December 2002).

3 See for example *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA). For a rare instance where the Court of Appeal has since the establishment of the Supreme Court sat with five judges, see *Atkinson v Ministry of Health* [2012] NZCA 184, [2012] 3 NZLR 456 (CA).

4 Ministry of Justice "Annual Statistics" Supreme Court December 2012 and December 2013 <www.courtsofnz.govt.nz>.

and the High Court of Australia. However, the number of appellate judges in those Courts is much larger. In New Zealand, the Supreme Court Act 2003 restricts the number of judges in that Court to six, but in fact the decision was taken administratively to have only five permanent judges, apparently on the theory that every permanent judge should have the "right" to sit on every case. Leaving aside any financial issues, this is a wrong-headed policy that will necessarily limit the impact that the Supreme Court can have on the New Zealand way of life.

The debate about whether the Judicial Committee of the Privy Council should continue to be the final appellate court for New Zealand rose from time to time over nearly a century and with greater vigour following the lead of Canada and Australia[5] in abolishing rights of appeal to it. Dissatisfaction with the Privy Council was debated in the House of Lords following reported criticisms of delays in the disposal of appeals by Sir Robert Stout, then the Chief Justice of New Zealand, in July 1905.[6] The Lord Chancellor was reported to have said that the criticism by Sir Robert, if correctly attributed, was "manifestly a ridiculous exaggeration". This provoked a reported response from the Chief Justice in the following terms:[7]

> My statement as to delays was not exaggerated, as the following figures will prove. During the last 15 years 29 appeal cases from New Zealand have been decided by the Privy Council. Of these two took between nine months and one year from the date of the New Zealand Appeal Court decision; thirteen between one year and two years; thirteen over two years. Of the latter thirteen nine took between two and three years, two took between three and four years, one took over five years, and one took seven years. I did not say who was to blame for the delays but that the delays have occurred. A judicial system in which there are such delays requires reformation.

The question of delays in the Supreme Court will be discussed below where it will be seen that the problem has not gone away, though the delays appear to be more in the time taken between the time of hearing and the date of delivery of judgment rather than in the time taken to have an appeal heard. That distinction will be of no comfort to litigants who are entitled to have expectations that there will be no unwarranted delays in obtaining an outcome to their litigation, expectations that it will be submitted have not been met by the Supreme Court in a number of cases.

Further discussion of the desirability (or otherwise) of abolishing appeals to the Privy Council arose: in 1978 in the Report of the Royal Commission on the Courts;[8] in 1989

5 Criminal appeals to the Privy Council were abolished in Canada in 1933 and civil appeals in 1949. Australia abolished the right of appeal from the High Court of Australia in 1968 and from State Courts in 1986.

6 "Privy Council Condemned: Chief Justice Comments on its Delay" *Evening Post* (New Zealand, 15 July 1905) at 6.

7 "Political Notes: Dilatory Privy Council" *North Otago Times* (New Zealand, 15 September 1905) at 2.

8 David Beattie "Report of the Royal Commission on the Courts" [1978] AJHR H2.

in a Law Commission Paper on the Structure of the Courts;[9] in 1995 in a report by the Solicitor General to the Cabinet Strategy Committee on court structures;[10] in a Discussion Paper called "Reshaping New Zealand's Appeal Structure" issued in 2000 by the Attorney General;[11] and in an Advisory Group report in April 2002 issued by the Attorney General's Office which recommended replacing appeals to the Privy Council with the establishment of a Supreme Court.[12]

The Supreme Court Act 2003, which established the new Supreme Court, was enacted soon after. Existing appeals to the Privy Council however continued for some time and some still continue, though rarely, particularly in the case of a number of highly publicised criminal convictions for murder that preceded the passing of the 2003 Act.

One of the justifications for a local final appellate court was that it would enhance access to justice as litigants would not have to bear the costs of travel to the United Kingdom. As a theoretical argument, that was hard to sustain as the costs of air travel and even of London hotels are but a small fraction of the costs of conducting an appeal (wherever it is heard). Furthermore, in terms of access to justice, the fairly stringent leave conditions under the Supreme Court Act 2003[13] are a greater barrier to bringing forward an appeal (at least in a civil case) than was the case with the Privy Council where disputes that involved a monetary amount of $5,000 or more could be brought as of right.

As referred to above, the number of appeals that have surmounted the leave requirement and been heard and disposed on their merits is not as great as had been anticipated.[14] However, judged by the standard of the number of attempts that have been made to obtain leave, the claim of greater access has undoubtedly been made out numerically. Judged by the far greater proportion of applications that are rejected however, this claim may to some extent be illusory. On the other hand, in 2012, 11 substantive appeals in which leave to appeal had been given were allowed and 13 dismissed. That might be said to justify the establishment of the Court given an apparently large degree of error in the Court of Appeal

9 Law Commission *The Structure of the Courts* (NZLC R7, 1989).

10 John McGrath *Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure* (Crown Law Office, Wellington, 1995). Mr McGrath, later appointed as one of the judges of the Supreme Court, recommended that appeals to the Privy Council be replaced with appeals to a divisional or Full Court of Appeal, rather than to a new Supreme Court.

11 Office of the Attorney-General *Discussion Paper: Reshaping New Zealand's Appeal Structure* (December 2000).

12 Terence Arnold *Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, April 2002).

13 These are contained in s 13 of the Supreme Court Act 2003. In summary, they require an applicant for leave to demonstrate that (a) the appeal involves a matter of general or public importance; or (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or (c) the appeal involves a matter of general commercial significance.

14 For a recent analysis of leave applications, see Polly Pope and Vicki McCall "What is Capturing the Interest of the High Court?" (2014) 2 NEWLAW 10.

in those cases where leave was granted. I would myself hesitate to draw that conclusion based on statistics alone. The judicial process is inherently uncertain and judges at different levels, and even at the same level, frequently disagree. It cannot be assumed the judges in the Supreme Court have some intrinsically greater wisdom or knowledge of the law than those in the Court of Appeal or even the High Court despite the fact that they will almost certainly have greater judicial experience.

A primary justification for a local Supreme Court, as reflected by the statutory leave criteria, is that it will provide guidance in important areas of the law through its judgments. The rest of this chapter will test that hypothesis by reference to some of its rulings in major cases that have attracted public or professional attention. Necessarily the cases considered are but a selection but one that, in my view, is sufficiently broad to enable some general conclusions about the performance of the Court to date. The cases selected cover commercial law, tax law, the law of tort and various social and human rights issues, all areas that impact on the daily lives of New Zealanders.

## Commercial law

Two judgments of the Court are examined. Both cases relate to the principles by which commercial contracts should be interpreted. The first case considered is *Vector Gas Ltd v Bay of Plenty Energy Ltd* (*Vector*).[15] The second, *Wholesale Distributors Ltd v Gibbons Holdings Ltd*,[16] is more restricted in its application but was important as being the first step taken by the Court in directing a far more expansive approach to the interpretation of contracts and of allowing a much fuller consideration of pre-contractual evidence and of post-contractual evidence. *Vector* has been cited uncritically by counsel in the High Court and Court of Appeal in cases on interpreting contracts (and other instruments such as trusts), no doubt because those courts regarded it as the "last word" on the subject. However, as this work goes to Press, the Supreme Court has delivered its judgments in the case of *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd*.[17] The majority judgment, which is discussed further below after the analysis of *Vector*, may be interpreted as indicating some dissatisfaction with the Court's previous views on the principles relating to the interpretation of commercial contracts. Only one of the *Vector* judges sat on the *Zurich case* and that one – McGrath J – took the most limited approach (in *Vector*) to allowing appeals to context to license an over-reception of extrinsic material, referring in this respect to the cautionary approach of the High Court of Australia in *Codelfa*.[18] Of the remaining *Vector* judges, Blanchard, Tipping, Wilson and Gault JJ have all since left the Court.

15 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

16 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

17 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd* [2014] NZSC 147.

18 *Vector Gas Ltd v Bay of Plenty Energy* Ltd [2010] NZSC 5, [2010] 2 NZLR 444 [*Vector*] at [77] and [60] citing *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347-348 and 352.

The facts of *Vector* were as follows. Vector Gas (then called NGC) and Bay of Plenty Energy (BoPE) had been engaged in litigation concerning the validity of NGC's termination of a long-term gas supply agreement between the parties. Pending the determination of that litigation, the lawyers representing the parties reached an agreement by correspondence that NGC would supply BoPE with gas at $6.50 per gigajoule. No reference was made in that letter to transmission costs, though an earlier letter during the course of negotiations had referred to the cost being per gigajoule plus transmission costs and, in that context, the figure of $6.50 per gigajoule was discussed. A dispute later arose as to whether or not the $6.50 per gigajoule that was agreed included transmission costs. The Supreme Court, reversing the Court of Appeal, held that agreed price did not include transmission costs which were therefore to be paid separately.

The decision of the Court was based on a number of different reasons, including (in the case of three of the judges) estoppel. However, the rulings (by Blanchard, Tipping, McGrath and Gault JJ) that have attracted most attention since have been:

(1) It was not necessary for there to be an ambiguity in the wording of a contract before the court could resort to reading pre-contractual materials as an aid to interpretation;

(2) Reference could be made to the negotiations in order to establish the commercial context, the market in which the parties were operating and the subject-matter of the contract if it showed objectively what the parties intended their words to convey.

Wilson J did not join with the four other judges in relation to the view that the court could look at pre-contractual materials as an aid to interpretation even where there was no ambiguity in wording. He did however say that, in resolving ambiguity:[19]

> … the time has come to remove in this country the barrier imposed by *Prenn v Simmonds*[20] to looking at … negotiations in a situation where they illuminate, in advance of consensus being achieved, what the parties were intending to achieve in their contract

The prohibition expressed by the House of Lords in that case on admitting evidence of negotiations was famously described by Lord Wilberforce in the following terms:[21]

> … such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process,

19 *Vector*, above n 18, at [122].
20 *Prenn v Simmonds* [1971] 1 WLR 1381 (HL).
21 At 1384.

> help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back; indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. It may be said that that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true; the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. Cardozo J thought so in the *Utica Bank* case.[22] And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that, it may be difficult to go; ….

This analysis was unequivocally re-affirmed in 2009 by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*.[23] Lord Rodger traced the prohibition on having regard to negotiations in interpreting contracts back to Lord Eldon LC in 1822 when he said that he could not "conceive that anything can be more dangerous than the construing deeds by the effect of letters and correspondence previous to the execution of them".[24]

Lord Hoffmann, in *Chartbrook*, undertook a lengthy review of Lord Wilberforce's analysis in *Prenn v Simmonds*.[25] He concluded that there was "no clearly established case for departing from the exclusionary rule".[26] In support of this, he instanced the New Zealand case of *Yoshimoto v Canterbury Golf International Ltd*[27] in which, he said, "Thomas J thought he had found gold in the negotiations but the Privy Council said it was only dirt".[28] Lord Hoffmann did however acknowledge the validity of the "private dictionary" cases which allow the receipt of evidence (whether, as Lord Hoffmann pointed out, in the course of negotiations or otherwise) that the parties habitually used language in an unconventional sense and that the words in the contract should be construed accordingly.[29]

Both Wilson J and Tipping J separately were of the view further that it was open to a court to disregard plain words in a contract if, "when read contextually, [they] lead to a result which does not make sense, whether commercially or otherwise". As Tipping J put it: "a meaning that flouts business commonsense must yield to one that accords with business

22 *Utica City National Bank v Gunn* 118 NE 607 (1918).

23 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 (HL).

24 At [69] referring to *Miller v Miller* (1822) 1 Sh App 308 (HL) at 317.

25 At [30]-[41].

26 At [41].

27 *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 (CA).

28 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 (HL) at [33].

29 At [45]-[47] criticising Kerr J in *The Karen Oltmann* [1979] 2 Lloyd's Rep 708 (QB) and David McLauchlan "Contract Interpretation: What is it About?" (2009) 31 Syd LR 5. Tipping J in *Vector*, above n 18, at [35]-[37], defended Kerr J's judgment but on the basis that it was a case of "agreement or estoppel as to meaning, not [one] of special meaning".

commonsense".[30] Wilson J referred to similar statements that had been made in the House of Lords in *Chartbrook*.[31] It is to be noted however that Lord Hoffmann in that case did warn against the dangers of relying on a standard such as that when he said: "It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another." He went on to say that this situation was rare "because most draftsmen of formal documents think about what they are saying and use language with care".[32]

Wilson J also considered the effect of post-contractual conduct of the parties which, he said by reference to Lord Hoffmann's judgment in *Chartbrook* and to the Court of Appeal in *Air New Zealand Ltd v Nippon Credit Bank Ltd*,[33] could give rise to estoppel by convention or even to a case for rectification which, as he said in the case of the latter, "is not of itself a question of interpretation but may obviate a question of interpretation which would otherwise arise".[34] Lord Hoffmann in *Chartbrook* described estoppel by convention and rectification as "two legitimate safety devices which will in most cases prevent the exclusionary rule from causing injustice". But, he said, they have to be specifically pleaded and clearly established.[35]

Where the Supreme Court has taken a different approach in this respect is in recognising a third device that obviates the effect of the rule that excludes evidence of previous negotiations as an aid to interpretation, namely the permissible receipt of evidence of subsequent conduct of the parties.[36] This had, previously to *Vector*, been allowed by the Supreme Court in *Wholesale Distributors Ltd v Gibbons Holdings Ltd*.[37] In that case, there was, on the Court's ruling, no need to receive evidence of the subsequent conduct of the parties and for that reason Blanchard J simply reserved his position on the point.[38] In stark contrast to this conventional stance, Tipping J and Thomas J, although finding that the relevant evidence did not support its admission and that the case could be decided on established principles, both took the opportunity at some length to assert as good law the proposition that evidence of subsequent conduct was not restricted to cases of estoppel by convention but could be used as an aid to interpretation. Thomas J, obiter, went a step

30 *Vector Gas Ltd v Bay of Plenty Energy* Ltd [2010] NZSC 5, [2010] 2 NZLR 444 [*Vector*] at [22] referring to the dictum of Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 (HL) at 201.

31 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 (HL) [*Chartbook*] at [16] per Lord Hoffmann and at [89] per Lord Walker.

32 At [15].

33 *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218 (CA) at 223-224.

34 *Vector*, above n 30, at [126].

35 *Chartbrook*, above n 31, at [47].

36 See *Vector*, above n 30, at [30]-[31] per Tipping J in which he saw no logical reason for considering pre- and post-contractual evidence differently; and at [122] per Wilson J.

37 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

38 At [27].

further and stated his view that the doctrine of good faith applies to contract law.[39]

This raises an important question as to the role of the Supreme Court. Yes, its function is to determine the cases that it will hear according to the statutory criteria of general or public importance or commercial significance – which suggests that the outcome will have an impact or interest far beyond the interests of the particular parties to the case – alongside the substantial miscarriage of justice ground which would normally be confined to the situation of the applicant for leave. But is it the role of the Court, in determining a case that falls within the broader criteria to take it on itself to rule on contentious points of law and, especially, to create new law where the issue does not truly and necessarily arise or where the case can be determined according to established principles?

As referred to above, Blanchard J in *Wholesale Distributors Ltd v Gibbons Holdings Ltd* was not prepared to discuss the issue of subsequent conduct because, he said, on the facts of that case the subsequent actions could be of no assistance in the interpretation of the obligations under the contract.[40] That was also the finding of both Tipping J and Thomas J as well as Elias CJ who, in one line, said that she accepted that "how the parties subsequently treated their contractual obligations may be helpful evidence as to the meaning of the contract",[41] and Anderson J, who was equally brief and who thought that the issue was of "limited practical importance".[42]

Of the two judges who did venture on a legal analysis of whether the law permitted evidence of subsequent conduct as an aid to interpretation, Tipping J referred only to two previous authorities: a decision of the Ontario Court of Appeal[43] and one of the New Zealand Court of Appeal.[44] He also referred to academic writings, including within this genre, lectures given by Lord Nicholls and Lord Steyn.[45] He concluded that he found "the case in favour of admitting post-contractual conduct … distinctly more persuasive than the case for not doing so".[46] He thought that there was "some conceptual difficulty" in adopting different evidential rules for rectification and estoppel purposes on the one hand and for interpreting a contract on the other.[47] With respect, the concepts of rectification (relating to a mistake in the wording of the contract) and estoppel by convention (which

39 At [148]-[149]. This was the sequence to Thomas J's earlier judgment on the same issue in *Attorney-General v Dreux Holdings Ltd* (1996) 7 TCLR 617 (CA).

40 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 [*Wholesale Distributors*] at [28].

41 At [7].

42 At [72].

43 *Montreal Trust Co of Canada v Birmingham Lodge Ltd* (1995) 125 DLR (4th) 193.

44 *Attorney-General v Dreux Holdings Ltd* (1997) 7 TCLR 617 (CA), see especially the judgment of Thomas J.

45 Lord Steyn "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Syd LR 5; Lord Nicholls "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577; David McLauchlan "In Defence of a Role for Subsequent Conduct in Contract Interpretation" (2006) 12 NZBLQ 30.

46 *Wholesale Distributors*, above n 40, at [54].

47 At [51].

refers to the way that the parties have performed the contract) *are* different from the task of interpretation.

The judgment of Thomas J does have the virtue of being more fully argued with the competing arguments being set out with reference to authorities and writings. He refers to yet another article by Professor McLauchlan [48] who has waged something of a campaign for acceptance of subsequent conduct as an aid to interpretation. The Judge fairly sets out at some length the written views of a solicitor, Alan Berg, who states the practical difficulties that a lawyer will have in advising a client on the meaning of a contract if it is necessary to ascertain and take account of a large volume of extrinsic material.[49] He agrees that the notion that lawyers should have to trawl through pre-contractual correspondence and drafts to advise on the meaning of a clause in a contract is "intuitively unacceptable" and that the prospect of a subsequent party having to undertake due diligence on this material and "possibly" (the Judge says) on the subsequent conduct of the original parties is also unacceptable.[50] Indeed. But Thomas J then says that Berg "overstates his case" and that "his approach would herald a retreat to 'literalism'".[51] He downplays the task of amassing "all relevant and available background knowledge before advancing an opinion or advising on legal action" and says, reassuringly, that courts will not expect the impossible and will be "alert to ensure that no party is disadvantaged by virtue only of the difficulty of obtaining access to evidence of pre-contractual or post-contractual conduct".[52] One wonders whether Lord Eldon would have changed his view that correspondence outside the instrument should be put aside if in 1822 the modern forms of communication such as emails, which have multiplied the extent of communications many times over, had existed or whether, on the other hand, he would have felt even stronger in his view that such material is "dangerous".

The real problem which the discussions by Tipping J and Thomas J demonstrate is that judicial changes in, or extensions of, legal principle really do need hard specific facts. Without them, the Court cannot properly focus on how the new or modified principle will apply from a practical point of view, without the evidence that pleaded facts necessarily attract. Tipping J's statements of conceptual difficulty, and his assertion that the case in favour of admitting post-contractual conduct is "distinctly more persuasive" than the case for not doing so, are unconvincing because of the lack of analysis supporting those conclusions and because the post-contractual conduct relied on was of itself clearly not probative of anything. Thomas J's views discounting the practical difficulties faced by a practising solicitor, as expounded by one, could only be regarded as authoritative if supported by

48 David McLauchlan, "Contract Formation, Contract Interpretation and Subsequent Conduct" (2006) 25 UQLJ 77 See above for other references to articles written by Professor McLauchlan given by Lord Hoffmann in *Chartbrook* (in which he was critical) and by Tipping J in *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

49 Alan Berg "Thrashing Through the Undergrowth" (2006) 122 LQR 354.

50 *Wholesale Distributors Ltd,* above n 48 at [118].

51 At [119]. See also at [95] for the Judge's view on formalism in contract.

52 At [120].

empirical evidence that demonstrated that, at least in the case before the court, the material could have readily been found and assembled within a reasonable compass other than by having to undertake formal discovery in a litigation context. As a Judge who had not been at the commercial bar for over 20 years, he should, with respect, have been more cautious about expressing views on practicalities without the sort of focussed factual situation and empirical evidence that I have described.

The same point can be made about the Courts' use of the standard of commercial common sense in interpreting a contract in a way that contradicts at least unambiguous contractual language. The judgments in *Vector* rely heavily on that standard and say it should be applied irrespective of whether the words of the contract in their context are unambiguous. The problem with a standard of this kind, as Lord Hoffmann pointed out in *Chartbrook*, is that judges can readily disagree as to what is sensible.[53] I would add to that the same point made above in relation to Thomas J's view on practicality. Namely that judges, at least at the appellate level, will not be abreast of changes in commercial practice that have occurred since they left legal practice, and it may therefore be imprudent for them to base contractual interpretation on such a standard in the absence of empirical evidence.

*Vector* has undoubtedly had a substantial impact in New Zealand on how commercial contracts are interpreted. The standard of commercial common sense and the ruling in *Vector* that exchanges in negotiations which, construed objectively, tend to establish background facts or cast light on meaning were applied by Asher J in *I-Health Ltd v Isoft NZ Ltd*.[54] Additionally, Asher J created a new rule that:

> … draft agreements or clauses of an agreement which are capable of shedding objective light on the meaning of the agreement or clause ultimately agreed, and thus have a tendency to prove or disprove something that is of consequence to the determination of a proceeding, are relevant.

He added:[55]

> Indeed, it can be impossible to properly evaluate a relevant train of correspondence in a negotiation without reference to the drafts, as they will be often an integral part of the negotiation process. I am conscious of the fear of Judges being asked to wade through endless exchanges of drafts, but the touchstone of relevance firmly applied should ensure that this task can be kept within reasonable bounds …

And so, the slippery slope begins. The Supreme Court, in taking a more expansive approach to the interpretation of contracts, has made that task more complex than it needs to be. That is to be regretted. Legal practitioners will not be reassured by Asher J's confidence that "relevance" will limit the material that must be referred to. This will be argued about

53 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 (HL).

54 *I-Health Ltd v Isoft NZ Ltd* High Court Auckland CIV-2006-404-007881, 8 September 2010.

55 At [42].

given the Supreme Court's view in particular that reference can be made to extrinsic material (both pre- and post-contractual) notwithstanding the lack of ambiguity in the wording of a contract. In concluding on this point, the last word should go to the warning given by Lord Blackburn in 1878 against misunderstandings that can arise during negotiations when the parties may be widely at issue. As he rightly said:[56]

> The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversations.

It would seem that the forebodings that I have expressed above may be shared by some of the newer members of the Court who have been appointed since the judgments in *Vector* were given. In *Zurich*[57] (referred to above), delivered by the Court on 15 October 2014, the majority judgment of McGrath, Glazebrook and Arnold JJ (delivered by the latter), in analysing an insurance contract, made scant mention of *Vector* and then only in two footnotes. In one of those, the Judges expressly said that they did not address the Court's views in *Vector* of the admissibility of pre-contractual negotiations because it was not one that they had to consider in the case before them.[58] They did affirm the *Vector* ruling that a purposive or contextual interpretation is not dependent on finding a linguistic ambiguity[59] but, significantly, expressed concern at judges using commercial common sense as a touchstone for interpreting contracts. The English authorities on this point discussed above (and which were not referred to in the *Vector* judgments) were all analysed at some length. Added to them was the following pointed observation of Neuberger LJ (as he then was) in the *Shanska case:*[60]

> "Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood …."

## Tax Law

Tax avoidance has long been a controversial area of the law. There has been a constant battle between wealthy taxpayers who have endeavoured to avoid or minimise the taxes that they

56 *A & J Inglis v John Buttery & Co* (1878) 3 App Cas 552 (HL) at 577 as cited in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 (HL) at [29] per Lord Hoffmann.
57 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd* [2014] NZSC 147.
58 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at n 42.
59 At [61].
60 *Shanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 at [22].

pay, on the one hand, and revenue authorities who are charged with ensuring that everybody meets their legal obligations in relation to tax, on the other. The scales have swung back and forwards starting with the laissez faire approach of the House of Lords in the famous *Duke of Westminster case*[61] in which it was said that it was open to a taxpayer to arrange his affairs in whatever way he chose in order to minimise the tax payable. Lord Tomlin firmly and unequivocally rejected the very approach that, it will be seen, has won favour with the Supreme Court. He said:[62]

> Apart … from the question of contract …, it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter", and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine … seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner the misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the incertain and crooked cord of discretion" for "the golden and straight metwand of the law"…. The so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

Without traversing here the swings that have occurred in the United Kingdom, Australia and New Zealand, it is enough to say that the pendulum in New Zealand has certainly swung strongly in favour of the Commissioner of Inland Revenue. The courts generally in recent times have reacted against tax arrangements, particularly those that have been designed by tax professionals and in many cases marketed as such.

It has to be said at the outset that the statutory provisions that define and establish tax avoidance are not conducive to easy judicial interpretation and application. The courts have struggled for over half a century to determine the boundaries between legitimate commercial transactions that may give rise to tax advantages and those that are illegitimate and that run foul of the statutory prohibition on entering into tax avoidance arrangements. That is understandable when the statutory provisions are read. Section BG1 of the Income Tax Act 1994 provides simply that a tax avoidance arrangement is void against the Commissioner for income tax purposes. The term "arrangement" is defined broadly and a "tax avoidance arrangement" is defined as meaning an arrangement that "directly or indirectly – (a) has tax avoidance as its purpose or effect; or (b) has tax avoidance as one of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family

61 *Commissioners of Inland Revenue v Duke of Westminster* [1936] AC 1 (HL).
62 At 20-21.

dealings, if the purpose or effect is not merely incidental …" The term "tax avoidance" is then defined as including "(a) directly or indirectly altering the incidence of any income tax: (b) directly or indirectly relieving any person from liability to pay income tax: (c) directly or indirectly avoiding, reducing, or postponing any liability to income tax".

This provision or its predecessors had been considered a number of times in the Privy Council in appeals from New Zealand, going back at least to the two *Europa cases*[63] in 1971 and 1976, *Mangin v Commissioner of Inland Revenue* in 1971,[64] *Challenge Corp Ltd v Commissioner of Inland Revenue* in 1986,[65] *Commissioner of Inland Revenue v Mitsubishi Motors New Zealand Ltd,*[66] *Commissioner of Inland Revenue v Auckland Harbour Board* [67] and *Miller v Commissioner of Inland Revenue*[68] in 2001 and *Peterson v Commissioner of Inland Revenue*[69] in 2006. The best known of these is *Challenge* in which the High Court and the Court of Appeal (both by majority) upheld inter-company transactions which culminated in the corporate group being able to include tax losses that had originated in a company that had been brought into the group with losses that were pre-existing. The Privy Council (by a four to one majority) ruled that the predecessor to s BG1 overrode the provisions of the specific section that allowed profits and losses in a corporate group to be set off against each other. In delivering the judgment of the majority, Lord Templeman thought that the key indicator of tax avoidance was an arrangement in which the financial position of the taxpayer was unaffected (save for the costs of devising and implementing it) and through this arrangement the taxpayer sought to obtain a tax advantage without the reduction in income, loss or expenditure which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax.[70] Lord Oliver, dissenting, thought that the tax avoidance section (then s 99) and the specific provision under which a deduction was claimed had to be read together if the former were not to deprive the latter of any utility or content.[71]

In December 2008, the Supreme Court delivered its judgments in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* (*Ben Nevis*).[72] It was heralded at the time as that Court's attempt to give definitive guidance as to what constituted tax avoidance so that taxpayers and their advisers could know where the line was drawn between tax minimisation and tax avoidance. The case concerned investment in a forestry scheme with attempted deductions for payment of obligations relating to promissory notes, licence fees

63 *Commissioner of Inland Revenue v Europa Oil (NZ) Ltd* [1971] NZLR 641 (PC); *Europa Oil (NZ) Ltd v Commissioner of Inland Revenue* [1976] 1 NZLR 546 (PC).
64 *Mangin v Commissioner of Inland Revenue* [1971] NZLR 591 (PC).
65 *Challenge Corp Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (PC).
66 *Commissioner of Inland Revenue v Mitsubishi Motors New Zealand Ltd* [1995] 3 NZLR 513 (PC).
67 *Commissioner of Inland Revenue v Auckland Harbour Board* [2001] 3 NZLR 289 (PC).
68 *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC).
69 *Peterson v Commissioner of Inland Revenue* [2006] 3 NZLR 433 (PC).
70 At 562.
71 At 564.
72 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 [*Ben Nevis*].

and insurance premiums covering the performance of the forest scheduled to be harvested in 50 years' time. The Court ruled that the scheme was a tax avoidance arrangement and commented in particular on the risk that the scheme would never be a profitable one, the gratuitous use of the promissory note mechanism and the timing mismatch between when expenditure was legally incurred and the point when it was required to be paid "in an economic sense".[73]

There were two separate concurring judgments delivered by the Court. The first by Elias CJ and Anderson J and the second, more substantive one, by Tipping, McGrath and Gault JJ. While all the judges were agreed on the result, Elias CJ and Anderson J thought that the specific statutory allowances under the Income Tax Act 2007 were not in potential conflict with the general anti-avoidance provision. The judges however then went on to say that it was not necessary in the present case to determine whether the claims were properly made under the specific provisions of the Act because they "were part of a wider tax avoidance arrangement" and that was sufficient to decide the appeal.[74] By contrast, the other three judges had found compliance with the specific provisions allowing deductions but struck them down because the scheme ran foul of s BG 1. The subtlety of the different approaches and the need for the separate judgment of Elias CJ and Anderson J may escape even experienced tax practitioners.

Tipping, McGrath and Gault JJ (the majority judgment) undertook a fairly lengthy review of the judgments in *Challenge*. This review covered the decisions of Woodhouse P, who thought that any tax avoidance purpose or effect, even if linked to a legitimate business purpose, was enough to trigger s 99, and of Richardson J who (for the majority) took a "scheme and purpose of the Act" approach and said that it was not the function of the anti-avoidance provision "to defeat other provisions of the Act or to achieve a result which is inconsistent with them".[75] Thus, if the specific provisions contemplated that there would be a deduction or other tax advantage then there was no room for overriding that statutory purpose by the application of s 99 or s BG 1. The majority judgment noted that the Privy Council did not differ from that statement of principle but only on the facts, taking the view that the economic reality was that it was a "pretence" for a profitable company to buy the shareholding of a loss company outside the group in order to offset the losses against the profits made within the group and that this was tax avoidance.[76]

The majority judgment clarified the relationship between specific provisions allowing a tax deduction or other benefit and the general anti-avoidance section by reference to the Court of Appeal's judgment in *Commissioner of Inland Revenue v BNZ Investments Ltd*[77] by

73 At [119]-[120].

74 At [6].

75 *Challenge Corp Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (PC) at 549 cited in *Ben Nevis*, above n 72, at [87].

76 At [94].

77 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2002] 1 NZLR 450 (CA) at [39]-[40].

concluding "it is only if a specific provision on its true construction and application was intended to give the particular transaction the tax benefit claimed that it will fall outside the areas of application of s 99".[78] The judgment went on to say that uncertainty on this issue had been created by the Privy Council in the *Auckland Harbour Board* case and that Parliament's "overall purpose is best served by construing specific tax provisions and the general anti-avoidance provision so as to give appropriate effect to each". They are, the judges said, "meant to work in tandem".[79]

This led to an attempt to lay down some principles by which the question of whether the tax benefit arising in the particular transaction was within the scope intended by Parliament. The majority judgment thought that there could be a combination of factors including the economic and commercial effect of the transaction and the financial consequences for the taxpayer. As to this, they said: [80]

> … A classic indicator of a use that is outside parliamentary contemplation is the structuring of an arrangement so that the taxpayer gains the benefit of the specific provision in an artificial or contrived way. It is not within Parliament's purpose for specific provisions to be used in that manner.
>
> [109] In considering these matters, the courts are not limited to purely legal considerations. They should also consider the use made of the specific provision in the light of the commercial reality and the economic effect of that use. The ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of a specific provision in a manner that is consistent with Parliament's purpose. If that is so, the arrangement will not, by reason of that use, be a tax avoidance arrangement. If the use of the specific provision is beyond parliamentary contemplation, its use in that way will result in the arrangement being a tax avoidance arrangement.

With respect, that is a statement of principle and a test which is succinctly stated and consistent with the preponderance of recent Privy Council authority.[81]

Finally, under the heading of tax law, reference should be made to two cases decided by the Supreme Court that go to issues of process in the administration of the revenue statutes. The first of these was *BNZ Investments Ltd v Commissioner of Inland Revenue*,[82] in which the Commissioner had issued amended tax assessments for a number of banks,

78 *Ben Nevis*, above n 72, at [97] referring to *Commissioner of Inland Revenue v Auckland Harbour Board* [2001] 3 NZLR 289 (PC).

79 *Ben Nevis*, above n 72, at [103].

80 At [108]-[109].

81 The Supreme Court took a not dissimilar "economic reality" approach shortly afterwards in relation to a general anti-avoidance provision in the Goods and Services Act Tax 1985: see *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2008] NZSC 116, [2009] 2 NZLR 359 at [52].

82 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709.

in relation to what were known as structured finance deals which the Commissioner said constituted tax avoidance. The Bank of New Zealand took action challenging the amended tax assessments. In response to orders for discovery, the Commissioner provided a list of documents which included material relating to other banks which had been obtained by the Commissioner using his statutory powers of investigation to show that they had engaged in similar transactions. The propriety of this was challenged by all the banks. Both the High Court and the Court of Appeal found in favour of the Commissioner. The Supreme Court ruled similarly that, although tax secrecy and confidentiality were important values that should be protected (and were expressly protected under s 81 of the Tax Administration Act 1994), the disclosure of information regarding the affairs of other taxpayers was reasonably necessary for the fulfilment of the Commissioners statutory obligation in this instance.

The contrary position had been the subject of decisions of the highest authority, beginning with the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*,[83] as applied by the New Zealand Court of Appeal, by two of the greatest New Zealand Judges, Cooke P and Richardson J (as they both were at the time) in *Knight v Commissioner of Inland Revenue*[84] and *Commissioner of Inland Revenue v E R Squibb & Sons (NZ) Ltd* (*Squibb*).[85] The Supreme Court in *BNZ Investments Ltd v Commissioner of Inland Revenue*, in a judgment delivered by McGrath J,[86] however, held that the judgments in *Squibb*[87] had to be read as confined to the subject-matter to say that the "issues raised by tax secrecy and the public interests at stake will differ in different situations and this must affect how the legislative provisions are applied in any particular context".[88]

The second substantive case relating to tax administration to come to the Supreme Court was *Tannadyce Investments Ltd v Commissioner of Inland Revenue* (*Tannadyce*).[89] In that case, the Commissioner had made default assessments which rejected the great part of a claim by the taxpayer that it had substantial losses globally. The taxpayer did not initiate the statutory disputes procedure and the Commissioner then took enforcement action to recover the debt by way of a statutory demand. The taxpayer then sought to set the demand aside and challenged the assessments by judicial review on the grounds of conscious maladministration, abuse of power and breach of natural justice. The taxpayer claimed that it had not been able to file a return because it needed access to financial records in order

83 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 632 per Lord Wilberforce.

84 *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (CA).

85 *Commissioner of Inland Revenue v E R Squibb & Sons (NZ) Ltd* (1992) 14 NZTC 9,146 (CA).

86 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709 at [50] relying on a dictum of Cooke P in *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 (CA) at 523.

87 *Commissioner of Inland Revenue v E R Squibb & Sons (NZ) Ltd* (1992) 14 NZTC 9,146 (CA).

88 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709 at [50].

89 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 [*Tannadyce*].

to do so which were in the possession of the Department, a claim that the Department initially denied. It later appeared that it did have documents of the plaintiff. The statement of claim was wholly struck out in the Court of Appeal. The appeal to the Supreme Court, after giving leave, was dismissed.

An important statutory provision that required consideration by the Court was s 109 of the Tax Administration Act 1994 which provided that, except by way of statutory objection or challenge proceedings, "(a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and (b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are taken as being, correct in all respects". Such privative or ouster clauses have often been treated with a degree of contempt by the courts particularly if they are seen as an attempt to exclude the supervisory powers by way of judicial review of the superior courts over administrative action. The classic case is that of *Anisminic v Foreign Compensation Commission*[90] in which the House of Lords made it plain that errors of process and substantive errors that failed to match administrative law standards were reviewable notwithstanding a privative clause in the statute that conferred the decision-making power under challenge. In *Tannadyce,*[91] the Supreme Court in the majority judgment of Blanchard, Tipping and Gault JJ (delivered by Tipping J) confined judicial review to cases where the taxpayer was unable to bring its grievance within the statutory process. The minority judgment of Elias CJ and McGrath J (delivered by the latter) dissented from this approach but all the judges were of the view that on the facts the appellant had not made out its case.

Tipping J acknowledged that judicial review should not be excluded lightly by a statutory ouster clause but said that the statutory challenge proceeding "has a built-in right for the taxpayer to take the matter to the High Court, if that is thought necessary or desirable".[92] It cannot matter, he said, whether the taxpayer seeks relief by judicial review or pursuant to a statutory challenge.[93] Somewhat oddly, he then went on to say that it was "necessary to recognise the possibility that there may be rare cases in which it is not practically possible for a taxpayer to challenge an assessment under [the statute]".[94] Further, he said, judicial review will also be available when what is in issue is not "the legality, correctness or validity of an assessment but some suggested flaw in the statutory process that needs to be addressed outside the statutory regime, because it is not provided for within it".[95]

Later in the judgment, Tipping J explained his insistence on the statutory process being paramount in removing "the opportunity which the availability of judicial review would

90 *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
91 *Tannadyce*, above n 89.
92 At [56] referring to *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133.
93 *Tannadyce*, above n 89, at [57].
94 At [58].
95 At [59].

present, and has presented, for gaming the system".[96] One assumes that this is a reference to the case of *Westpac Banking Corp v Commissioner of Inland Revenue*.[97] In that case, by way of a separate cause of action in the nature of judicial review, the taxpayer bank had sought to challenge the validity of the assessment. This challenge relied on the fact that before entering into a series of structured finance transactions the taxpayer bank had obtained a binding ruling from the Commissioner pre-approving the first transaction and the fact that there were authoritative officers within the Department who were of the view that, generically, these transactions did not constitute tax avoidance. The Court of Appeal said that judicial review was restricted to cases where the purported assessment was "not an assessment" or where there was "conscious maladministration".[98] The taxpayer bank sought leave to appeal that decision to the Supreme Court but leave was refused.[99] Ironically, the Court of Appeal's judgment was expressly overruled by the Supreme Court in *Tannadyce*. In a joint judgment, Elias CJ and McGrath J explained, rather weakly, that in declining leave, the Court did not intend to be confirming the correctness of the Court of Appeal's decision.[100] That assertion needs to be measured against the actual words used by the Court in the *Westpac* leave decision: "… we are satisfied that it is not reasonably arguable that the Court of Appeal's approach to the law, including its view of the effect of the policy of the legislation, was wrong".[101] The Court went on to say: [102]

> Furthermore, in applying these principles to the pleaded facts, the applicant's proposed appeal is not one that has any reasonable prospect of success. There is no basis in those circumstances for the argument that different views within the Inland Revenue Department on tax liability of transactions of the kind in issue can preclude an assessment by an officer who honestly takes one of those views.[103] Nor is there any other basis in the pleading for the argument that there is no true assessment at all.

What conclusions can be drawn as to the Supreme Court's judgments to date in tax avoidance cases?[104] It is submitted, first, that the test laid down in *Ben Nevis*,[105] which

96 At [71].

97 *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 (CA).

98 At [59].

99 *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZSC 36.

100 *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 (CA) at [31].

101 At [4].

102 At [5].

103 That rather emasculates the factual argument that Westpac advanced: see *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] 2 NZLR 99 (CA) [2009] NZCA 24, [2009] 2 NZLR 99 at [23]-[41] (footnote inserted).

104 The Court did grant leave for the taxpayer to appeal the decision of the Court of Appeal in *Alsesco New Zealand Ltd v Commissioner of Inland Revenue* [2013] NZCA 40, (2013) NZTC 21-022 in which the Court of Appeal had upheld a ruling that the transactions concerned constituted tax avoidance, but the case was settled shortly before the hearing which had been scheduled for February 2014.

105 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

builds on earlier decisions of the Court of Appeal and Privy Council in *Challenge*,[106] is a workable exposition of principle but one that will always be problematic in application because of the conceptual difficulties inherent in tax avoidance and its distinction from tax minimisation. Secondly, the existence of a statutory process for challenging the correctness of tax assessments should never be a reason for excluding judicial review on process grounds, including not only allegations of breach of natural justice but also cases where a taxpayer alleges that its legitimate expectations based on dealings with the Department have been frustrated. The courts have always been zealous in preserving their supervisory jurisdiction by way of judicial review of administrative decision-making. It cannot be assumed that a statutory process designed for testing substantive correctness will provide an adequate venue for dealing with process issues that may go to the validity of the assessment.

## The Leaky Building Cases

The leaky building crisis, which began approximately 15 years ago as a result of deficient building design and cladding products used specifically in relation to plaster finish buildings, reached astronomical proportions until local authorities and building regulators upgraded their design specifications and improved their inspecting standards. The effects on people's lives and on the value of their principal asset, namely the family home, were catastrophic. Remedial work was invariably expensive and in many cases developers and builders were not worth suing because, in the case of venture developers, they had been wound up, and in the case of builders, they did not have assets that would be available to meet a judgment. Other professionals, such as architects, might carry insurance and the major cladding manufacturers were of sufficient means to be sued. They and the local authorities therefore tended to be the principal defendants against whom court proceedings were taken. The volume of such cases was considerable with the High Court at Auckland establishing a special building list with an assignment of an Associate Judge to handle the interlocutory and directions matters. A considerable proportion of these cases ended up either in judicial settlement conferences or in private mediation. Lawyers acting for insurers and councils became particularly adept at obtaining for their clients favourable settlements in mediation. A whole new industry for dispute resolution of leaky building cases was established and flourished.

Local authorities were sued in tort for breach of the duty of care that they owed to home owners when carrying out their periodic inspections during the course of construction and in issuing code compliance certificates on completion. The principal precedent relied on to establish liability for councils was the Privy Council decision in *Invercargill City Council v Hamlin*,[107] in which negligent inspection of house foundations during the course of construction successfully founded a claim in tort when years later the foundations proved to

106 *Challenge Corp Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (PC).
107 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

be defective. The existence of a duty of care was admitted at trial and, notwithstanding that the common law as applied by English courts would not have done so,[108] the Privy Council said that the Court of Appeal in New Zealand should not be deflected from developing the common law of New Zealand differently on the basis that "community standards and expectations" demanded the imposition of a duty of care on councils when undertaking building work inspections.

In a series of decisions following the onset of the leaky building crisis, the Court of Appeal and the High Court restricted the application of the *Hamlin* duty of care however to the immediate purchasers of a new building who occupied the building as their own home. Buildings used for commercial or industrial purposes were thought not to be within the scope of the council's duty of care. In the *Sunset Terraces* case,[109] however, the Court of Appeal held that the duty extended to investor owners who had purchased apartments in a residential building for rental purposes and did not occupy the apartment as their personal home, and also to subsequent purchasers. On appeal to the Supreme Court by the North Shore City Council, it was held unanimously that the Council owed a duty of care in its inspection role to owners of premises designed for residential use, regardless of whether the owners of the premises were occupying it and whether a code compliance certificate had been issued. Furthermore, this duty extended independently to any subsequent owners who additionally and independently incurred loss. It was also held that a duty was owed to the body corporate in respect of common property, notwithstanding that the loss caused by damage was a loss in value to the unit owners rather than, strictly, to the body corporate itself.

The Council argued that there should be no duty of care at all by councils in respect of building owners, thereby arguing that the Privy Council's judgment in *Hamlin* was no longer good law in New Zealand. The Supreme Court had on a previous occasion refused to follow recent Privy Council precedent on a New Zealand case,[110] but had little difficulty in not doing so in the present instance. Elias CJ said that *Hamlin* was "likely to have settled and confirmed [the] expectations in the 15 years since it approved the pre-existing New Zealand case law".[111] Tipping J, who gave the principal judgment in the case on behalf of himself and the other three members of the Court, acknowledged that, to the extent that the analysis in *Hamlin* (both in the Court of Appeal and in the Privy Council) was based on the Building Act 1991 which at time had been enacted but was not yet operative, that analysis was obiter.[112] But, he said: [113]

108 See *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

109 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

110 See *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149, refusing to follow *Bottrill v A* [2003] 2 NZLR 721 (PC).

111 *Sunset Terraces*, above n 109, at [6].

112 At [19].

113 At [23].

> What matters for present purposes is that those ordering their affairs in this field were entitled to take the view that what the Court of Appeal and Privy Council had said was a correct statement of the law. Hundreds, if not thousands, of people must in the meantime have relied upon the proposition that the 1991 Act had not affected the common law position. For this Court to defeat that reliance retrospectively by holding that the true position was otherwise would represent an inappropriate use of our ability to depart from a previous decision of the Privy Council. That would be the position even if, as [counsel for the Council] submitted, the determination of the Privy Council was erroneous.

The judgment of Tipping J focused on the seminal judgments of the English Court of Appeal in 1971 in *Dutton v Bognor Regis Urban District Council*,[114] in which a Council was held liable not only to the original owner but also to subsequent owners. That decision, as Tipping J identified,[115] was based on the neighbour principle adopted by Lord Atkin in the most famous tort case of all time – *Donoghue v Stevenson*.[116] Applying that principle, Tipping J thought that as "a matter of principle and logic" the duty should extend to all homes and not (as was argued for the Council) just modest houses occupied by the owner as his or her home. Distinctions drawn based on ownership structure, size, configuration, value or other facets of "premises intended to be used as a home", he said, "are apt to produce arbitrary consequences". The principle, he added, "must be capable of reasonably clear and consistent administration".[117] He then rejected an argument that the duty should not apply where professionals such as engineers and architects had been retained. The existence of such persons should not, he thought, absolve councils from liability, but, if they were negligent also, that could be reflected in their bearing an appropriate share of the responsibility for the ultimate loss.[118]

It is plain that the Supreme Court in *Sunset Terraces* considered that the liability should accrue wherever the "intended use of a building" was residential,[119] irrespective of whether the plaintiff was an original or subsequent owner or was an occupier or not. That was a factor that necessarily limited the scope of the decision as a binding precedent. A short time later, a further case came to the Court which sought to remove that limitation by an argument that the duty of care by councils was owed also to the owners of commercial premises or in respect of premises that had a mixed commercial and residential use.[120] Such was the case in respect of the Spencer on Byron multi-storey apartment building in Takapuna, in which the penthouses were only used for residential purposes, while the bulk of the apartments were

114 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA).
115 *Sunset Terraces* [2010] NZSC 158, [2011] 2 NZLR 289 at [33] and [44].
116 *Donoghue v Stevenson* [1932] AC 562 (CA).
117 *Sunset Terraces*, above n 115 at [49].
118 At [50].
119 At [53]-[54].
120 *North Shore City Council v Body Corporate 207624* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*].

used as hotel accommodation. The High Court and Court of Appeal held that the North Shore City Council was under no duty at all and struck out the claim.

The Supreme Court however held (William Young J dissenting) that those responsible for the construction or supervision of the erection of buildings, including the Council, owed a duty of care to building owners. The Court affirmed its ruling in *Sunset Terraces* that the Council owed a duty of care in their inspection role to both original and subsequent unit owners and also held that there was a duty of care in issuing code compliance certificates. The duty, the Court said, extended to protect those who inhabited the building as well as the economic interest of those who owned the building. Furthermore, it concluded that liability for negligent error did not hinge on the nature of the particular building and there were no policy reasons that reasonably limited the duty of care to residential homes as opposed to the mixture of non-residential and residential apartments as was the case in the Spencer on Byron building. The Court held that the proceeding should not have been struck out.

Elias CJ acknowledged that in *Hamlin* the Court of Appeal had drawn on "New Zealand home-owning social circumstances and habits of reliance upon regulatory protections" (a position not interfered with by the Privy Council).[121] However, she thought it was significant that the Privy Council placed weight on the fact that, in enacting the Building Act 1991, Parliament did not seek to change the pre-existing common law precedents that had established a duty of care on a broader basis.[122] She pointed out that in *Sunset Terraces*, the Court had reserved the position in relation to non-residential uses because it was aware that at that time the issue was before the Court of Appeal.[123] For a variety of reasons, she then rejected all of the Council's arguments, including an argument that claims for pure economic loss were precluded,[124] and "floodgates" pleas,[125] and ruled that there was no principled basis for drawing a distinction between home owner and owners of other buildings in respect of the Council's duties.[126]

The major judgment in the case was the joint judgment of McGrath and Chambers JJ delivered by Chambers J. This was the first case that Chambers J sat on after his elevation from the Court of Appeal. His untimely death, a little over a year later, robbed the Court of a judge who was widely expected to make a contribution to the Court developing its own brand of jurisprudence. This judgment was noteworthy for its detailed focus on the differing policy considerations that might impact the question, and extent, of the duty of

121 At [7].
122 At [8].
123 At [9].
124 There was ample authority in England and New Zealand for the rejection of that proposition. Elias CJ at [12] referred to Lord Denning's description of it in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) as an "impossible distinction.
125 *Spencer on Bryon*, above n 120 at [19], pointing to the existence of the 10 year long stop limitation period under the Building Act 1991.
126 At [9].

local authorities.[127] An example of a succinct consideration of one of the policy issues that was debated concerned the argument for the Council that imposing liability in relation to commercial buildings would make council inspectors excessively cautious in performing their functions and the contrary argument that imposing liability would encourage the maintenance of standards. Chambers J thought that there "may be something in [the Council's] point, although excessive caution would seem preferable to the laxness which has contributed to the leaky building disaster".[128]

The decisions and judgments of the Supreme Court that deal with the tortious liability of councils in respect of the major social and economic problem that the construction of buildings using faulty design and construction techniques and defective building products represent a natural development of the exercise that the Court of Appeal (with the approval of the Privy Council) had begun in *Hamlin* more than two decades earlier. The extension of liability was less precedent based than policy based with regard to contemporary conditions and requirements. That is an approach which one would expect to be taken in appropriate cases in a second tier appellate court.

## Social Issues

There is a view that a Supreme Court should focus on the great social issues of the day. One only needs to consider the United States Supreme Court and the landmark decisions which come to mind and which are not in the area of commercial law but rather concern matters that affect all citizens. The great education segregation case of *Brown v Board of Education*[129] is an example. In Australia the High Court's judgments in *Mabo v Queensland (No 2)*[130] constituted a radical breakthrough in thinking about native rights. New Zealand has yet to sort out where the Treaty of Waitangi fits within the structure of the New Zealand legal system, notwithstanding important dicta in the Privy Council in *New Zealand Maori Council v Attorney-General*,[131] a case in which the present Chief Justice appeared as counsel for the Maori Council. In the sequence to that case, in which the Maori Council challenged the sale of the commercial assets of Radio New Zealand, the Court of Appeal, exceptionally, sat with seven judges, presumably in recognition of the importance of Treaty issues in New Zealand law. After deciding the case six to one against the New Zealand Maori Council, the court of three judges then refused leave to appeal to the Privy Council on the grounds that the issue was not of sufficient public importance to warrant leave![132]

The Supreme Court has, unsurprisingly, had to deal with key issues relating to the law

127 At [187]-[214].
128 At [205].
129 *Brown v Board of Education* 347 US 483 (1954).
130 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA).
131 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).
132 The New Zealand Maori Council must have agreed because it did not follow up with a petition to the Privy Council for leave.

of abortion and, perhaps unsurprisingly, on an issue where personal values affect judgment, divided three to two.[133] Interesting as this case is, there are other two Supreme Court cases in this area which I wish to focus on. I will be expressing disappointment in their outcomes, which on one view might be thought to be liberal in the sense of upholding civil rights and the Bill of Rights but in another sense may be said to be totally out of empathy for the views of New Zealand citizens.

The first case is that of *Brooker v Police*.[134] This case is remarkable for at least one fact, namely that 18 months elapsed between the time of hearing and the delivery of the judgments. This will be commented on further below.

The appellant was convicted of disorderly behaviour in the District Court. He had been the subject of a search at his home late at night pursuant to a search warrant. A few days later, at 9.20 am, he knocked on the door of a female police constable, who had been involved in the search knowing that she had been on duty the night before and would be asleep. The constable asked him to leave, whereupon he retired a short distance to the verge just outside the house and began singing songs and displayed a sign that was derogatory of the constable. There was no evidence of public disruption or of complaints from members of the public. The appellant was first charged with acts intended to intimidate a person but, after hearing the evidence, the District Court Judge exercised his power to amend the charge to one of disorderly behaviour under s 4(1)(a) of the Summary Offences Act 1981. He then convicted the appellant. That conviction was upheld by the High Court and by the Court of Appeal. By a majority of three to two, the Supreme Court allowed his appeal. A somewhat similar course occurred in the *Morse* case, discussed below, save that the Supreme Court was unanimous. The fact remains that in *Brooker*, seven out of ten judges found themselves in the minority and in *Morse* ten judges were evenly split but the Supreme Court prevailed.

Elias CJ founded her judgment in *Brooker* on s 14 of the New Zealand Bill of Rights Act 1990 which affirms the right to "freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form". She said that that provision was enacted to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. It is to be noted immediately however that art 19 of the Covenant provides that the exercise of the rights "to hold opinions without interference" are subject to the duties and responsibilities that are provided by law and that are necessary for "respect of the rights and reputations of others". Elias CJ however thought that it was not enough that the appellant's actions may have caused annoyance to the constable, citing in this respect the judgment of Douglas J in the United States Supreme Court affirming

133 *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762. For an insightful critique, see Hugo Farmer "An analysis of New Zealand's Abortion Law System and a Guide to Reform" (2013) 1 PILJNZ 147.

134 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

the right of free speech under the First Amendment to the United States Constitution.[135] That approach was consistent with the concurring judgments of Blanchard and Tipping JJ.

The dissenting Judges, McGrath J and Thomas J, took a different approach and gave value to the right to privacy. It is fair to acknowledge that the Chief Justice was well aware that the law provides protection to the privacy of individuals and she instanced the Trespass Act 1980, the Harassment Act 1997 and provisions in the Summary Offences Act 1981, including the one with which the appellant had first been charged.[136] Her view was that, in that broader legal context, the existence of those provisions suggested that "an expansive meaning of s 4(1)(a), unconnected to public order, is unnecessary".[137]

McGrath J, by contrast, while recognising the importance of freedom of expression, said that the earlier Court of Appeal decision in *Melser*[138] had incorporated "freedom of expression as a balancing factor in deciding if conduct reaches the level of being disorderly".[139] The Judge considered that the right to privacy, although not among the fundamental rights that are affirmed in the Bill of Rights, was one recognised in international human rights instruments and had also received increasing recognition in New Zealand law.[140] He said that, although the complainant was a police constable and therefore a public official, she was entitled to enjoy the rights of an ordinary citizen which included the right "to be free from unwarranted physical intrusion into the privacy of her home".[141] With reference to the right to freedom of expression under the New Zealand Bill of Rights Act 1990, McGrath J pointed to s 5 which renders all fundamental rights and freedoms subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. He went on to say that the offence of disorderly behaviour could provide such a limit if the conduct amounted "to a sufficiently serious and reprehensible interference with the rights of others to warrant the intervention of the criminal law".[142] He then undertook what he called a balancing exercise of the conflicting rights of freedom of expression and protest and the right to privacy. In doing so, he placed particular emphasis on the fact that the protest took place outside the complainant's house and on her doorstep.[143] "Home is the place of rest at the end of a day's work", he said, "especially during the time when a citizen wishes to sleep".[144] That has to strike a chord in most of us.

Thomas J gave an especially long judgment of 186 paragraphs. He apologised for the length of it, particularly given that he was in dissent (along with McGrath J) and,

135 *Terminiello v City of Chicago* 337 US 1 (1949) at 4: cited in *Brooker* at [12].
136 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [37].
137 At [38].
138 *Melser v Police* [1967] NZLR 437 (CA).
139 *Brooker*, above n 136, at [111].
140 At [122].
141 At [123].
142 At [130].
143 At [139].
144 At [142].

acknowledging that a future court, differently composed, might take a different view of the balancing exercise between competing rights that was required, said that he had written in length "in the hope that what I have to say may be of assistance to a future court". From the judgment of Thomas J, I would extract one paragraph that goes to the heart of judicial decision making and that highlights the necessary connection between judicial thinking and community values. He said:[145]

> I wish to stress the importance of a test which imports the standards of the community for good reason. First, as I have suggested, what is or is not disorderly conduct should, as far as possible, be determined by reference to the values of the community and not the predilections of judges. Reference to the Bill of Rights automatically tends to enlarge the scope for judicial evaluation of the behaviour in issue. Rights and freedoms, and the protection of rights and freedoms, it is thought, are more naturally the province of judges. But the application of the Bill of Rights does not mean that what is essentially a question of fact and degree is to be converted into a question of law or that contemporary attitudes, practices and values of the community are to be set aside. The reaction of the reasonable person can be informed by due recognition of the rights and values affirmed in the Bill of Rights.

Thomas J also pointed to judgments of the United States Supreme Court that affirmed the right to privacy[146] in the face of what he described as that Court's "commitment to an almost absolute concept of freedom of speech"[147] and said that he did not think the absence of its inclusion in the Bill of Rights meant that it should not be "recognised as a fundamental value and given the weight of a fundamental value".[148]

The fact that the values of the community are not the province of judges of the Supreme Court was also demonstrated by that Court's judgments in *Morse v Police*,[149] decided a few years later. In that case, the appellant had been convicted of offensive behaviour under s 4(1)(a) of the Summary Offences Act 1981, the same section under which Brooker had also been charged. She had participated in the burning of the New Zealand flag at an Anzac Dawn Parade in Wellington which had been attended by 5000 people in a protest against New Zealand military participation in Afghanistan. Her appeals to the High Court and the Court of Appeal were dismissed but the Supreme Court unanimously upheld her appeal and quashed the conviction.

Elias CJ stated the legal test of offensive behaviour, which she equated with disorderly behaviour, as follows: [150]

145 At [202].
146 At [260]-[265].
147 At [286].
148 At [286].
149 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.
150 At [2].

> … "offensive" behaviour is behaviour productive of disorder. It is not sufficient that others present are offended if public order is not disrupted. On the other hand, it is not necessary that the conduct be violent or likely to lead to violence since behaviour with that effect constitutes the more serious offence described by s 3 of the Summary Offences Act.[151] The behaviour must however be such as to interfere with use of public space by any member of the public, as through intimidation, bullying, or the creation of alarm or unease at a level that inhibits recourse to the place.

The Chief Justice thought that, as both sides of the same coin, disorderly behaviour and offensive behaviour both required the element of disruption of public order.[152] She said that, in her view, the courts below were "wrong to take the view that behaviour is offensive within the meaning of s 4(1)(a) simply on the basis that it is capable of wounding feelings or arousing outrage in a reasonable person, irrespective of objectively assessed disruption of public order".[153] She went on to say that, in her view, those who ventured into a public space must be tolerant of the "expressive behaviour of others" because of the value our society places on freedom of expression. In her view also, a lack of "proportionality in outcome (more restriction than is necessary to achieve the legitimate outcome of preservation of public order under s 4(1)(a)) is a result that is substantively unreasonable and amounts to error of law".[154]

It is not necessary for present purposes to traverse the similar judgments of the other members of the Court. The convictions were set aside on the basis that the element of public disorder had not been the correct focus of the trial judge. While a rehearing might normally have then followed, the Court directed that, given the time that had elapsed and the nature of the charge, the matter did not warrant a rehearing.[155]

This decision was the subject of a caustic article by Thomas J, writing extra-judicially after his retirement. The article took the form of a bogus judgment of a fictitious Judge (Athena J) which upholds the refusal of a District Court Judge, Wiseman DCJ, to apply the Supreme Court's judgment in *Morse.* The humour at times wears a little thin however the final paragraph is worth repeating here: [156]

> The Supreme Court's decision in *Morse* reflects the ugly side of human rights or the enforcement of human rights. It presages a law captured by the rhetoric of the right to freedom of expression without due regard to the value underlying the

151 Section 3 creates the offence of disorderly behaviour, which is defined as inciting or encouraging a person to behave in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.

152 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [36].

153 At [38].

154 At [40].

155 At [58] and [130].

156 EW Thomas, "*Bonkers and Ors v The Police:* Judgment of Athena J in the High Court" (2011) 19 Waikato Law Review 94 at 122.

particular exercise of that right; a law in which, under the guise of the right to freedom of expression, the "right" to offend can be exercised without responsibility or restraint providing it does not cause a disruption or disturbance in the nature of public disorder; a law in which an impoverished amoral concept of "public order" is judicially ordained; a law in which the right to freedom of expression trumps – or tramples upon – other rights and values which are the vital rights and properties of a free and democratic society; a law to which any number of vulnerable individuals and minorities may be exposed to uncivil, and even odious, ethnic, sexist, homophobic, anti-Christian, anti-Semitic, and anti-Islamic taunts providing no public disorder results; a law in which good and decent people can be used as fodder to promote a cause or promote an action for which they are not responsible and over which they have no direct control; a law which demeans the dignity of the persons adversely affected by those asserting their right to freedom of expression in a disorderly or offensive manner; a law in which the mores or standards of society are set without regard to the reasonable expectations of citizens in a free and democratic society; and a law marked by a lack of empathy by the sensibilities, feelings and emotional frailties of people who can be deeply and genuinely affronted by language and behaviour that is beyond the pale in a civil and civilised society.

To those who grew up in the aftermath of the Second World War and conscious of the sacrifices made by New Zealanders in both the First and Second World Wars, Anzac Day is part of the fabric of this Nation. That is true even of those who are the descendants of that generation, as witnessed by the increasing attendances at Anzac Day parades. Given that expression of public sentiment, which it is submitted is an obvious one, the Supreme Court's judgments in *Morse* must raise real questions of the ability of appellate judges who are far removed from the day-to-day world of ordinary New Zealanders to interpret and apply statutes that are said to embody New Zealand values.

## Concluding Observations

The cases that I have discussed or referred to above are but a small selection but I believe that my observations above and that I will make hereafter reflect a much broader knowledge and experience of the Court and the judgments that it has delivered.

It is interesting for me to return to a comparable chapter that I wrote shortly before the Supreme Court was established and at a time when its form and composition was still a matter of debate.[157] The question that I had been asked to address was whether the quality of decision making in New Zealand would be weakened if the Privy Council were to go as the final court of appeal in the New Zealand judicial system. My view then was that whatever

157 James Farmer "The New Zealand Court of Appeal: Maintaining Quality after the Privy Council" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) at 237.

court replaced the Privy Council should be one whose role "needs to accommodate not only analysis of the facts and the law to achieve a result that accords with law and justice in particular cases, but also statements of principle that will provide proper guidance for lower Courts and that will be reflective of proper legal development".[158] I have raised above, in considering the judgments issued in *Wholesale Distributors Ltd v Gibbons Holdings Ltd*[159] in particular, whether the Supreme Court should venture to expound the law in grand terms that go far beyond the facts or even the issues in the case that it is considering.

That was a question that was addressed in the Court of Appeal, before the Supreme Court was established, in *Attorney-General v E.*[160] I referred to that case and in particular to the dissenting judgment of Thomas J who complained of what he called the "judicial minimalism", namely "resolving the issue before the Court and nothing more".[161] What I said in relation to that was: "Over time, a minimalist approach to judicial decision making is likely to stultify the growth of the law and leave practitioners with a body of precedent that is very fact-oriented, giving little guidance to how future cases will be decided."[162] I also expressed the view that "to the extent that the common law in particular requires adaptation to meet social change, it is the [Supreme] Court that provides the authoritative lead".[163] I believe that the Supreme Court has recognised and sought to grapple with that challenge, sometimes with outstandingly successful results such as in the leaky building judgments and sometimes with questionable outcomes as in the commercial contracts cases discussed above.

To the latter I would also add the disappointing and much-criticised judgment of the Court in *Commerce Commission v Telecom Corp New Zealand Ltd* (*0867 case*),[164] in which the Court considered whether it was always necessary to adopt a counterfactual analysis in cases where the issue was whether a firm with substantial market power had used that power for an anti-competitive purpose in a market. This was an important issue in the equally important area of competition law, and one which the Commerce Commission took to the Court for guidance and in which the Government appeared by counsel to make submissions. The Court heard the case over four days. The argument is reported in the New Zealand Law Reports over eleven pages. The judgment occupies 15 pages and, in marked contrast to the Court's performance in most other cases it hears (as to which see further below), delivered its judgment in just over two months after the hearing. A commendable performance except that, as all the commentators say,[165] the product was less than impressive, was superficial and

158 At 239-240.
159 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.
160 *Attorney-General v E* [2000] 3 NZLR 257 (CA).
161 At [59].
162 James Farmer "The New Zealand Court of Appeal: Maintaining Quality after the Privy Council" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) at 245.
163 At 247.
164 *Commerce Commission v Telecom Corp New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577.
165 See for example, Paul Scott, "Taking a Wrong Turn? The Supreme Court and Section 36 of the Commerce Act" (2011) 17 NZBLQ 260.

failed to grapple convincingly with the issues. Competition law constitutes an important driver of the New Zealand economy and the apparent lack of interest by the Court in this area was less than had been expected.

The reference to the uncharacteristic speed with which the Court delivered judgment in the *0867 case* leads to the final point relating to the performance of the Court which is the time which it has taken to deliver some judgments. I have not attempted a statistical analysis to establish the average time that the Court has taken to deliver judgments after the completion of hearings. However, there have been a number of cases in which the Court has taken more than a year to do so.[166] Reference has been made above to *Brooker* (18 months).[167] There has also been *Lai v Chamberlains*[168] (11 months), in which the Court followed the lead of the House of Lords in preference to the High Court of Australia in abolishing the common law immunity of barristers in respect of their conduct of litigation. Most egregious is the case brought by Susan Couch. Ms Couch was seriously injured, and three of her colleagues killed, when William Bell robbed the club in which they worked. William Bell, a parolee, came to rob the club after being negligently assigned to employment there by the Department of Corrections, and discovering that alcohol and cash were amply available. Ms Couch brought a claim in tort against the Department of Corrections in which she sought exemplary damages. The Department applied to strike out the claim on the grounds that no duty of care was owed to the plaintiff and was successful in the High Court and in the Court of Appeal. The Supreme Court gave two judgments in her favour. In the first, it was held that there was an arguable duty of care. That decision took 14 months to give. The Court then considered whether her claim for exemplary damages was barred by the Accident Compensation Act 2001, holding that it was not.[169] One year and one day passed between the time of the hearing and the delivery of the judgments of the Court. The total time between the first hearing and the delivery of judgments after the second hearing was just under three years. Ms Couch, who was seriously disabled, waited either patiently or otherwise while the Court sat on its hands.

To say that justice delayed is justice denied is a trite observation. An enormous effort has been put into making the courts at all levels more efficient and in expediting the hearing of cases. Case management in the High Court in particular is characterised by strict and tight timetables for the conduct of litigation and the disposal of interlocutory steps leading up to substantive hearings. These impose onerous obligations on the legal profession which does a very good job in complying with the orders of the Court and in facilitating the speedy disposal of cases. There is a similar good performance from the Supreme Court and its

166 I have not attempted an analysis but there are others apart from those mentioned here.
167 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.
168 *Lai v Chamberlains* [2007] NZSC 70, [2007] 2 NZLR 7.
169 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

administrators in getting applications for leave and the hearing of appeals established. But the performance of the Court in a number of cases in the ultimate disposal of those cases has not been one that the private sector would tolerate. It is ironic, as noted at the beginning of this piece, that in 1905 the then New Zealand Chief Justice had complained of delays in the Privy Council in disposing of appeals.

This leads finally back to the issue posed at the beginning as to whether the right of appeal to the Privy Council should have been replaced – and, now, can be said to have been beneficially replaced – by the establishment of the Supreme Court. I will attempt to answer that question in a roundabout way before concluding that it is not yet possible to come to a conclusion.

There is, it seems to me, a marked difference between the style of the judgments that issued from the Privy Council and those that have been delivered over the last decade by the Supreme Court. I rather doubt that the Privy Council ever saw its role as being that of deciding cases other than on a relatively "minimalist" approach. This may be a reflection of the decision making process adopted by the Privy Council which was to require counsel to "retire" from the hearing room at the conclusion of the hearing and for their Lordships then to remain, discuss the case and come to a conclusion before allocating the writing of the judgment to one of their number. I am not privy to the internal workings of the Supreme Court but I doubt that its processes resemble those of the Privy Council.

A feature of the judgments of the Supreme Court is that they are lengthy and burdened with references and footnotes that would make them more suitable for submission as academic articles to the Law Quarterly Review. The judgments in *Brooker*, a case about a protestor singing outside the home of a police constable, occupy nearly 300 paragraphs or 100 pages.[170] (As noted above, the judgments in the *0867 case* on a complex economic and commercial issue, occupy a mere 50 paragraphs.[171]) There is also the feature of the majority of Supreme Court judgments that there is seldom a single judgment written for the court. In *Vector* there were five separate judgments.[172] I have commented above on the confusion created by the separate joint judgment of Elias CJ and Anderson J in *Ben Nevis*[173] which detracts from the reasonable simplicity of the joint judgment of the other three judges. This leads to inevitable difficulty in ascertaining the ratio decidendi of the case, especially when the judgments are as long as many of them are.

The challenge facing the Supreme Court in the years ahead is to combine simplicity and brevity of exposition with guidance on decision making. The responsibility of the Court is not only to determine the issues in the instant case before it but do so in a way that provides

170 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.
171 *Commerce Commission v Telecom Corp New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577.
172 *Vector Gas Ltd v Bay of Plenty Electricity Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
173 *Ben Nevis Forestry Ventures v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

some guidance as to how other courts might determine similar cases that are not necessarily based on the same facts but that at least give rise to the same or similar issues. There must be, of course, a sound factual basis for doing so, assisted by directed argument from counsel. There was always a feeling that the Privy Council never considered that it was required or appropriate to provide such guidance and that that was more appropriate for the Law Lords to consider when they were considering British law in the House of Lords. The Supreme Court of New Zealand was, by contrast, established with a different mandate.