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NEW ZEALAND'S RIGHT OF APPEAL TO THE PRIVY COUNCIL: WORTHY OF RETENTION?

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ABSTRACT

The Judicial Committee of the Privy Council has acted as New Zealand's final appellate court ever since the English colonised our country. With increasing frequency, cases that have been ruled upon by the New Zealand Court of Appeal are taken to the Lawlords for final resolution of the dispute.

For almost as long as the Privy Council has participated in our justice system, critics have bemoaned its New Zealand jurisdiction. By focusing on such matters as the cost of bringing an appeal to the Council, the inevitable delay involved, and the threat posed to New Zealand's autonomy and "indigenous" legal identity, these critics have argued that the right of appeal should be abolished.

In contrast, there have always been those who applaud the actual and symbolic contribution made by the Privy Council. These supporters tend to focus on the efficiency of the process, on the fact that the Privy Council is not paid for by the New Zealand public, and on the high standard of legal reasoning evident in Privy Council appeals. A further, and increasingly significant, claim in favour of the Privy Council is that it acts as a safeguard in those rare cases where the Court of Appeal, for whatever reason, delivers a questionable judgment.

The issue of retention or abolition of appeals to the Privy Council involves weighing up the relative merits or otherwise of the right of appeal. In this paper I have attempted to outline the issues relevant to the Privy Council debate. Although proponents of the abolition camp do have many valid concerns, these concerns are ultimately outweighed by the vital need for a final appellate court that can look into Court of Appeal decisions which patently require re-examination.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16 300 words.

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I INTRODUCTION

> When crossing India's Rajputana plateau, a nineteenth century traveller noticed a group of villagers offering sacrifice to a far-off god, who had restored to them certain lands which had been seized by a predatory rajah. Inquiries about the deity they were worshipping drew the response: "We know nothing of him but that he is a good god, and that his name is the Judicial Committee of the Privy Council."[1]

New Zealand's final appellate court is the Judicial Committee of the Privy Council. Every year, and with increasingly frequency, decisions of the New Zealand Court of Appeal are taken to England to be decided by members of the English judiciary and visiting judges from member jurisdictions.

Ever since the Privy Council assumed the role of final New Zealand appellate court, debate has ensued on the merits or otherwise of foreign judges determining local cases. On the "abolition" front, a number of arguments stand out. Criticism is made of the enormous cost of Privy Council appeals, which effectively prohibits all but the very wealthy from taking this course. Another way in which the Privy Council is thought to prejudice against certain groups of the community is that criminal cases are very seldom granted leave to appeal, which effectively limits the Privy Council to a civil jurisdiction, and denies criminal cases this final appeal option. Privy Council appeals also delay the administration of justice, and so few cases are taken on appeal that the significance of the right of appeal is questionable. Perhaps the most popular voice amongst abolitionists is that the Privy Council undermines the autonomy and identity of New Zealand. Commentators have suggested that the right of appeal to the Privy Council challenges the independence of our judiciary, and New Zealand's independence from its motherland. Privy Council appeals may also fail to consider "indigenous" aspects of New Zealand's legal and social make-up, and are inappropriate if issues such as the Treaty of Waitangi and Bill of Rights Act 1990 are being determined. All of these arguments will be examined in greater detail later in this paper.

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1 P A Howell *The Judicial Committee of the Privy Council 1833 - 1876* (Cambridge University Press, Cambridge, 1979).

The arguments raised by those in favour of retaining the right of appeal to the Privy Council are perhaps not as well publicised or known. In their favour, however, they have quietly and confidently fought off over a century of anti-Privy Council sentiment. Commentators who support the final appeal to the Privy Council mention the efficiency of the process involved, and the fact that it is paid for by the English public. They also talk of the opportunity it provides for witnessing the best of English lawyers at work. Finally, and of particular importance to this paper, those in favour of Privy Council appeals stress the need for a final appeal court that can re-examine and, if need be, re-assess Court of Appeal judgments that are inconsistent or just plain wrong. Given that the Privy Council in recent years has overturned Court of Appeal judgments at a greater rate than ever before, this argument is assuming heightened significance. Six recent Court of Appeal and Privy Council judgments have been examined in this paper, concerning equity and the law of torts, in an attempt to ascertain the legitimacy of these claims.

If, as politicians are currently pronouncing, the Privy Council may soon cease to be New Zealand's final appellate court, the question arises of what will take its place. Over the years a number of alternatives have been canvassed, and these will be briefly outlined. What must be kept in mind, however, is that no *one* alternative has yet been established as a particularly suitable alternative, and this in spite of the fact that many would concede an alternative final appeal court *is* necessary before New Zealand does away with appeals to the Privy Council. Furthermore, politicians have been pronouncing for decades the right of appeal to the Privy Council is on its way out. Until affirmative steps are taken in this direction, these statements must simply be added to the history of rhetoric surrounding the Privy Council debate.

A History of the Privy Council

The Judicial Committee of the Privy Council derives its jurisdiction from the prerogative right of the Sovereign, as the fountain head of all justice, to entertain appeals from the courts within her dominions.[2] Its constitution initially bestowed office upon a number of high-ranking British judiciary, among them the Lord President, Lord Chancellor, and other

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2 *Halsbury's Laws of England* (4 ed, Butterworths, London, 1975) vol 10, "Courts", para 770, p 356.

members who had or still did hold high judicial office.[3] Membership was eventually extended to include Privy Councillors who had been or still were chief justices or justices of other countries.[4] New Zealand is among the countries represented on the Privy Council judiciary, with an agreed member from New Zealand sitting approximately once every two years.[5]

During the early prosperous years of the British Empire, the Privy Council was the final court of appeal for one-fourth of the world,[6] and it was believed by some that it would become the Supreme Court of the whole Empire.[7] This vision never realised, however, and with the enactment of the Statute of Westminster in 1941 Dominions were empowered to override Imperial Law, and thereby discontinue appeals to the Privy Council. Most of the larger and more powerful Commonwealth members have long ceased taking appeals to the Privy Council - Canada relinquished its right of appeal in 1949,[8] Australia relinquished federal appeals in 1967[9] and State appeals in 1986,[10] and Singapore gave up its right of appeal to the Privy Council in 1993. New Zealand is now the only significant country of the old Commonwealth that has retained appeals to the Council.[11]

B How Appeals get to the Privy Council

The procedural rules that govern appeals to the Privy Council are of English not New Zealand

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3 Above n 2, para 767, p 357.

4 Above n 2, para 768, p 357.

5 Sir G Barwick *New Zealand Commentary on Halsbury's Laws of England* (4 ed, Butterworths, Wellington, 1981) Vol C, "Courts", para C768, p 732. Eichelbaum CJ was the most recent New Zealand judge to sit as a member of the Privy Council in late 1993.

6 J G Hall and D F Martin "The Future of the Judicial Committee of the Privy Council" (1993) 143 New LJ 1652.

7 In 1921 Lord Haldane expressed his vision of the Privy Council becoming the Supreme Court of the Empire, see above n 6.

8 L Zines *Constitutional Change in the Commonwealth* (Cambridge University Press, Cambridge, 1991) 83.

9 "Cut-Price Top Legal Advice" *National Business Review* Weekend Supplement, Wellington, New Zealand, 24 November 1989, w3.

10 Above n 8, 22.

11 J McLinden "The Privy Council in the 1990s" (1992) 364 LawTalk 10 - countries that still use the court, other than New Zealand, are Hong Kong, Brunei, Gambia, Mauritius, Gibraltar and a number of the West Indies of which Trinidad & Tobago and Jamaica.

origin, and require an appellant to initiate appeal procedures within New Zealand pursuant to the 1910 Order, and complete the appeal in England pursuant to the 1982 Rules.[12] Rule 2 of the 1910 Order is the fundamental procedural provision. It provides three situations in which a right of appeal shall lie to the Privy Council from New Zealand.

Rule 2(a) provides that an appeal shall lie as of right, from any final judgement of the Court of Appeal where the value in dispute is NZ$5000 or more. This is a straightforward provision, and it is probable that few disputes would reach the Court of Appeal today involving less than that sum.[13] It has been suggested that this sum is in fact too generous a provision for appeal as of right.[14]

Rule 2(c) provides for appeal to lie at the discretion of the High Court. This is an exceptional provision, that would now appear to be basically obsolete.[15] Although it has been praised for allowing quicker and cheaper access to the Privy Council,[16] it has been admonished for the fact that the Law Lords of the Privy Council are deprived of the benefit of the Court of Appeal's judgement.[17] Cooke J (as he was then) expressed reservations of Rule 2(c) in *Finnigan v New Zealand Rugby Football Union Inc (No 3)*.[18]

Rule 2(b) is the most significant provision governing rights of appeal to the Privy Council. It provides that an appeal shall lie at the Court of Appeal's discretion if the question is of great general or public importance, or otherwise ought to be submitted for decision. Judicial interpretation of Rule 2(b) has seen a number of provisos attached to this provision. Firstly, mere private importance will not suffice,[19] and it is insufficient to show that an important question of law is involved. Instead, the question must be of great general or public

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12 *McGechan on Procedure* (Brookers, Wellington, 1985 - 1988) Vol 1, p 4A-1 - the "1910 Order" is the Order in Council provided for appeals from the Supreme Court and Court of Appeal in New Zealand of 10 January 1910, as printed in PC (JC) Rules Notice 1973 (SR 1973/181), and the "1982 Rules" are the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (UK) S1 1982 No 1676.

13 J W Turner "Civil Procedure" (1992) 1 NZ Recent Law 15, 25.

14 Above n 13, 28.

15 Above n 13, 25.

16 A P Molloy "'Leap-Frogging' to the Privy Council" [1980] NZLJ 455, 456.

17 Above n 16, 457.

18 (1985) 2 NZLR 190, 193 per Cooke J - admittedly in a slightly different context.

19 *Stininato v Auckland Boxing Association (No 2)* (1978) 1 NZLR 609, 611.

importance.[20] This is a relatively unpredictable test,[21] as is apparent when the judgment of *Bhasin v Elite Lifestyles Ltd*[22] is compared with *Attorney General for Hong Kong v Reid.*[23] In the former case it was decided that the question arising between mortgagee and mortgagor was not of general public importance, whereas in the latter case it was decided that the continued application of old English authority was an important question for appropriate consideration. Secondly, the proviso "or otherwise ought to be submitted for decision", although allowing the Court of Appeal to consider reasons other than great general or public importance, still requires something beyond the normal run of cases.[24] Thirdly, even if the applicant satisfies the Court that Rule 2(b)'s requirements have been complied with, the Court retains an overriding discretion to withhold leave. Discretionary refusal, although unlikely, is not unknown.[25]

C Incidence of Privy Council Appeals from New Zealand

Very rarely are cases appealed from New Zealand to the Privy Council, and those that are appealed tend to be almost exclusively civil. Over the past 150 years the Privy Council has decided approximately 200 New Zealand appeals, one third of which were decided in the appellant's favour. Although during this time there has been a modest increase in the incidence of appeals,[26] it is salient to note that in the last six years applications for leave to appeal have actually tripled.[27]

The most significant, and controversial, feature of recent appeals to the Privy Council is that the Privy Council is increasingly overturning judgments of the Court of Appeal. Although

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20 *Rich v Christchurch Girls' High School Board of Governors (No 2)* (1974) 1 NZLR 21, 23 (CA).

21 Above n 12, 4A-11.

22 (1991) 1 NZLR 95; (1990) 3 PRNZ 102 (CA).

23 (1992) 2 NZLR 394.

24 *Hallam v Ryan* (1991) 1 NZLR 700; (1990) 3 PRNZ 562 (CA).

25 For instance, see above n 18 - common ground for refusal to grant leave under Rule 2(b) was that the appeal had become academic.

26 P Joseph "Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights" (1985) 2(3) Canterbury LR 273, 275 - from 1840 to 1932 an average of 1.1 appeals went to the Privy Council per year, 1.3 from 1958 to 1973, and 1.9 from 1975 to 1984.

27 "Auditors, Forex Advisers, Privy Council on Trial" *Independent* Auckland, New Zealand, 26 March 1993, 10.

this is predominantly in the area of negligence,[28] it reflects a broader trend than negligence alone, and is seen by some as heightening the need for an examination of the role the Privy Council has to play in the legal system of New Zealand.[29] Even though the Privy Council's increased tendency to overturn the Court of Appeal is relatively recent, debate on the retention or abolition of the Privy Council is by no stretch of the imagination a novel phenomenon.

D To be or not to be... Within the Jurisdiction of the Judicial Committee of the Privy Council

At the beginning of the twentieth century, a judicial uproar erupted in the colony of New Zealand, upon receipt of the Privy Council's judgment *Wallis and others v Solicitor General.*[30] The New Zealand Supreme Court judges took great offence at what they perceived to be the derogatory insinuations of the Privy Council judiciary, aimed at the New Zealand Supreme Court. Action was taken in the form of a "Protest of Bench and Bar",[31] in which the judiciary raised many of the arguments that are still currently used today. Sir Robert Stout CJ reproached the Privy Council for not being conversant with our history, and for being ignorant of our local laws.[32] Mr Justice Williams declared that the Privy Council was an "alien tribunal",[33] pointing out that the Privy Council decision weakened the New Zealand Supreme Court's authority.[34] He stated that it was the responsibility of the New Zealand public to judge the Supreme Court, not "four strangers sitting 14,000 miles away".[35]

Today, these same issues are bantered back and forth when the retention or abolition of the Privy Council is being discussed. The most prominent and influential of these arguments is that the Privy Council undermines or threatens to undermine New Zealand's autonomy and identity. Other arguments raised are the cost, delay and incidence of appeals, and the fact that

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28 "Questions on Role of Privy Council" *Otago Daily Times* Dunedin, New Zealand, 10 August 1993, 21.

29 For a discussion of recent New Zealand appeals to the Privy Council concerning negligence and duties of care, see pp 26 - 32.

30 [1840 - 1932] NZPCC 23.

31 "Protest of Bench and Bar, April 25 1903" [1840 - 1932] NZPCC 730.

32 Above n 30, 737 and 745.

33 Above n 30, 756.

34 Above n 30, 747.

35 Above n 30, 756.

Privy Council appeals are in practice unavailable for criminal appeals.

II ARGUMENTS IN FAVOUR OF ABOLITION

A Cost

The substantial cost of applying and taking an appeal to the Privy Council from New Zealand is widely seen as a reason for abrogating Privy Council appeals. In effect, the cost prohibits all but the Crown, substantial corporations and wealthy individual litigants from utilizing this final appellate court.[36] A further financial obstacle to appeals to the Privy Council is that legal aid is unavailable for criminal appeals.[37] The prohibitive cost involved in an appeal to the Privy Council was raised by the Royal Commission on the Courts in 1978.[38] However, the Royal Commission also pointed out in this report that, while the cost is high, it only exceeds the cost of a Court of Appeal appeal in terms of airfare and accommodation. The Commission suggested that these additional costs are justified by the value of the appeal itself.[39]

B Delay

It was pointed out in the New Zealand Law Commission's 1989 report *The Structure of the Courts* that "a principle of our legal system dating back to Magna Carta is that justice must not be deferred".[40] This statement was referring to appeals to the Privy Council, which inevitably delay the administration of justice. Some people see the Privy Council option as a delay tactic, which effectively mandates an abuse of the courts' process.[41] Problems with delay may be heightened by an anomaly within the Privy Council rules, which allows only

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36 Above n 26, 277.

37 C Cato "Privy Council: The Takaro Properties Case" [1988] NZLJ 110, 114.

38 *Royal Commission on the Courts* (Government Printer, Wellington, 1978), para 279, p 82.

39 Above n 38, para 272, p 80.

40 New Zealand Law Commission *The Structure of the Courts* (Wellington, 1989) para 236, p 82.

41 Above n 27, 10.

21 days within which to seek conditional leave to appeal from a judgment of the Court of Appeal, as compared to a three month period for appeals from the High Court to Court of Appeal. This raises the concern that in cases involving intricate or complex matters, prospective appellants may feel obliged to lodge an appeal to allow themselves enough time to consider the Court of Appeal's judgment.[42]

The issue of delay also raises an established principle of law, found in the judgment of Casey J in *Green*,[43] that "the public interest requires that there be an end to litigation".

C Criminal Appeals

Criminal appeals can be made to the Privy Council, subject to compliance with Rules 2(b) or (c) of the 1910 Order. However, the Privy Council is traditionally reluctant to intervene.[44] This is ironic when it is considered that criminal appeals are probably the most suitable contenders for a further right of appeal, as they are most likely to involve questions of the liberty of the individual in relation to the State. The Court of Appeal is therefore in practice the final criminal appellate court.[45] Sir David Beattie, former Governor General and Supreme Court judge of New Zealand, recently pointed out the manifest unjustness of this situation, saying that "[I]f there is only the right to appeal to the Court of Appeal where the liberty of a subject is at stake it is difficult to contend there should be two appeals in a civil case".[46]

D Incidence of Appeals

Traditionally, there have been so few appeals taken to the Privy Council that it has been

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42 Above n 13, 28.

43 [1988] 2 NZLR 490, 505.

44 The only successful criminal appeal to the Privy Council from New Zealand is *R v Nakhla* (1975) 1 NZLR 393. In 1994 the case of *Adams v R* was appealed to the Privy Council. Although the appeal was unsuccessful, the Privy Council "took issue" with the Court of Appeal's approach - see *Adams v R* (1994) 17 TCL 43/6.

45 Above n 37, para 274, p 81.

46 "Privy Council Appeal 'Colonial Relic'" *Evening Post* Wellington, New Zealand, 5 October 1993, 7.

realistic to consider the Court of Appeal as our final appellate court. It is only in recent years that appeals from New Zealand to the Privy Council have increased, despite more efficient air travel and an increasingly litigious society.[47] The low incidence of Privy Council appeals prior to the late 1980s, however, need not be viewed as unique to the Privy Council system. The proportion of second appeals in any jurisdiction is miniscule.[48] It is also important to note that second appeals are not provided for the benefit of individual litigants, but to elucidate and clarify the law.[49] Surely there are few cases in which this is required.

E Autonomy and Identity

The most significant voice in the abolition/retention debate is that of New Zealanders proclaiming the autonomy of their country and their identification with New Zealand as it is today, rather than as it was during its colonial past. This voice gives rise to claims that the right of appeal to the Privy Council is a "colonial relic",[50] that it is an affront to our national sovereignty[51] and to our legal system, which has now "come of age".[52] President of the Court of Appeal, Sir Robin Cooke, expressed similar sentiments at the 1987 Law Conference, saying "We must accept responsibility for our own national destiny and recognise that the Privy Council has outlived its time. Not to take the obvious decision now would be to renounce part of our nationhood."[53] A decade earlier former Court of Appeal president, Sir Thaddeus McCarthy, said as much upon retirement.[54]

> I believe that just as we decide all other questions for ourselves - whether to go to war, whether we trade with this country or that country, what immigrants we should have, I see no reason that we should not decide the law ourselves.

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47 Above n 26, 275.

48 Above n 40, para 247, p 85.

49 Above n 40, para 238, p 83.

50 Above n 46, 7.

51 Above n 13, 25.

52 A Culley "Case Notes: *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257" (1991) 6(4) Auckland Uni LR 618, 621.

53 Above n 52, 621.

54 Above n 46, 7.

McCarthy substantiated his views by pointing out "the difficulties of their Lordships in understanding the backgrounds to New Zealand cases, our social philosophies, sometimes even our language".[55] Ideas such as these are rife in the abolition/retention debate, when New Zealand's autonomy and identity is at issue.

1 Judicial independence

During New Zealand's early colonial years, appeals to the Privy Council were justified because they preserved against judicial corruptibility, partiality and dependence on the executive.[56] Nearly one hundred years ago the New Zealand Supreme Court judiciary were incensed at allegations made against them by the Privy Council that their judgment in *Wi Parata v Bishop of Wellington*[57] may have been influenced by the executive.[58] Does this notion of judicial dependence still influence the debate today? Some commentators would have us think not.[59] Certainly it is no longer likely that the Privy Council will expressly make this allegation. However, a number of contemporary constitutional law experts have advocated the retention of appeals to the Privy Council in order to protect against the pressure of making "popular" decisions.[60] The Royal Commission paid heed to both sides of this argument, recognizing that United Kingdom judges are removed from the local scene and pressures,[61] while also acknowledging that (1) the inference that New Zealand judges are insufficiently detached is unfair and incorrect, and (2) detachment from local pressures can in fact be a disadvantage rather than a merit.[62]

2 Retention of links with Commonwealth

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55 Above n 26, 279. It is interesting to compare McCarthy's comment that their Lordships are unable to understand "our" language with the recent Maori Broadcasting case (below n 82), in which the Privy Council may be said to have evinced a greater understanding of the cultural and legal significance of the Maori language than the Court of Appeal.

56 Lord Normand "The Judicial Committee of the Privy Council - Retrospect and Prospect" (1950) 3 CLP 1, 5.

57 (1877) 3 NZ Jur 72 (SC).

58 Above n 30.

59 Above n 37, 114.

60 Above n 9, w3.

61 Above n 38, para 269, p 80.

62 Above n 38, para 276, p 81.

The argument that by retaining the right of appeal to the Privy Council we retain links with the Commonwealth is now obsolete. Joseph suggests that the right of appeal infers our Court of Appeal is in need of the continuing beneficence and guidance of their Lordships, which is "utterly derogatory of New Zealand's constitutional maturity".[63] Joseph continues:[64]

> [C]onstitutional government historically and factually encompasses all three estates of the realm - the executive, the legislature and the judiciary. For this reason it is misplaced to propose judicial expertise from abroad as a reason for retaining Privy Council appeals. New Zealand does not seek the assistance of the English, the Irish or the Scots in other branches of government. Why then in the judiciary?

In comparison, the Royal Commission mentioned the retention of common links with the United Kingdom as a point in favour of the Privy Council.[65]

3 "Local circumstances" exception

Traditionally, appeals to the Privy Council were declined if they impinged upon "local circumstances" that their Lordships were not qualified to judge upon. However, the notion of "local circumstances" employed by the Privy Council has varied, depending on whether a "unitary" or "divergent" view of the common law is taken.[66] The divergent view of the common law accepts that its norms vary from one jurisdiction to another,[67] while the unitary view sees the common law "as including fundamental principles which transcend different jurisdictions and which ought to be immune from deliberate judicial abrogation".[68] Whichever view of the common law is respectively adhered to by the Privy Council ultimately decides the amount of criticism levelled at a decision. In particular, the unitary view of the common law is seen to undermine attributes and issues that are unique to a particular country.

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63 Above n 26, 291.

64 Above n 26, 296.

65 Above n 38, para 271, p 80.

66 J W Harris "The Privy Council and the Common Law" (1990) 106 LQR 574, 580. See also P G McHugh "The Appeal of 'Local Circumstances' to the Privy Council" [1987] NZLJ 24.

67 Above n 66, 574 - see *Cassell & Co Ltd v Broome* [1972] AC 1027, 1127 per Lord Diplock.

68 Above n 66, 574.

The Privy Council employed a unitary view of the common law in *Hart v O'Connor*,[69] overruling the unanimous decision of the New Zealand Court of Appeal in *Archer v Cutler*[70] because it felt that the Court of Appeal's decision was merely based on considerations of general application throughout all common law jurisdictions. More recently, in *New Zealand Apple & Pear Marketing Board v Applefields Ltd*[71] the Privy Council submitted that it rejected the Court of Appeal's reasoning because the issue was wholly governed by statute, and therefore its resolution was purely a matter of interpretation.[72] This approach could be criticised in a number of ways. Firstly, what may outwardly appear to be "merely" an issue of statutory interpretation may in fact encompass wider social policy concerns. Secondly, a unitary approach such as that utilized in *Applefields*, which regards uniformity as a positive goal in itself, harks back to the antiquated notion of Imperial Law.[73]

Only a divergent view of the common law is appropriate today, where the respective countries of the Commonwealth that have retained rights of appeal to the Privy Council are diverse and dissimilar. That this is in fact the intended approach of the Privy Council was signalled in *Attorney General for Hong Kong v Reid and others*,[74] when Lord Templeman in delivering the Board's judgment pointed out that the Court of Appeal should no longer feel itself to be bound by contemporary English law, in the absence of differentiating local circumstances.[75] This enlightened and important view on the role of English precedent in New Zealand law suggests that the Privy Council no longer adheres to a unitary view of the common law, which ousts an argument frequently made by proponents of the abolition camp.

4 New Zealand's "indigenous"[76] legal identity

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69 [1985] AC 1000.

70 [1980] 1 NZLR 386.

71 [1991] 1 NZLR 257.

72 Above n 52, 620.

73 Above n 66, 582 - the notion of Imperial Law "dates back, at least, to *Trimble v Hill* (1879) 5 App Cas 342, where it was said to be of importance that in all parts of the empire where English law prevailed uniform interpretation of that law was to be sought".

74 (1994) 1 All ER 1.

75 Above n 74, 11.

76 See *Budget Rent-A-Car v ARA* (1985) 2 NZLR 76, 79 per Cooke J.

Many opponents of the right of appeal to the Privy Council submit that New Zealand has its own unique legal identity, and that only judges who understand and empathise with this legal identity should preside over New Zealand cases. They argue that this "indigenous" legal identity has departed in certain fundamental ways from the legal culture of our English heritage, although some characteristics may be shared between the two.[77]

> To this extent New Zealand law may be said to be indigenous: not in the sense that it is completely different in substance from other jurisdictions, but rather in the sense that it is as it is because it is seen by New Zealand's authorities as best for New Zealand. It is not indigenous in the sense that the laws of other jurisdictions have not been *influential* in shaping it, but rather in the sense that they have not been *decisive*.

One area of law that could prove to be particularly significant in this respect is the New Zealand Bill of Rights Act 1990. This issue was anticipated by the government report into the Bill of Rights Act, the "White Paper". It proposed that only New Zealand judges should be entrusted to decide whether legal limits imposed upon Bill of Rights freedoms are in fact "demonstrably justified in a free and democratic society".[78] A similar view has been expressed by the Court of Appeal.[79] The New Zealand Law Commission acknowledged in its report written at the time the Bill of Rights Act was being legislated that the Court of Appeal is increasingly being faced with a continuing surfacing of policy cases, which must be solved in a manner "best fitting the particular national way of life and ethos".[80]

5 The Treaty of Waitangi

At first glance it may seem apparent that the Treaty of Waitangi, being unique to New Zealand, should be resolved within our own legal system. Certainly Prime Minister Jim Bolger said as much in media statements of early 1994.[81] Yet a recent New Zealand case

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77 S Baldwin "New Zealand's National Legal Identity" (1989) 4(1) Canterbury LR 173.

78 Above n 26, 275.

79 *R v Butcher* (1992) 2 NZLR 257, 269 per Gault J.

80 Above n 40, para 232, p 81.

81 J Bolger "Address to Newspapers Publishers Association: Annual Conference" 16 March 1994 -"We really don't want issues relating to unique New Zealand cases - such as the Treaty of Waitangi - dealt with in a distant court".

taken to the Privy Council, *New Zealand Maori Council and others v Attorney General*,[82] would appear to indicate otherwise. The Privy Council decision upheld the Court of Appeal judgment, that the Crown was entitled to transfer its broadcasting assets to the SOE, Television New Zealand. However, the Privy Council made a number of statements that gave the Maori appellants, and the Maori community, cause not to lose heart.[83] Firstly, the Council declined to order that the Maori appellants pay costs, stating that the proceedings were brought not out of any motive of personal gain, but in the interests of the Maori language, which is an important part of New Zealand's heritage.[84] The decision was also encouraging because the Council agreed with the High Court and Court of Appeal that the Maori language was a *taonga*, deserving of the Crown's protection, in accordance with the treaty.[85] It took this idea a step further than the Court of Appeal, however,[86] by assigning legal significance to the government's assurance to the Maori that it would set up a scheme of protective reservations as to the continued broadcasting of Te Reo Maori programmes.[87] The Privy Council suggested that the Crown's failure to comply with this assurance may "give rise to a successful challenge on an application for judicial review".[88] Whatatangi Winiata, an appellant in the case, subsequently declared that he was "considerably cheered" by the Privy Council's declaration that the Treaty of Waitangi is of "the greatest constitutional importance to New Zealand", and proceeded to reconsider his anti-Privy Council stance.[89]

III ARGUMENTS IN FAVOUR OF RETENTION

A Tradition, and Cost

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82 (1994) 1 All ER 623.

83 M Vercoe and J Williams "Showdown at Downing Street" (1994) 5 *Mana: The Maori News Magazine for all New Zealanders* 50, 51.

84 Above n 82, 638.

85 Above n 82, 629.

86 In effect, the Privy Council agreed with the minority judgement of Cooke P in the Court of Appeal, [1992] 2 NZLR 576, 578.

87 Above n 82, 638.

88 Above n 82, 638.

89 W Winiata "Back in Court" (1994) 5 *Mana: The Maori News Magazine for all New Zealanders*" 53.

Perhaps the most vocal of arguments in favour of retaining a right of appeal to the Privy Council comes from the New Zealand judiciary and legal profession, who revere the Council for its honourable tradition and high calibre of practice.[90] On his recent return from the Privy Council, Chief Justice Eichelbaum commented on how valuable it is for a New Zealand judge or lawyer "[t]o be exposed to the variety of styles and the reasoning process of the top English legal brains".[91] However, access to this style and reasoning would still be possible without the right of appeal, therefore this in itself is not a valid reason for retaining Privy Council appeals.[92] As Sean Baldwin points out, "[j]ust because we would no longer be a branch of the common law tree doesn't mean we would be precluded from picking its fruit".[93]

Other arguments against abolition are that the Privy Council procedure is a distinctively quick and informal procedure,[94] the cost of which falls largely on the British taxpayer.[95] The cost to New Zealand of replacing the Privy Council as a final court of appeal, if indeed that is what would be done, is a persuasive reason for retaining the right of appeal to the Privy Council.

A further reason for retaining our membership of the Privy Council is that it ensures that inconsistent or questionable Court of Appeal judgments have a further judicial forum in which to debate the correctness or otherwise of the Court of Appeal judgment.[96] This is a compelling idea, if it is accepted that the New Zealand Court of Appeal requires a further forum in which to test particularly intricate or significant legal issues.

B Analysis of Six Recent Court of Appeal Decisions Taken on Appeal to the Privy Council - Equitable and Tortious Issues

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90 Above n 11, 10.

91 "Chief Justice at the Privy Council: Interview with Sir Thomas Eichelbaum on 2 March 1994, concerning the Privy Council and other topics" [1994] NZLJ 86, 88.

92 See above n 38, para 277, p 81. Also, above n 40, para 498, p 167.

93 Above n 77, 184.

94 Above n 11, 10.

95 Above n 8, w3. See also above n 36, para 268, p 79.

96 E Garrett "Privy Council Appeals" [1989] NZLJ 105.

1 Determining whether the relationship between the parties is fiduciary in nature

An apt starting point in any discussion of the relative similarities and differences in the judicial reasoning of recent New Zealand Court of Appeal decisions taken on appeal to the Privy Council is the matter of fiduciary relationships. The fiduciary obligation, a concept developed by equity, does not rely on express or written agreement between the parties, and may give rise to a number of remedies if the fiduciary breaches his or her duty.[97] It arises in situations where, due to the nature of the relationship between the parties, a particular standard of conduct is imposed. Gault J in the Court of Appeal decision *Liggett v Kensington*[98] described it in the following manner:[99]

> Generally it is appropriate to look for circumstances in which one person has undertaken to act in the interests of another or conversely has communicated an expectation that another will act to protect or promote his or her interests. There are elements of reliance, confidence or trust between them often arising out of an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information affecting their interests.

In the Court of Appeal and Privy Council judgments examined for this paper, the actual imposition of a fiduciary relationship by the Court of Appeal was seldom questioned in the Privy Council. For instance, in *Clark Boyce v Mouat* the Privy Council[100] agreed with the Court of Appeal[101] that a fiduciary relationship existed between the 72 year old appellant and the solicitor. Similarly, the Privy Council judgment[102] in *Attorney General of Hong Kong v Reid* commences with the assumption that the Court of Appeal[103] was correct in deciding that a fiduciary relationship existed between the Hong Kong government and Mr

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97 See Professor Charles Rickett *Equity in Commerce* (New Zealand Law Society Seminar, March 1993) 14 - 25 for a summary of the proprietary and in personam remedies available if a fiduciary duty is breached.

98 (1993) 1 NZLR 257.

99 Above n 98, 281.

100 (1993) 3 NZLR 641.

101 (1991) 1 NZ ConvC 190,917.

102 (1994) 1 NZLR 1.

103 (1992) 2 NZLR 385.

Reid, a past employee of the Hong Kong government who had been convicted under the Prevention of Bribery Ordinance of being in control of pecuniary resources or property disproportionate to his present or past official emoluments.

However, the Goldcorp case *Liggett v Kensington* is a striking example of the Privy Council[104] disagreeing with the majority's conclusion in the Court of Appeal[105] as to the nature of the parties' relationship. The case concerned a gold and bullion company, Goldcorp Exchange Ltd (Exchange), which became insolvent, leaving a serious shortfall in its stocks of gold bullion. Many of the company's clients - including a Mr Liggett who had made a particularly large purchase of bullion, and other clients described in the case as "non-allocated claimants" - had paid money in the belief that they were purchasing physical bullion which Exchange held in safekeeping for them. Exchange had made (false) representations to them that the bullion would be held as part of an unallocated bulk, but with adequate stock to meet all their obligations to their clients. Clients were given certificates of ownership, and were informed of the right to uplift their bullion with seven days notice. On Exchange's collapse, however, if became apparent that Exchange had not operated in a manner consistent with its representations. Debts to secured creditors exceeded assets. The claimants would therefore only succeed if they could establish proprietary interest in the remaining bullion, so as to defeat the interests of the secured creditors. Unsecured creditors unable to establish such an interest would get nothing. Thus, the Court of Appeal's conclusion that the parties' relationship was fiduciary was crucial because it allowed the claimants a proprietary remedy capable of defeating the interests of secured creditors.

In the Court of Appeal, the minority judgment of McKay J upheld Thorp J's decision in the High Court, that the relationships between Exchange and the claimants was not fiduciary. McKay J rejected the proposition that Mr Liggett's "vulnerable" position gave rise to a fiduciary relationship.[106]

> No doubt he was "vulnerable" in the sense that he was dependent on the honesty of the

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104 *Re Goldcorp Exchange Ltd (in receivership)* (1994) 2 All ER 806.

105 See above n 98.

106 Above n 98, 290.

> people with whom he was dealing, but that is true in any commercial transaction situation in which one person parts with his money without immediate delivery of goods or their specific identification.

McKay J was influenced by the essentially commercial character of the dealings,[107] pointing out that unless something further was established by way of a factual basis, the contract between Exchange and the claimants did not give rise to a fiduciary relationship. In the event, he did not find any factual basis for the imposition of fiduciary obligations.[108]

> [Exchange] simply entered into contracts of sale. It advertised and promoted itself as a bullion trader and could, therefore, be assumed to be in business for its own benefit and to be acting in its own interests. Its business required it to enter into contractual relationships with members of the public wishing to purchase and store bullion, but this does not require or suggest a fiduciary relationship.

In contrast, both Cooke P and Gault J found that a fiduciary relationship did exist between Exchange and the claimants. Cooke P, while acknowledging that "[t]he Courts should be slow to inject fiduciary duties into arms-length commercial transactions"[109] found that Exchange's practical independence from control or supervision by its clients, and the faith that clients were invited to place in Exchange, provided a classic paradigm of the assumption of a fiduciary status.[110] Likewise, Gault J was influenced by the strong suggestion in the evidence that the duties of a fiduciary were expected of the company by the purchasers and that expectation was encouraged.[111]

In the Privy Council very little attention was paid to the relative merits or otherwise of the majority's reasoning as to the fiduciary status of the relationship, although ultimately the Privy Council preferred Gault J's approach.[112] The Privy Council's discussion on the nature

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107 Above n 98, 290 and 299.
108 Above n 98, 299.
109 Above n 98, 267.
110 Above n 98, 267.
111 Above n 98, 282.
112 Above n 104, 821 - 822.

of the relationship between the parties was primarily concerned with the implications that arise from an assumption of fiduciary status. As was pointed out, "[t]o describe someone as a fiduciary, without more, is meaningless".[113] Of greater importance was thought to be the answer to the question, if the company *was* a fiduciary of the claimants, "what kind of fiduciary duties did the company owe to the customer?"[114] Lord Mustill, speaking for the Board, proposed that Exchange's obligations under a fiduciary status would be to do honestly and conscientiously what it had by contract promised to do.[115] The reliance of the claimants on Exchange doing just this occurs in many commercial relationships, and is not justification for giving such relationships a fiduciary character. The tenor of the argument was succinctly summarised by Lord Mustill when he said "high expectations do not necessarily lead to equitable remedies".[116]

Yet it was equitable remedies that Cooke P and Gault J appeared to have in mind when pondering the plight of the claimants in the Goldcorp case. Gault J was willing to concede that in reaching his conclusions he had taken into account the company's conduct, which "must be seen overall as inequitable and unconscionable justifying relief".[117] Similar concerns are apparent in other Court of Appeal decisions, in particular with regard to the obligations that the Court of Appeal concludes are assumed under a fiduciary relationship.[118] It is the breadth of these obligations which has been queried in subsequent appeals to the Privy Council.

2 Determining the nature of the duties that arise from fiduciary relationships

Clark Boyce v Mouat is a recent decision of the Court of Appeal that was subsequently criticised by the Privy Council for unnecessarily expanding the purview of the fiduciary obligations in the circumstances of the case. *Clark Boyce* concerned an elderly, recently widowed woman, Mrs Mouat, whose son arranged for her to place a mortgage of $110 250

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113 Above n 104, 821.

114 Above n 104, 821.

115 Above n 104, 821.

116 Above n 104, 822.

117 Above n 98, 282.

118 For instance, see *Day v Mead* [1987] 2 NZLR 443, and *Gillies v Keogh* [1989] 2 NZLR 327.

on her home for his business interests. In return he undertook primary liability for interest payments. The son's usual solicitors declined to act for both the son and mother in the transaction, citing "ethical considerations". The son then requested the legal services of Mr Boyce, who was willing to act for the mother and son. An interview was carried out the next day, with Mr Boyce showing his awareness of the conflict between the mother and son's interests by suggesting three times that the mother obtain independent legal advice, and indicating that he could arrange for her to see another lawyer at a neighbouring law firm. Mrs Mouat was adamant that she wished to proceed with the transaction, so Mr Boyce drafted a form of authority and declinature of independent advice which she signed. Thereafter Mr Boyce pointed out to Mrs Mouat that if her son defaulted on mortgage payments she would lose her home. Mrs Mouat made it clear that she was already aware of this consequence. It subsequently happened that the son did default on payment, and Mrs Mouat's home was liable to be sold in a mortgagee sale. Mrs Mouat then brought an action against Mr Boyce's firm of solicitors, Clark Boyce, alleging, among other things, that Mr Boyce had breached his fiduciary obligations by (1) failing to decline to act for Mrs Mouat, (2) failing to disclose three respective types of relevant information, and (3) failing to adequately advise her of her need for independent advice.

In the Court of Appeal, Gault J in the minority judgement agreed with the High Court decision of Holland J[119] that the solicitor had not breached his fiduciary obligations. Gault J's reasoning mirrors the Privy Council's, in that it is focused on the actual relationship between Mrs Mouat and Mr Boyce. Gault J observed that authorities on the subject of fiduciary obligations "emphasize that the nature and scope of fiduciary duties in a particular case will depend upon the specific relationship involved, and especially that which the fiduciary is called upon to do".[120] In contrast, McGechan J concentrated on the overall duty of good faith encapsulated in a fiduciary relationship.[121] He stated that a fiduciary may only act against the interests of a beneficiary if he or she obtains "fully informed consent", which requires that all of the material facts must be disclosed, explained and understood.[122]

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119 See (1991) 1 NZ ConvC 190,794.

120 Above n 101, 190,925.

121 Above n 101, 109,938.

122 Above n 101, 190,939.

McGechan J's "objective" test for material facts - them being "fact[s] which relevantly and sensibly could be taken into account by a reasonable person" - led to an imposition of liability upon Mr Boyce for failing to create an informed consent, due to his failure to disclose relevant information.[123] On the other two counts of breach of fiduciary duty, McGechan J agreed with Sir Gordon Bisson that all three heads of liability had been established.

In contrast, in the Privy Council Lord Jauncey of Tullichettle, delivering the Board's judgement, pointed out that, although informed consent is essential if a solicitor is to act for both parties in a transaction where their interests may conflict, the test for informed consent requires a determination of precisely what services are required of the solicitor by the parties.[124] That necessitated returning to the findings of the trial judge, Holland J, as to the intentions of Mrs Mouat. In fact, Holland J had been satisfied that Mrs Mouat was not concerned about the wisdom of the transaction, and was simply seeking a solicitor's services to ensure that the transaction was given proper effect by way of ascertaining questions of title and ensuring the parties achieve what they contracted for.[125] This finding had been adhered to by Gault J, while Sir Gordon Bisson and McGechan J had chosen to challenge it.[126] The Privy Council upheld Gault J and the trial judge's conclusions. It accepted that solicitor/client relationships are fiduciary in nature, and that a fiduciary duty in certain situations requires disclosure of material facts. Furthermore, the Privy Council agreed that this case was one in which certain material facts needed disclosure. However, it continued by pointing out that fiduciary duties cannot be prayed to enlarge the scope of contractual duties. There being no contractual duty on Mr Boyce to advise Mrs Mouat on the wisdom of entering into the transaction, she was not able to claim that he nevertheless owed her a fiduciary duty to give that advice.[127] It has been pointed out that the Privy Council's decision in *Clark Boyce* "may cause legal practitioners... to look more fondly upon Their Lordships' guidance".[128]

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123 Above n 101, 190,941.

124 Above n 100, 646 - 647.

125 Above n 119, 190,801.

126 See below p 36 for a discussion of situations where the Court of Appeal has questioned the trial judge's findings as to witnesses' states of mind.

127 Above n 100, 648.

128 *Clark Boyce v Mouat* (1993) 16 TCL 38:1.

3 Determining the existence of constructive trusts

In keeping with the tenor of this analysis thus far, the issue of constructive trusts concerns the conduct of parties, and their relationships with one another.[129]

> Constructive trusts arise by operation of law. A constructive trust, in common with all other types of trusts, is a relationship in respect of property under which one person, known as a trustee, is obliged to deal with property vested in him for the benefit of another person, known as the beneficiary. But unlike all other trusts, a constructive trust is imposed by the court as a result of the conduct of the trustee and therefore arises independently of any of the parties.

In New Zealand, "the constructive trust has become a broad equitable remedy for reversing that which is inequitable or unconscienable".[130] Constructive trusts are a creation of equity, and assume heightened significance given that they can be used to make persons who are neither trustees nor fiduciaries acknowledge another's right to property and account for it accordingly. Such was the usage of the constructive trust in the Court of Appeal's decision *Elders Pastoral v Bank of New Zealand*,[131] described by one commentator as "a new high-water mark in the infiltration of equity into commercial law".[132]

In *Elders Pastoral* a farmer, Mr Gunn, was indebted to his stock agents, Elders, and to the Bank of New Zealand (BNZ) as fourth mortgagee. In June 1987 Elders persuaded BNZ to take out a first chattel security over the farmer's stock. Six months later Elders conducted a stock sale on behalf of the farmer, and from the proceeds of the sale Elders deducted not only their costs but also the amount of the farmer's current indebtedness to them. BNZ brought an action against Elders claiming the amount of the deduction for the farmer's debt to Elders. In the High Court, Master Hansen granted BNZ summary judgement against Elders. On appeal to the Court of Appeal, Cooke P stated that, although Elders' good faith was not questioned, "on an objective test, theirs has to be seen as a less than conscienable

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129 Above n 97, 34.

130 *Powell v Thompson* [1991] 1 NZLR 597 (HC) per Thomas J.

131 [1989] 2 NZLR 180.

132 *Elders Pastoral v Bank of New Zealand* (1990) 13 TCL 43:1.

claim to retain money".[133] Using the elusive "reasonable person" test, Cooke P found a clear case for holding that a constructive trust was created under which Elders held the net proceeds of the sale for the Bank to the extent of the farmer's indebtedness to the Bank. Somers J thought that Mr Gunn stood in fiduciary relationship to the Bank, due to the fiduciary nature of the implied contractual obligation that if Mr Gunn received monies payable on sale of assigned stock he would pay them to the Bank.[134]

Because the Privy Council judgment did not address the issue of constructive trusts, the Court of Appeal's reasoning on this point was not examined. However, a useful commentary by John Dixon raises a number of queries.[135] Firstly, Dixon points out that to describe the relationship between Elders and the Bank as "fiduciary" is to "put a great deal of strain on the word".[136] He proceeds to suggest that in fact no legal relationship existed between the parties - not in tort, contract, or a fiduciary relationship. In the light of this fact, Dixon states that the granting of a constructive trust and thereby proprietary remedy to the bank, "could be viewed as a little extreme, considering the effects of granting such a right (particularly in relation to third parties)".[137] Dixon concludes by pointing out that "[w]ithout too much ado, the Court of Appeal appears to have introduced a new emphasis on commercial morality".[138]

A similar rationale was adopted by the Court of Appeal in the Goldcorp case, with both Cooke P and Gault J holding that a constructive trust existed between Exchange and the claimants. Cooke P's analysis led to him labelling the situation as a "constructive trust on orthodox lines",[139] and Gault J said he would confer a proprietary interest on the purchasers by way of constructive trust over the bullion stocks held by the company at the date of receivership.[140] In arriving at this conclusion, Gault J insisted on *balancing* the proprietary

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133 Above n 131, 186.

134 Above n 131, 192.

135 John Dixon "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1992) 7 Auck Uni LR 147.

136 Above n 135, 153.

137 Above n 135, 160.

138 Above n 135, 162.

139 Above n 98, 271. See above n 97, where Professor Rickett points out that Cooke P in fact applied a type of express trust analysis.

140 Above n 98, 281.

interest of the claimants against the competing claim of the secured creditor. As previously noted, Gault J had stated that the foundation of trust relief in *Liggett v Kensington* was the "inequitable and unconscionable" conduct overall of the company.[141] This he balanced against his observation that generally the courts should be reluctant to grant an effective priority by means of constructive trust to a claimant party over a charge of a secured creditor which had been obtained for value and without notice of the circumstances giving rise to the claimant's claims.[142] In the circumstances of the case, Gault J suggested that BNZ as the debenture holder had indeed received notice of the type relevant for a knowing receipt constructive trust to be imposed on a stranger.[143] It was therefore appropriate to grant some type of remedy to the claimants.

McKay J was also aware that the imposition of a constructive trust in the circumstances of the case might be justified on remedial grounds. In dealing with the submission that a remedial trust ought to be imposed he discussed the Court of Appeal's decision in *Elders Pastoral*, in which this type of trust appeared to have first been recognized in New Zealand, and concluded:[144]

> This does not mean that a constructive trust is to be imposed on the basis of some vague idea of what might seem fair. It is used... to prevent a person from retaining a benefit in breach of his legal or equitable obligations. The circumstances must be such that it would be unconscionable for the benefit to be retained by the person who received it.. [In *Elders* t]he constructive trust was not imposed by the Court as some new and unforeseeable hazard suddenly injected into a commercial relationship. It was simply giving effect to what reasonable people would have expected to be the position.

McKay J then declined to impose such a trust. He also dismissed the contention that a "constructive trust in the ordinary sense" has arisen,[145] because no particular property had been vested in the trustee.

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141 Above n 98, 282.
142 Above n 98, 283.
143 Above n 98, 283.
144 Above n 98, 293.
145 Above n 98, 291.

McKay J's reasons for declining to impose a more orthodox constructive trust accord with the underlying premise of the subsequent Privy Council judgment. As Lord Mustill made clear at the beginning of the Board's judgment, one crucial factor was going to stand in the way of the claimants at every point of the case.[146] That factor was that the contracts in question were for the sale of *unascertained* goods. Until the buyer knows to what goods the title relates, the buyer cannot acquire title. Lord Mustill quoted from Lord Blackburn's *The Effect of the Contract of Sale*[147] to succinctly convey the moot point in *Liggett v Kensington*, that the bullion purportedly sold under the contracts was never ascertained.[148]

> The first of the rules that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a bargain and sale, is one that is founded on the very nature of things... [I]t is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold.

The quotation from Lord Blackburn's treatise continues;

> It makes no difference, although the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. In such a case the reason still applies: the parties did not intend to transfer the property in one portion of the stock more than in another, and the law which only gives effect to their intention, does not transfer the property in any individual portion.

Thus it was that, in the light of "the very nature of things",[149] there was simply no property in which the claimants could assert either a legal or equitable title. For instance, the Board pointed out that even if it had accepted that Exchange was a fiduciary, and that the claimants therefore would have achieved a proprietary interest if Exchange had done what is said, the fact remained that it did *not* do what it said. "There never was a separate and sufficient stock

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146 Above n 104, 814.

147 Lord Blackburn *The Effect of the Contract of Sale* (1st ed, 1845).

148 Above n 104, 814.

149 Above n 104, 814.

of bullion in which a proprietary interest could be created".[150] In so far as a remedial constructive trust over the company's bullion was concerned, the Privy Council found no justification for its creation.[151]

> By leaving its stock of bullion in a non-differentiated state the company did not unjustly enrich itself by mixing its own bullion with that of the purchasers; for all the gold belonged to the company. It did not act wrongfully in acquiring, maintaining and using its own stock of bullion, since there was no term of the sale contracts or of the collateral promises, and none could possibly be implied, requiring that all the bullion purchased by the company should be set aside to fulfil the unallocated sales. The conduct of the company was wrongful in the sense of being a breach of contract, but it did not involve any injurious dealing with the subject matter of the alleged trust... The company's stock of bullion had no connection with the claimants' purchases, and to enable the claimants to reach out and not only abstract it from the assets available to the body of creditors as a whole, but also to afford a priority over a secured creditor, would give them an adventitious benefit devoid of the foundation in logic and justice which underlies this important new branch of the law.

Similarly, the Privy Council was not persuaded that a remedial restitutionary right superior to the security created by the bank's charge should be subsequently created. Lord Mustill recognized that one possible avenue for realising such a right would be by striking "directly at the heart of the problem"[152] and concluding that there was such an imbalance between the positions of the parties that if orthodox methods failed a new equity should intervene to put the matter right, without recourse to further rationalisation. Unsurprisingly, this strategy was firmly rejected by Their Lordships, Lord Mustill saying "[t]he fact that the claimants are private citizens whereas their opponent is a commercial bank could not justify the court in simply disapplying the bank's valid security".[153]

4 Determining the existence and purview of duties of care

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150 Above n 104, 822.

151 Above n 104, 822 - 823.

152 Above n 104, 827.

153 Above n 104, 827.

Negligence is another area of the law which has recently been at issue in New Zealand cases taken on appeal to the Privy Council. As Jack Hodder, an editor of The Capital Letter reported when the Privy Council's decision *Deloitte Haskins & Sells v National Mutual Life Nominees Ltd*[154] was delivered, "the contemporary strike-rate is high for appellants to the Judicial Committee of the Privy Council from decisions of our Court of Appeal involving liability for negligence".[155] The reason for this high strike-rate is that the Court of Appeal has in recent years demonstrated that it is increasingly ready to accept negligence claims. The House of Lords commented on this tendency of our Court of Appeal in its 1994 judgment *Spring v Guardian Assurance plc.*[156] Lord Keith cited three New Zealand Court of Appeal cases involving negligence,[157] and then pointed out that they had been "decided in a jurisdiction which is well known to be tender in its approach to claims in negligence involving pure economic loss".[158]

Negligence is a tort caused by lack of proper care and attention or carelessness. It only arises if the defendant owed a legal duty to the plaintiff to take care. It also requires that (a) the defendant acted in such a way as to breach the duty of care, (b) damage suffered by the plaintiff was caused by the defendant's breach of duty, and (c) the damage was also a sufficiently proximate consequence of that breach.[159] In New Zealand the Court of Appeal laid down guiding principles in *Takaro Properties Ltd v Rowling.*[160] Stephen Todd describes the law of negligence in New Zealand in the following way:[161]

> Before any prima facie duty arises the relationship between the parties must be sufficiently proximate in accordance with the needs of the particular case, including considerations of certainty and the avoidance of indeterminate liability, and in the light

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154 (1993) 3 NZLR 1.

155 *Delloitte Haskins & Sells v NMLN* (1993) 16 TCL 22:1.

156 [1994] 3 All ER 129.

157 *Balfour v Attorney General* [1991] 1 NZLR 519 (CA), *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA), and *Bell-Booth Group Ltd v Attorney General* [1989] 3 NZLR 148 (CA).

158 Above n 156, 141 per Lord Keith.

159 See Stephen M D Todd et al *The Law of Torts in New Zealand* (The Law Book Company Ltd, Sydney, 1991) 115.

160 (1986) 1 NZLR 22 at 73 (CA).

161 Above n 159, 123.

of previous authority.

The fact that no single general principle is able to provide a practical test which can be applied to every single situation to determine whether a duty of care is owed, and if so, what is its scope, may account for the several occasions in which the Privy Council has disagreed with the Court of Appeal on issues of negligence.

In 1993 the Privy Council delivered its judgment on *Deloitte Haskin and Sells*, an appeal from the New Zealand Court of Appeal concerning negligence and duties of care. The appeal was concerned with an action against Deloitte from breach of a common law duty of care in relation to the obligation to report in Section 50(2) of the Securities Act 1978. Deloitte had been liquidated in mid 1986, causing its trustee and guarantor, National Mutual Life Nominees Ltd (NMLN) to incur a liability of $6.75 million to AICS's depositors. Proceedings were brought against, among others, Deloitte, in an effort by NMLN to recover the $6.75 million.

Both the Privy Council and the Court of Appeal agreed with Henry J's conclusion in the High Court[162] that a relationship of proximity existed between Deloitte and NMLN, giving rise to a duty of care on the part of Deloitte when making reports required under the Securities Act 1978 and the relevant trust deed. What was at issue in the Privy Council was how far any duties arising out of that relationship extended. In the Court of Appeal,[163] the High Court's far-ranging view of Deloitte's duties had been affirmed. Essentially it was found that Deloitte had breached its duty under Section 50(2) by not reporting on matters relevant to the exercise of the duties of the trustee. One of the trustee's duties under the trust deed had been to exercise reasonable diligence to ascertain whether or not any assets of AICS were sufficient or likely to be sufficient to discharge its liabilities. In the High Court, Holland J concluded that a prudent auditor would have formed an opinion and reported under Section 50(2) no later than mid March 1986.[164] Deloitte had therefore breached its common law duty of care to NMLN by failing to report AICS probable insolvency by mid March 1986. The Court of

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162 See [1990] 3 NZLR 641.

163 (1991) 3 NZBLC 102,259.

164 Above n 162, 678.

Appeal, following slightly different interpretative reasoning, arrived at the same conclusion.[165]

The Privy Council, however, chose to differ. In considering whether in fact Deloitte had breached its common law duty of care owed to NMLN it adopted a rigorous analysis of the relevant legislation and documentation. It pointed out that, because the Section 50(2) duty is expressly only owed when an auditor *had* formed an opinion, the effect of the decisions in the Courts below was to impose upon auditors a common law duty more extensive than that imposed by the Act.[166] In the Court of Appeal, Casey J had been more persuaded by the evidence that serious financial problems existed by early March that were relevant to the exercise of the trustee's duties and powers than by the alternative submission "that it is incorrect to impose a duty in relation to matters in respect of which the auditor merely *should* have been aware - it can only be responsible for matters of which it *was* aware".[167] In contrast, the Privy Council's conclusion on the duty of care imposed under Section 50(2) is firmly within the constraints of the relevant legislation. Lord Jauncey for the Board pointed out that the duty to report under Section 50(2) is contingent upon the auditor having formed an opinion. The subjective nature of the test is evident in the inclusion of the words "in his opinion" into Section 50(2). Thus Their Lordships saw no justification for superimposing a common law duty of greater scope upon the statutory duty contained in the subsection.

Similarly, in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* the Privy Council[168] was obliged to rein in a far-reaching duty of care suggested in the Court of Appeal judgment.[169] In this case, NMLN attempted to decrease its $6.75 million liability to AICS's depositors by attaching contributory liability to the directors of AICS and to the Kuwait Asia Bank. Two of AICS's five directors were employed by the bank, which was beneficially interested in approximately 40 per cent of the shares in AICS. The case concerned whether or not NMLN could serve proceedings on the bank under Rule 131 of the

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165 Above n 163, 102,273.

166 Above n 154, 7.

167 Above n 163, 102,272.

168 [1990] 3 NZLR 513.

169 [1989] 2 NZLR 50.

New Zealand High Court Rules, because the bank was in fact incorporated under the laws of Bahrain and operated internationally with no place of business in New Zealand. NMLN tried to get the proceedings brought within two of the Rule 219 exceptions, Rule 219(a) requiring that an act or omission for which the damages are claimed was done in New Zealand, and Rule 219(h) requiring that the person currently out of New Zealand is a proper party to the proceedings brought against some other person served within New Zealand.

In the Court of Appeal Cook P opined that "[t]he ultimate issue under Rule 131 is whether the Court is satisfied that there are sufficient grounds for it properly to assume jurisdiction".[170] He thought that this depended upon the strength of the plaintiff's case, and upon balancing all the circumstances of the case. It was enough for it to be shown that there was a "good arguable case" against the foreigner. Cooke P acknowledged that the case raised major and difficult questions of company law, in particular under Rule 219(a) questions relating to the duties of care owed by directors to third parties. He pointed out that although directors' primary duty of care was owed to the company, in this case AICS, in some circumstances directors could also come under a duty of care to persons dealing with the company, in this case NMLN. In the light of the terms of the trust deed between NMLN and AICS, Cooke P believed that it was arguable the directors owed a duty of care to NMLN. Cooke P also believed that it was arguable that the bank was liable as the principal of the directors, who were the bank's agents and purportedly acting in accordance with the bank's instructions. It was this latter duty of care that was queried in the Privy Council. Cooke P then proceeded to justify these findings by stating "[i]t is not a question about the lifting of the corporate veil. Rather it is a question about responsibility and no doubt in some cases about competing loyalties".[171] The Court of Appeal believed that the plaintiff had established a sufficiently strong case to warrant the New Zealand court accepting jurisdiction under Rule 131 of the High Court Rules.

The Privy Council judgment in *Kuwait Asia Bank*, delivered for the Board by Lord Lowry, arrived at fundamentally different conclusions as to the proper interpretation of the relevant

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170 Above n 169, 54.

171 Above n 169, 55.

High Court Rules, and as to the Court of Appeal's conclusion that NMLN, as plaintiff, had made out a case against the bank, as defendant outside New Zealand, which justified the Court in entertaining the plaintiff's claim against the defendant. Lord Lowry examined the approaches taken in the High Court and Court of Appeal as to the interpretation of the High Court Rules, pointing out that although they both arrived at the same conclusion, their reasoning was dissimilar. Because the Privy Council considered that no cause of action was made out by the plaintiff in the case, it acknowledged that it need not resolve the difference of opinion as to the right test between the Court of Appeal and Henry J in the High Court.[172] However, a preference for Henry J's reasoning could be read into Lord Lowry's comment that, "[a]s was said recently in *Equiticorp Finance Group Ltd v Cheah* Their Lordships would be most reluctant to differ from the Court of Appeal on a matter of procedure under the New Zealand rules".[173] It is also noticeable that the Privy Council's support for an examination of the merits of the case adheres more to Henry J's conclusion, that the issue of jurisdiction to hear and determine the case is a fact related to whether the proceeding should be struck out because no cause of action is disclosed, than it does to Cooke P's "good arguable case" analysis. In any event, the Privy Council did not find any cause of action established against the bank. This was because the bank had never accepted or assumed any duty of care towards NMLN, and therefore, in the absence of fraud or bad faith on the part of the bank, no liability attached to the bank in favour of NMLN for any instructions or advice given by the bank to the two directors.[174]

> By the terms of the trust deed or by agreement supplemental to the trust deed NMLN might have attempted to impose a duty of care on third parties such as the bank, but NMLN neither intended nor attempted expressly or by implication to impose on employers, shareholders or any other third parties liability for acts or omissions of the only persons [the directors] who by the trust deed were charged with the duty to see that the quarterly certificates were accurate.

The Privy Council's evident preference for a narrower duty of care than the New Zealand

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172 Above n 168, 523.

173 Above n 168, 523.

174 Above n 168, 534.

Court of Appeal, as seen in the *Deloitte Haskin & Sells* and *Kuwait Asia Bank* appeals, can be inferred from a comment of Lord Oliver of Aylmorton in the Privy Council's judgment *Meates v Westpac Banking Corporation Ltd.* In this case both the Court of Appeal[175] and the Privy Council[176] dismissed the appellant's claims to indemnity and contributions which had been argued for, inter alia, under a duty of care. In *Meates* the Privy Council queried the reasoning that had led the Court of Appeal to reach the conclusion that a duty of care existed in an earlier case, *Meates v Attorney General.*[177] In particular, the Privy Council referred to a passage in Cooke J's (as he was then) judgment. However, the Privy Council felt obliged to assume that *Meates* had been correctly decided and should be followed. Lord Oliver concluded the Board's judgment with the following statement:[178]

> The claims which have been pursued [in this expensive and protracted litigation] have rested upon ignoring the express terms of the formal documents which have been executed and seeking to supplement and contradict them by reference to contracts and duties of care alleged to have arisen by implication from conversations, press statements and other unsuspected traps into which the parties are alleged to have fallen. To say that, as a general rule, governments and large corporations intend to be bound only by formal written engagements assumed after mature consideration, reflection and negotiation may seem something of a truism; but in the light of the history of this litigation, it may not be inappropriate to reiterate it and to stress that anyone impatient of official delays, whether avoidable or unavoidable, who anticipates the conclusion of negotiations does so at his own risk.

5 Reasoning of the Court of Appeal queried by the Privy Council - Precedent, Causation and Interpretation

Precedent

In arriving at a decision that granted the claimants a proprietary remedy, the Court of Appeal

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175 [1991] 3 NZLR 385.
176 [1991] 3 NZLR 396.
177 [1983] NZLR 308.
178 Above n 175, 404.

in the Goldcorp case dispensed with a number of additional legal points that prevented the successful disposition of the claimants' case. One significant point that stood in the claimants' way was the argument that the bank's debenture had priority over any unsecured proprietal interest of the claimants. Cooke P dealt with this by citing a decision of the Privy Council that he had had the honour of participating in, namely *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd.*[179] Cooke P drew from the case a governing distinction between trust beneficiaries not taking a risk of insolvency and lenders taking that risk. He concluded:[180]

> What is tolerably clear, in my view, is that the bank on electing to take over the Goldcorp account was in a better position to ascertain particulars of Exchange's trading methods, and to assess the risks, than were the nonallocated purchasers. It is not inequitable that the latter should have priority over the bank.

The Privy Council, on the other hand, found it "difficult to understand"[181] how *Space Investments* could even be applied on the facts, given that it concerned monies being paid into a mixed fund, whereas here the monies said to be impressed with a trust were paid into an overdrawn, and in effect nonexistent, fund. The Privy Council was equally dismissive of Cooke P's reliance on Goulding J in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*[182] believing that the situations in the two cases were entirely different. Cooke P had cited *Chase Manhattan* as authority for the proposition that the claimants' payment of money, made as it were by mistake, resulted in retained proprietary interest giving rise to a constructive trust. Furthermore, the Privy Council did not accept the claimants' argument that they need not assert the same proprietary interest against a bank as they would do if their opponent was a stranger to the entire relationship.[183] Instead, Lord Mustill suggested that the chargee, the bank, does not become on crystallisation of the charge the universal successor of the chargor, Exchange. Rather, the bank becomes entitled to a proprietary interest which it may assert adversely against Exchange. The freedom of Exchange to deal with its assets

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179 (1986) 3 All ER 75.
180 Above n 98, 274.
181 Above n 104, 827.
182 [1981] Ch 105.
183 Above n 104, 818.

pending the crystallisation of the charge did not entail that the bank's right to assets be circumscribed by an indebtedness of a purely personal nature.[184]

Standing in stark contrast to the Court of Appeal's innovative use of precedents in the Goldcorp case, in *Attorney General of Hong Kong v Reid* the Court of Appeal adhered rigidly to an old and criticised English Court of Appeal precedent that had the effect of constraining the accountability of a fiduciary. When the case was appealed to the Privy Council, Lord Templeman in delivering the judgment of the Board queried the Court of Appeal's affirmation of the precedent *Lister & Co v Stubbs*,[185] stating that "the New Zealand Court of Appeal must be free to review an English Court of Appeal authority on its merits and to depart from it if the authority is considered wrong".[186] And that is precisely what the Privy Council did. It held that as soon as Mr Reid, who was a fiduciary of his employer, the Hong Kong government, received a bribe in breach of his duty he was obliged to pay and account for the bribe to the government.[187] Lord Templeman dismissed *Lister & Co v Stubbs* as inconsistent with the principles guiding fiduciary relationships,[188] preferring instead to impose liability in the light of attitudes such as those expressed in *Boardman v Phipps*:[189]

> *Boardman v Phipps* demonstrates the strictness with which equity regards the conduct of a fiduciary and the extent to which equity is willing to impose a constructive trust on property obtained by a fiduciary by virtue of his office.

Causation

Decisions reached by the Court of Appeal on causation have also been queried in subsequent Privy Council judgments. In *Deloitte Haskin & Sells* the Privy Council was again critical of reasoning utilized by the Court of Appeal that on the face of it could be viewed as a means of ensuring that the desired end result would be arrived at. Having decided that a broader

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184 Above n 104, 818.
185 (1890) 45 ChD 1.
186 Above n 102, 9.
187 Above n 102, 4.
188 Above n 102, 8.
189 Above n 102, 9.

common law duty of care than that imposed under the Securities Act was appropriate, the Court of Appeal then established that the purported breach of that duty by Deloitte had been causative of NMLN's loss. This it did by agreeing with Henry J in the High Court, that the issue was whether NMLN's own breaches of duty to particular depositors and its liability to them would have been avoided in whole or in part had Deloitte or the directors complied with their duties of care .[190] McGechan J went into a detailed analysis of causation in the case. He was uneasy with the proposition that it was possible that nothing Deloitte did after March 1986 would have been "causative" of NMLN's liability, preferring instead to accept that if Deloitte had given a timely Section 50(2) report identifying AICS's probable insolvency NMLN would eventually have acted to freeze the situation, preventing it worsening.[191] McGechan J acknowledged that policy considerations underlie causation questions, and thought that in the present case policy should be allowed to operate so that all of those responsible for the circumstances giving rise to the harm which the plaintiff actually suffered, including the plaintiff itself where appropriate through contributory negligence, should be brought into the proceedings, and responsibility apportioned accordingly.[192]

In the Privy Council it was held that the Court of Appeal had been wrong to endorse the approach to causation taken in the High Court.[193]

> The question to be answered is not whether NMLN would, on receipt of an earlier report, have avoided liability to those depositors existing at 30 August 1986 [date of liquidation] but whether, by Deloitte's failure to report, NMLN suffered a loss which it would not have suffered if Deloitte had reported by mid March 1986.

Because the evidence inferred that, even if AICS had been closed at the end of March 1986, it would still have been liable for $6.75 million to depositors, the Privy Council held that causation had not been established.

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190 Above n 163, 275.

191 Above n 163, 292 - 293.

192 Above n 163, 293.

193 Above n 154, 8.

Clark Boyce v Mouat is another example of a Court of Appeal decision where reasoning on causation is subsequently challenged by the Privy Council. Bisson J surmised that the solicitor's negligence had caused Mrs Mouat's loss.[194] He postulated that if Mrs Mouat had been fully and properly advised by an independent solicitor, or even by Mr Boyce, she would not have signed the mortgage as the real risk to her home would have emerged. Bisson J then proceeded to point out that even if the disclosure and advice which she would have been given would not have altered her mind, equity would give relief regardless.[195] In contrast, the Privy Council believed that even if the solicitor had informed Mrs Mouat of certain matters that had not been disclosed to her, and if nondisclosure had amounted to a breach of contract, there was evidence neither that Mrs Mouat would have accepted the advice nor that if she had she would have acted differently. Mrs Mouat had therefore failed to establish she suffered loss as a result of any such breach.[196] It is pertinent to this conclusion that the Privy Council drew heavily upon the findings of the trial judge as to the witness's state of mind, while in the Court of Appeal McGechan J and Bisson J chose to differ from Holland J's evidentiary findings, for no substantive reason. Lord Jauncey appeared unimpressed with their contrary conclusions, citing Viscount Haldane LC in *Nocton v Lord Ashburton*:[197]

> [I]t is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness.

He proceeded to point out that no such exceptional circumstance existed in this case which would justify differing from Holland J's evidentiary findings.

Interpretation

The Court of Appeal's interpretative reasoning in *Elders Pastoral v BNZ* came under scrutiny in the subsequent Privy Council judgment. The debate concerned the interpretation of

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194 Above n 101, 190,951.

195 Above n 101, 190,951.

196 Above n 100, 648.

197 Above n 100, 647, from [1914] AC 932 at 957.

legislation and a stock security. While the Court of Appeal judgment is primarily concerned with the conscienability of Elders retaining the proceeds of the sale, and the imposition of a constructive trust, the Privy Council judgment does not address either of these issues. Lord Templeman on behalf of Their Lordships undertook a detailed analysis of the relevant documents and legislation. He concluded that clause 15 of the stock security *did* create an equitable assignment by way of charge on any future chose in action, namely the right of a grantor to receive and recover from a purchaser the sale price of stock mortgaged to the bank.[198] In the Court of Appeal Cooke P had disposed of this possibility by simply saying he did not think that clause 15 went as far as to amount to a contract by the farmer to assign a future chose in action.[199] Similarly, Somers J opined that the provisions of clause 15 were not sufficiently clear to amount to a contract to assign future property.[200] Both Cooke P and Somers J substantiated this point by referring to clause 19 of the stock security, a reference that the Privy Council was unpersuaded had any effect whatsoever on the construction of clause 15. Somers J alluded to the fact that, if clause 15 had been intended to create an assignment Mr Gunn would surely have been obliged to give notice to purchasers of the bank's right.[201] However, the Privy Council pointed out that the stock security was a registrable instrument under Section Two of the Chattels Transfer Act 1924, and that Elders had notice of that charge as a result of registration of the stock security under Section 4(1). Thus, Their Lordships having decided that clause 15 of the stock security did create a charge, were not required to consider whether the Court of Appeal judgment should be affirmed on other grounds. Employing a more orthodox line of reasoning they had arrived at the same result.

6 Conclusion

These six cases together indicate that the approaches taken by our Court of Appeal and by the Privy Council towards issues of equity and negligence are increasingly inconsistent. This need not, of itself, be cause for alarm. A final appellate court exists in order to scrutinize,

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198 [1991] 1 NZLR 385, 387.

199 Above n 131, 185.

200 Above n 131, 191.

201 Above n 131, 191.

and if necessary, re-assess decisions of lower courts. By querying the Court of Appeal's imposition of a constructive trust in the Goldcorp case, and by narrowing the duty of care imposed by the Court of Appeal in *Clark Boyce v Mouat*, the Privy Council was simply fulfilling its role as final appellate court. Similarly, by pointing out in *Elders Pastoral v BNZ* that the same decision could have been arrived at with more orthodox legal reasoning, the Privy Council was fulfilling this role. And so on for the other Court of Appeal judgments that have been queried in subsequent Privy Council appeals.

Consternation need only arise when it is suggested that the New Zealand justice system as it is currently conceived would operate effectively without the Privy Council. Clearly, this is not the case. On the contrary, the Privy Council is currently demonstrating how vital it is to the overall concept of "justice" in New Zealand. If the New Zealand justice system was to ever operate effectively without the Privy Council, it would need to have in place an alternative forum that is equally capable of acting as a final arbiter of legal issues.

IV ALTERNATIVES TO THE PRIVY COUNCIL

There seems to be a consensus that *if* the right of appeal to the Privy Council were to be abolished, a third appellate tier will need to be created. The "White Paper", in reviewing the court system required for a Bill of Rights Act, conditioned abolition of the Privy Council appeal on the creation of an alternative appeal forum.[202] The Royal Commission on Courts made the point strongly[203] that "there can be little doubt that issues do benefit from the distillation or crystallisation of argument provided by a second tier of appeal".[204] The Law Commission clarified this by indicating that a second appeal is *not* intended to necessarily benefit the litigants, but is "for the purpose of expounding and stabilizing principles of law" for the public's benefit.[205] This view is perhaps a little too simplistic, in so far as it ignores the desire of litigants to explore every avenue before admitting defeat. It also fails to bring attention to the fact that, before considering the options for a third appellate tier, an important

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202 Above n 26, 275.
203 Above n 38, para 267, p 79.
204 Above n 38, 115.
205 Above n 40, para 240, p 83.

issue that must first be resolved is "whether the distinctive New Zealand legal identity should be one which gives judges, as opposed to the legislature, the power to make policy decisions or 'value judgments' with potentially far-reaching effects".[206] It could be argued that a geographically and philosophically distanced appeal court may instil greater certainty and impartiality into significant policy issues.

However, if we are to proceed from the assumption that in time appeals to the Privy Council *will* be abolished,[207] what are our alternatives?

A An Australasian or Pacific Appeal Court

A logical solution to the creation of a third appellate court would be to combine the judicial expertise and resources of neighbouring countries. For instance, Bernard Clark recommends an Australasian appeal court.[208]

> There is no necessity for the Privy Council to sit in London or be exclusively or mainly comprised of English judges. A New Zealand Privy Council could sit in Wellington or even Canberra and comprise New Zealand judges together with select Australian judges from the Commonwealth High Court and, if they were prepared to come, a few of the very best judges from the United Kingdom.

Although in so far as Australia is concerned it could be submitted that the logistical problems of travel and cultural diversity are lessened,[209] this is not so in respect to Asia, the South Pacific or countries further afield. A Pacific appeal court may also be susceptible to domination by the larger and more powerful country, Australia. Furthermore, it has been suggested that an Australasian or Pacific appeal court would again require an "unpalatable"

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206 Above n 52, 621.

207 For examples of statements suggesting that the abolition of the right of appeal to the Privy Council is inevitable, see "Chief Justice Sees End to Privy Council Appeals" (1993) 396 LawTalk 8, and "Morning Report with Geoff Robinson, Interview with Jim Bolger" National Radio Station 1YA, Newsmonitor Services Ltd, 9 March 1994 7am.

208 B H Clark "When the Court of Appeal is Wrong" [1990] NZLJ 175, 175.

209 Above n 26, 292.

surrender of New Zealand's sovereignty.[210] Eichelbaum CJ has pointed out that it is illogical to suggest a third tier comprising or including judges of other countries "if we are abolishing the Privy Council appeal on account of the affront to our sovereignty or because foreign judges do not have sufficient knowledge of New Zealand conditions".[211]

However, the repatriation of the Privy Council to New Zealand could be a thoroughly independent and nation-affirming move. Rather than shunning exposure to foreign jurisdictions, it would welcome such exposure, and in doing so would reveal a country that is proud of and comfortable with its legal identity and institutions. The Council could be situated in Wellington, with the best judges from our own and neighbouring jurisdictions regularly sitting. Judges from jurisdictions further afield may be occasionally invited to sit also. Such a Council would inevitably strengthen feelings of nationalism and pride. It would establish New Zealand as an internationally-renowned centre of dispute resolution, where judges and counsel of the highest calibre resolve legal issues of great public and social importance. A repatriated Privy Council would stimulate, rather than undermine, New Zealand's sovereignty and indigenous legal identity.

B Transforming the New Zealand Court of Appeal

Another solution may be for our Court of Appeal to adapt in order to address the needs currently being met by the Privy Council. Strategies for doing so tend to suggest increasing the number of permanent judges on the court, so that when the occasion requires two divisions can sit concurrently, or on cases of exceptional public importance the whole court would sit. Joseph believes that "[t]wo divisions of the Court would enhance judicial specialise within it, relieve pressure of workload and release more time for consideration of important or complex legal points".[212]

This idea is evident in a recent discussion paper published by the New Zealand Law Society's

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210 Above n 26, 292.

211 Above n 91, 88.

212 Above n 26, 293.

Civil Litigation and Tribunals Committee.[213] The Committee's model has been developed in response to recent trends in the New Zealand justice system, whereby the District Court has assumed greater original jurisdiction, the High Court has assumed a greater appellate role, and the Court of Appeal has evinced a need "for fewer cases and more time to reflect".[214] The model essentially divides the High Court into a general appellate division and a second civil and criminal appellate division. This leaves the Court of Appeal free to assume a role similar to that currently met by the Privy Council. In particular, the Committee recommends that appeals from an appellate division of the High Court to the Court of Appeal as final court require special leave.[215]

C Special Leave

A primary concern with the current right of appeal to the Privy Council is the ease with which an appeal can be taken to England. This is due to Rule 2(a) of the 1910 Order which says an appeal shall lie as of right where the value in dispute is NZ$5000 or more. Given that few appeals to the Privy Council involve less than this sum, this provision is too generous for appeal as of right.[216] A solution may be to put in place a "special leave" requirement, as currently operates in Australia for appeals to the High Court.[217] For cases to be granted the right to appeal to the Australian High Court, applicants must first identify the issue which is said to merit the grant of special leave. They must them demonstrate that this issue is of sufficient importance, and that the substance of the proposed appeal is sufficiently arguable.[218] D F Jackson points out that "important" is an ephemeral notion, and that the mere fact a large sum of money is involved does not mean the issue is important.[219] He also says that the prospects of obtaining special leave in Australia are greater if judgments in the courts below are not unanimous.[220]

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213 See "New Zealand Courts After the Privy Council: A Discussion Paper" [1994] 424 Lawtalk 3.

214 Above n 213, 3.

215 See above n 213, 3.

216 See above n 13, 28.

217 See D F Jackson "The Lawmaking Role of the High Court" (1994) 11 Aust Bar Review 197.

218 Above n 217, 199.

219 Above n 217, 200.

220 Above n 217, 200.

By requiring special leave to be obtained before cases can be taken to the Privy Council, the Council will only sit in judgment on legal issues that (1) are of fundamental importance to the development of the law, or (2) have been misconstrued or misdirected in lower courts, and are in need of clarifying or correcting. That is precisely what is required of New Zealand's final appellate court. Jackson describes the effect of the requirement for special leave in Australia in the following way:[221]

> [T]he determination of which cases the court will, or will not, entertain plays a vital part in identifying the areas of the law in which change may occur, and the pace of any such change.

D Retaining our Current Court System

Another strategy for responding to the abolition of Privy Council appeals may be to retain our current court system just as it is. Eichelbaum CJ suggests this when he points out that if we were to comprise a third appellate court from the Court of Appeal our best judges would be relegated to a forum with a light work load, thereby weakening the Court of Appeal.[222]

> And all this apparently for the sake of providing a third tier when, at the moment, we're functioning quite comfortably without any real third tier at all given the extremely limited number of cases that actually go to the Privy Council.

This option is also plausible because it counters the issue of cost which would arise if we were to create a new appellate court. It is unlikely that the resources exist within New Zealand to create a further appellate layer,[223] and even if they did, it is arguable that "the resources would be better focused on improving the bottom end of the system which is where, in terms of the person in the street, access to justice really counts".[224] Furthermore, by

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221 Above n 217, 201.

222 Above n 91, 88.

223 Compare above n 38, para 267, p 79, and above n 37, 115.

224 Above n 91, 89.

retaining the right of appeal to the Privy Council, those few cases that require consideration beyond the Court of Appeal will still have a further forum in which to plead their case.

V CONCLUSION

In conclusion, the Privy Council debate covers a vast range of concerns and issues. It encompasses criticism that the spectre of the Privy Council constrains the development of an indigenous legal culture, that it is inaccessible to all but a select few of the community, and that it threatens the autonomy and identity of New Zealand. In contrast, the debate acknowledges that the Privy Council fulfils a needed role in the New Zealand justice system of a final appellate court, and that this role is carried out in a manner that is cost efficient to the New Zealand public and that provides access to the top legal talent that England has to offer. Furthermore, the Privy Council acts as a safety-monitor for those rare occasions when the Court of Appeal, for whatever reason, is mistaken or simply gets it wrong.

The six Court of Appeal and Privy Council judgments examined in this paper tend to suggest that the Privy Council has a critical and substantive role to play in the New Zealand justice system. As with all final appellate courts, the Privy Council in these six cases was able to elucidate and clarify the law.[225] In *Liggett v Kensington* this involved the Privy Council querying the Court of Appeal's decision that a fiduciary relationship existed between Exchange and the claimants, and instead establishing that Exchange owed no fiduciary duties to the claimants. Similarly, in *Deloitte Haskin & Sells* the Privy Council queried the Court of Appeal's decision that Deloitte owed NMLN a duty of care, and instead established that the only duty of care owed by Deloitte was under Section 50(2) of the Securities Act 1978, which Deloitte had not breached. *Clark Boyce v Mouat* saw the Privy Council narrowing a broad solicitor/client duty of care imposed by the Court of Appeal, and *Kuwait Asia Bank* again saw the Privy Council reining in a far-reaching duty of care suggested in the Court of Appeal judgment. In *Elders Pastoral*, although not required to decide upon the constructive trust imposed by the Court of Appeal, the Privy Council revealed that the correct final result could have been arrived at by using more orthodox interpretative reasoning. Constructive

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225 See above n 40, para 238, p 83.

trusts were also at issue in the Goldcorp appeal, and again underlying the Privy Council's judgment was the suggestion that the Court of Appeal had been too hasty in its utilization of equitable remedies. Causation principles enunciated in the Court of Appeal have also come within the purview of these six Privy Council judgments, in particular in the cases of *Deloitte Haskin & Sells* and *Clark Boyce*. Finally, the Court of Appeal's reliance on precedents has been the subject of scrutiny by the Privy Council.

When added together, it is apparent that in these six cases, the Privy Council has found that a number of points made by the Court of Appeal are either problematic or questionable. Some commentators may contend that by acknowledging these difficulties, and undertaking to address them, the Privy Council is effectively undermining the competence and integrity of the New Zealand Court of Appeal. I, however, would contend that, on the contrary, the Privy Council is fulfilling the role that any final appellate court is required to do. In doing so it is examining issues raised by the Court of Appeal that need examining, and is elucidating or reassessing these issues where appropriate. This is a crucial role, and the New Zealand justice system would be inadequate without it. Even if all other reasons for retaining the right of appeal to the Privy Council were obsolete, the need for the Privy Council or for another similar final appellate court to keep acting as the final arbiter of New Zealand cases remains paramount.

BIBLIOGRAPHY

Adams v R (1994) 17 TCL 43/6.

R Alexander QC "1987 Law Society Conference: The Law and its Concerns" [1987] NZLJ 316.

"Auditors, Forex Advisors, Privy Council on Trial" *Independent* Auckland, New Zealand, 26 March 1993, 10.

S Baldwin "New Zealand's National Legal Identity" (1989) 4(1) Canterbury LR 173.

G Bale "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council" (1985) 63(3) Can Bar Rev 461.

Sir G Barwick *New Zealand Commentary on Halsbury's Laws of England* (4 ed, Butterworths, Wellington, 1981) Vol C, "Courts".

J Bolger "Address in Reply Speech to Parliament" 8 March 1993.

J Bolger "Address to Newspapers Publishers Association: Annual Conference" 16 March 1994.

"Case Notes: *Kensington v Unrepresented Non-allocated Claimants* (1994) 5 NZBLC 103,453; *Re Goldcorp Exchange Ltd (in receivership)* (1994) 2 All ER 806. Privy Council" (1994) 7 Auck Uni LR 746.

C Cato "Privy Council: The Takaro Properties Case" [1988] NZLJ 110.

"Chief Justice at the Privy Council: Interview with Sir Thomas Eichelbaum on 2 March 1994, concerning the Privy Council and other Topics" [1994] NZLJ 86.

"Chief Justice Sees End to Privy Council Appeals" (1993) 396 LawTalk 8.

B H Clark "When the Court of Appeal is Wrong" [1990] NZLJ 175.

Clark Boyce v Mouat (1993) 16 TCL 38/1.

Sir R Cooke "Divergences - England, Australia and New Zealand" [1989] NZLJ 297.

A Culley "Case Notes: *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd* (1991) 1 NZLR 257" (1991) 6(4) Auckland Uni LR 618.

"Cut-price Top Legal Advice" *National Business Review* Weekend Supplement, Wellington, New Zealand, 24 November 1989, w3.

Deloitte Haskin & Sells v National Mutual Life Nominees Ltd (1993) 16 TCL 22/1.

John Dixon "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1992) 7 Auck Uni LR 147.

Elders Pastoral v BNZ (1990) 13 TCL 43/1.

E Garrett "Privy Council Appeals" [1989] NZLJ 105.

J G Hall and D F Martin "The Future of the Judicial Committee of the Privy Council" (1993) 143 New LJ 1652.

Halsbury's Laws of England (4 ed, Butterworths, London, 1975) vol 10, "Courts".

J W Harris "The Privy Council and the Common Law" (1990) 106 LQR 574.

P A Howell *The Judicial Committee of the Privy Council 1833 - 1876* (Cambridge University Press, Cambridge, 1979).

P Joseph "Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights" (1985) 2(3) Canterbury LR 273.

Kuwait Asia Bank v NMLN [1990] NZ Recent Law 192.

McGechan on Procedure (Brookers, Wellington, 1985 - 1988) Vol 1.

P G McHugh "The Appeal of 'Local Circumstances' to the Privy Council" [1987] NZLJ 24.

J McLinden "The Privy Council in the 1990s" (1992) 364 LawTalk 10.

D Marr *Barwick, The Classic Biography of a Man of Power* (Allen & Unwin, Sydney, 1992).

A P Molloy "'Leap-Frogging' to the Privy Council" [1980] NZLJ 455.

"Morning Report with Geoff Robinson, Interview with Jim Bolger" National Radio Station 1YA, Newsmonitor Services Ltd, 9 March 1994 7am.

New Zealand Law Commission *The Structure of the Courts* (Wellington, 1989).

G Palmer Att Gen "Privy Council Appeal Right to Go" (1987) 272 LawTalk 3.

"Privy Council Appeal Colonial Relic" *The Evening Post* Wellington, New Zealand, 5 October 1993, 7.

"Privy Council Rejects New Zealand 'Squires' Appeal" *National Business Review* Wellington, New Zealand, 12 October 1990, 21.

"Protest of Bench and Bar, April 25 1903" [1840 - 1932] NZPCC 730.

"Questions on Role of Privy Council" *Otago Daily Times* Dunedin, New Zealand, 10 August 1993, 21.

Professor Charles Rickett *Equity in Commerce* (New Zealand Law Society Seminar, March 1993).

Royal Commission on the Courts (Government Printer, Wellington, 1978).

Stephen M D Todd et al *The Law of Torts in New Zealand* (The Law Book Company Ltd, Sydney, 1991).

J W Turner "Civil Procedure" (1992) 1 NZ Recent Law 15.

M Vercoe and J Williams "Showdown at Downing Street" (1994) 5 *Mana: The Maori News Magazine for all New Zealanders* 50.

W Winiata "Back in Court" (1994) 5 *Mana: The Maori News Magazine for all New Zealanders* 53.

L Zines *Constitutional Change in the Commonwealth* (Cambridge University Press, Cambridge, 1991).

APPENDIX I

New Zealand Appeals to the Privy Council since 1983

PC Number	Parties	Date of Decision	Result
38/83	*R v Kaitamaki*	1/5/84	Refused
56/84	*Hart v O'Connor*	22/5/85	Allowed
22/86	*CIR v Challenge*	20/10/86	Allowed
40/86	*Taylor v Rotowax*	30/3/87	Refused
14/87	*Chch Drainage v Brown*	14/9/87	Refused
8/88	*NZ Meat Industry*	4/5/88	Refused
46/88	*Vugnovich*	23/5/89	Refused
42/88	*Savill v Chase*	31/10/88	Refused
27/88	*Chase v GSH*	31/10/88	Allowed
43/88	*Barber v Barber*	4/5/89	Refused
6/89	*Swee v Equiticorp*	12/7/89	Refused
18/89	*Green v BCNZ*	18/7/89	Refused
13/89	*Money v Playle*	27/7/89	Refused
40/89	*Kuwait Asia Bank*	21/5/90	Allowed
43/89	*Meates v Westpac*	5/6/90	Refused
51/89	*Elders v BNZ (1)*	18/6/90	Refused
24/89	*Stewart v Welch*	2/7/90	Refused
39/89	*CIR v Databank*	23/7/90	Refused
17/88	*Holt v Holt*	23/7/90	Refused
19/90	*Republic Resources v NZI*	25/7/90	Refused
51/89	*Elders v BNZ (2)*	22/10/90	Refused
15/90	*Applefields*	3/12/90	Allowed
41/90	*DFC v Coffey*	18/3/91	Allowed
46/90	*Butcher v Petrocorp*	18/3/91	Allowed
32/90	*Lloyds Bank v CIR*	19/6/91	Allowed
7/91	*NZ Stock Exchange v CIR*	1/7/91	Refused
14/91	*Swee v Equiticorp*	13/11/91	Refused
26/91	*EQC v Waitaki*	25/11/91	Allowed
13/91	*Downsview v First CIRY*	19/11/92	Refused, cross appeal allowed
14/92	*Hadlee v CIR*	1/3/93	Refused
28/92	*Deloittes v NML*	10/6/93	Allowed
49/93	*Clark Boyce v Mouat*	4/10/93	Allowed
44/93	*AG Hong Kong v Reid*	1/11/93	Allowed
14/93	*NZ Maori Council v AG*	13/12/93	Refused
21/94	*Telecom v Clear*	19/10/94	Refused
36/94	*Adams v R*	31/10/94	Refused
30/94	*MVDI v UDC Finance*	16/11/94	Allowed

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PC Numb			esult
38/83			efused
56/84			llowed
22/86			llowed
40/86			efused
14/87			efused
8/88			efused
46/88			efused
42/88			efused
27/88			llowed
43/88			efused
6/89			efused
18/89			efused
13/89			efused
40/89			llowed
43/89			efused
51/89	*Elders v BNZ (1)*	18/6/90	Refused
24/89	*Stewart v Welch*	2/7/90	Refused
39/89	*CIR v Databank*	23/7/90	Refused
17/88	*Holt v Holt*	23/7/90	Refused
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51/89	*Elders v BNZ (2)*	22/10/90	Refused
15/90	*Applefields*	3/12/90	Allowed
41/90	*DFC v Coffey*	18/3/91	Allowed
46/90	*Butcher v Petrocorp*	18/3/91	Allowed
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7/91	*NZ Stock Exchange v CIR*	1/7/91	Refused
14/91	*Swee v Equiticorp*	13/11/91	Refused
26/91	*EQC v Waitaki*	25/11/91	Allowed
13/91	*Downsview v First CIRY*	19/11/92	Refused, cross appeal allowed
14/92	*Hadlee v CIR*	1/3/93	Refused
28/92	*Deloittes v NML*	10/6/93	Allowed
49/93	*Clark Boyce v Mouat*	4/10/93	Allowed
44/93	*AG Hong Kong v Reid*	1/11/93	Allowed
14/93	*NZ Maori Council v AG*	13/12/93	Refused
21/94	*Telecom v Clear*	19/10/94	Refused
36/94	*Adams v R*	31/10/94	Refused
30/94	*MVDI v UDC Finance*	16/11/94	Allowed

r Jobson, Rachel
Folder Anne
Jo New Zealand's right of appeal to the Privy Council