CASE NOTES

Tax Secrecy: The Westpac Case

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The issue before the Supreme Court in *Westpac*[1] was whether secret information relating to one taxpayer could be used by the Commissioner of Inland Revenue in litigation against another taxpayer. The Commissioner, in previous investigations, had obtained confidential tax documents from Westpac and ANZ National, and now sought to use those documents in litigation against an unrelated taxpayer, the Bank of New Zealand ("BNZ").

I FACTUAL BACKGROUND

In the late 1990s, the BNZ entered into cross-border structured financing arrangements that gave rise to various deductions and provided the BNZ with a stream of tax-exempt income. Overall, this resulted in a significant reduction in the BNZ's taxable income. In 2000, the Commissioner concluded that the structured financing arrangements constituted tax avoidance in contravention of the general anti-avoidance provision of the day.[2] As a result, the Commissioner denied the various deductions and assessed the BNZ to tax on the previously exempt distributions derived from the arrangements.

The BNZ brought proceedings against the Commissioner challenging his finding of tax avoidance. As part of the discovery process in these proceedings, the Commissioner provided the BNZ with a list of documents, which included documents pertaining to arrangements implemented by other banks (namely, Westpac and ANZ National). The Commissioner considered those other arrangements to have been "substantially similar" to the structured financing transactions at issue in the BNZ proceedings.[3] Accordingly, even though Westpac and ANZ National were not parties to the litigation, the Commissioner discovered those banks' documents on the basis that they exposed the "off the peg" nature of the BNZ's scheme, and were therefore relevant to the issue of tax avoidance.[4]

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1 *Westpac Banking Corporation Limited v Commissioner of Inland Revenue* [2008] NZSC 24 ["*Westpac*"].

2 Income Tax Act 1994, s BG 1 (subsequently repealed).

3 *Westpac*, supra note 1, [8].

4 Ibid [16].

The BNZ then applied to the High Court (in interlocutory proceedings) for orders that the other banks' documents not be discovered in the litigation. The grounds on which the BNZ relied were: that the other banks' documents were not relevant to present proceedings; that the other banks' documents were confidential and protected by secrecy provisions in the Tax Administration Act 1994 ("the Act"); and that the number of documents discovered was oppressively large. The High Court rejected the BNZ's challenge on all three fronts.

The interlocutory judgment was appealed to the Court of Appeal, which also decided in favour of the Commissioner. By this stage, Westpac and ANZ National had joined the proceedings and had aligned themselves with the BNZ; their position was also that the documents should not be discovered. The Court of Appeal clarified that the inquiry was not whether the documents were admissible as evidence, but rather whether they had been properly discovered by the Commissioner (to set the scene for their admission).[5] The Court was satisfied that the documents were not irrelevant.[6] It implicitly concluded — at least as a preliminary matter — that the documents were part of a "wider commercial context" against which the question of whether the BNZ arrangements constituted tax avoidance could be assessed.[7] The Court iterated the Commissioner's argument that the documents were likely to be material in showing that the structure was "contrived and artificial" and amounted to a "transaction template" that was adopted by the BNZ solely to avoid tax.

Westpac and ANZ National — but not the BNZ — then appealed the decision to the Supreme Court. The two banks at this stage accepted that the documents in question were relevant. They also chose not to raise the oppression argument, which the Court of Appeal had earlier dispensed with as being "more apparent than real".[8] The key issue on appeal in the Supreme Court was whether the documents were protected by the secrecy rules set out in the Act. In April 2008, McGrath J delivered the Supreme Court's judgment on this interlocutory matter and dismissed the banks' appeal. The Supreme Court's judgment, and the reasons therein, are the subject matter of this case note.

II SECRECY RULES SET OUT IN THE ACT

The major issue before the Supreme Court was whether the Act barred the Commissioner from discovering, in the BNZ litigation, documents relating to other taxpayers, namely Westpac and ANZ National (hereinafter referred

5 Ibid [15].
6 Ibid [16].
7 Ibid.
8 Ibid [17].

to solely as "Westpac"). The Commissioner had previously obtained these documents from Westpac in the course of departmental investigations, either by compelling production pursuant to his statutory powers under the Act[9] or by executing agreements with Westpac, which avoided the need to exercise those powers.

Westpac argued that the circumstances in which the Commissioner had previously obtained the documents had rendered them secret and confidential. It followed that the Act precluded the Commissioner from disclosing those documents during discovery in another bank's litigation. At the very least, redaction was necessary to remove identification of Westpac from the documents. (On this issue, the Court of Appeal had held that such redaction would destroy the documents' utility).[10]

Westpac relied primarily on section 81(1) of the Act, which imposes a duty on officers of the Inland Revenue Department to maintain secrecy in respect of tax-related matters that come to their knowledge in the course of administering the various tax Acts. Section 81(1) provides that officers "shall not communicate any such matter to any person except for the purpose of carrying into effect the [tax] Acts".

Whilst section 81(1) restrains the extent to which the Commissioner may disclose a taxpayer's records, section 81(3) affords the Commissioner a qualified privilege to resist a demand by any Court for such disclosure:[11]

> [N]o officer of the Department shall be required to produce in any Court or tribunal any book or document or to divulge or communicate to any Court or tribunal any matter or thing coming under the officer's notice in the performance of the officer's duties as an officer of the Department, except when it is *necessary* to do so for the purposes of ... [c]arrying into effect ... the [tax] Acts.

Both subsection (1) and subsection (3) are subject to the general exception of "carrying into effect the Acts". However, subsection (3) explicitly requires that disclosure be "necessary" for the exception to apply, whereas the exception to the secrecy rule in subsection (1) contains no such requirement. Nonetheless, the Supreme Court held that the standard of "necessity" in subsection (3) "is a significant part of the context in interpreting section 81(1)".[12] Hence, the correct approach is "to read section 81(1) as if the word 'necessary' was included in the same way as it is in section 81(3)".[13] Otherwise the interpretation could be problematic:[14]

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9 Tax Administration Act 1994, s 17.

10 *Westpac*, supra note 1, [19].

11 Tax Administration Act 1994, s 81(3) (emphasis added).

12 *Westpac*, supra note 1, [68].

13 Ibid [62].

14 Ibid [68].

> [T]here would be a mismatch between the two provisions which would mean that the Commissioner had scope to use a wider class of confidential information by choice [section 81(1)], when conducting litigation, than the court could compel him to produce [section 81(3)]. This would be surprising and unlikely to have been intended by Parliament.

Fortifying section 81 is section 6(1) of the Act, which provides that every officer of the Inland Revenue is duty-bound "to use their best endeavours to protect the integrity of the tax system". Section 6(2) defines "integrity of the tax system" to include (among others) two values: "the rights of taxpayers to have their individual affairs kept confidential" and "the responsibilities of taxpayers to comply with the law". The latter value, according to McGrath J, reflects the importance of the Commissioner's duty to identify taxpayers who have failed to comply with tax laws.[15] McGrath J considered that the "ultimate issue" before the Court turned on "how the statute provides for them to be reconciled".[16]

III PREVIOUSLY DECIDED CASE LAW

The Supreme Court had to consider section 81 of the Act to determine the extent to which, if at all, it prohibited the Commissioner from discovering documents that related to non-party taxpayers (Westpac). The Court noted that the critical provision was section 81(1) and its exception; in other words, the key issue was whether — in carrying into effect the tax Acts in the BNZ litigation — circumstances rendered it necessary for the Commissioner not to maintain secrecy in respect of Westpac's documents. Section 81(3) was not applicable in these proceedings. Whereas section 81(1) restricts the circumstances in which the Commissioner may use secret tax material to support his case in litigation, section 81(3) confers a privilege to the Commissioner to *resist* a demand for production. That is, subsection (3) operates for the benefit of the Commissioner and "is not itself a restraint on the voluntary use of secret material by the Commissioner".[17]

In applying section 81(1) to the facts, the Supreme Court began by citing *Knight v Commissioner of Inland Revenue*,[18] in which the Commissioner sought to resist discovery of documents on the grounds of privilege. The provision on which the Commissioner relied was equivalent for all intents and purposes to the current section 81(3). The documents in question concerned the plaintiff himself, and not some third party. The Court of Appeal in *Knight* held that discovery, being a necessary element

15 Ibid [52].
16 Ibid.
17 Ibid [57].
18 [1991] 2 NZLR 30 (CA).

of litigation, formed part of carrying the tax Acts into effect. Accordingly, the Commissioner fell within the exception to subsection (3) and could not assert privilege. However, Cooke P did observe (in the hypothetical) that "public interest would debar [the Commissioner] from disclosing confidential information about *other* taxpayers".[19] The notion of "public interest" to which Cooke P referred is a common law principle (known in full as "public interest immunity") that enables a Court to restrict disclosure of information in litigation if such disclosure would damage the public interest; for example, where disclosure would undermine the assurance the public has that their private tax records will be kept confidential by the Inland Revenue. Although the concept arose several times in *Westpac*, the Supreme Court eventually concluded that public interest immunity, as a principle, has been comprehensively subsumed by the Act and that, consequently, its application as a distinct legal concept was no longer required.[20]

The Supreme Court next considered the Court of Appeal case of *Commissioner of Inland Revenue v E R Squibb & Sons (NZ) Ltd.*[21] There, the Commissioner claimed privilege (under the section 81(3) equivalent) and resisted disclosure of information relating to taxpayers who were not parties to the litigation.[22] The Court of Appeal in that case acknowledged the need to balance the public interest in maintaining the secrecy of taxpayers' affairs against the occasional need to use third party information as an independent means of verifying the affairs of a particular taxpayer. The Court held that subsection (3), due to its exception ("necessary for carrying into effect the [tax] Acts"), afforded the Commissioner a privilege merely against disclosure of other taxpayers' information in raw and original form.[23] The privilege did not extend to documents that had been (or could be) redacted to prevent identification of other taxpayers. Disclosure could still be compelled in respect of information of a general nature.

It was argued by Westpac that the logic in *Squibb* could be translated to the secrecy provision in subsection (1), to the effect that the exception in that provision permits disclosure of secret material in litigation only to the extent that it does not identify non-party taxpayers.[24] However, the Supreme Court rejected this argument for two reasons.[25] First, *Squibb* was concerned solely with the privilege provision in subsection (3), whereas the issue in *Westpac* turned on the secrecy provision in subsection (1).[26] Whilst in *Squibb* the Commissioner sought to resist disclosure of non-party

19 Ibid 35 per Cooke P (emphasis added).

20 *Westpac*, supra note 1, [71].

21 (1992) 14 NZTC 9146 (CA) ["*E R Squibb*"].

22 The proceedings against Squibb concerned transfer pricing. The information demanded by Squibb was the financial data of its competitors on which the Commissioner had relied in reassessing Squibb's taxable income.

23 *E R Squibb*, supra note 21, [61] per Richardson J.

24 *Westpac*, supra note 1, [63].

25 Ibid [49], [63].

26 Ibid [50].

information by claiming privilege, the issue in the present case was whether the secrecy provision restrained the Commissioner from voluntarily discovering non-party information.[27] Second, the Commissioner in *Squibb* had no intention of actually using the other taxpayers' information in the litigation against Squibb.[28] In fact, the Court of Appeal in *Squibb* specifically noted that different considerations would have arisen if the Commissioner had decided to adduce the other taxpayers' data in the main proceedings.[29]

IV DECISION

The Supreme Court began by noting that a breach of the secrecy obligation in section 81 constitutes an offence punishable by fine or imprisonment.[30] It also held that, under section 81(1), secrecy attaches to material irrespective of whether it was voluntarily disclosed in a taxpayer's return or demanded by the Commissioner pursuant to his powers under the Act.[31] The Court then recognized the "well established" position in *Knight* and *Squibb* that conduct by the Commissioner of any litigation in the exercise of his functions fell within the exception to section 81(1).[32] In this regard, disclosure of secret material (including information relating to non-party taxpayers) would be permitted only to the extent to which it is "necessary" for the purposes of carrying into effect the tax Acts.

As mentioned, the Court rejected Westpac's argument that *Squibb* stood for an unrelenting rule that the exception in section 81 allows disclosure of material by the Commissioner only in a manner that does not lead to the identification of taxpayers other than those who are parties to the litigation. The Court considered that such an approach was not consistent with the Commissioner's duty under section 6 to protect the integrity of the tax system:[33]

> To require redaction in a manner that would make a relevant document useless would at times frustrate the Commissioner's duty to identify instances where persons are not correctly returning their taxable income. An important purpose of the exception [in section 81] is to allow use by the Inland Revenue Department of information concerning the affairs of third parties as an independent, and at times valuable, source of objective material in checking the correctness of a different taxpayer's returns. A prohibition on use of the same

27 Ibid [57].
28 Ibid [50].
29 *E R Squibb*, supra note 21, [62].
30 Tax Administration Act 1994, s 143C.
31 See ibid s 17.
32 *Westpac*, supra note 1, [54], [58].
33 Ibid [63].

> material by the Commissioner in court, when in litigation over the exercise of his functions, in a manner that discloses the identity of the parties, is completely inconsistent with that purpose.

McGrath J concluded that section 81(1) permits the Commissioner to discover confidential material in a manner that identifies non-party taxpayers, provided such disclosure is, in the circumstances, "reasonably necessary for the performance of the Commissioner's functions".[34] Towards the end of his judgment, McGrath J seems to have enunciated a threshold test of "prejudice" for determining when circumstances call for disclosure of secret information: "[t]ax secrecy is also an important value which should be accommodated unless the Commissioner's case would be *prejudiced*."[35]

McGrath J concluded by saying that techniques of editing and redaction as applied in *Squibb* should be confined to situations in which they do not impair the utility of the material concerned. With regard to the present case, he noted:[36]

> It is clear that if the identity of the other banks is not before the High Court, the documents will have no utility as evidence. In those circumstances it is reasonably necessary that the identity of the other banks should be before the Court. For the reasons given, s 81 does not preclude that, nor does the common law.

Accordingly, the Court found in favour of the Commissioner and dismissed the appeal. Westpac's documents had been properly discovered in the BNZ litigation because the circumstances fell within the exception to the secrecy rule in section 81(1). Further, given that all three Courts in the interlocutory judgments implicitly found the Westpac documents to be of relevance to the tax avoidance issue, it is most likely that the Commissioner will be able to adduce the documents as evidence in the main proceedings against BNZ.

34 Ibid [65], [69].

35 Ibid [69] (emphasis added).

36 Ibid [72].

V CONCLUSION

A general ratio may be extracted from McGrath J's judgment: if disclosure of confidential information is reasonably necessary to enable the Commissioner to perform his functions, the exception in section 81(1) of the Act removes the duty of secrecy that attaches to taxpayers' records in the Inland Revenue's possession. In this case, the Supreme Court considered that circumstances did render disclosure "reasonably necessary".[37] The Commissioner was therefore permitted to discover in the BNZ litigation confidential documents that related to, and that identified, two other taxpayers (Westpac and ANZ National), neither of whom were parties to the main proceedings.

37 Ibid.

The Relevance of Privacy Concerns to a Charge of Disorderly Behaviour: Brooker v Police

SIMON ELLIOT

I INTRODUCTION

In *Brooker v Police*,[1] the Supreme Court considered the relevance of privacy concerns to a charge of disorderly behaviour pursuant to section 4(1)(a) of the Summary Offences Act 1981 ("the Act"). The case involved protest action — an exercise of the right to freedom of expression protected by section 14 of the New Zealand Bill of Rights Act 1990 ("NZBORA"). Each Justice rendered a separate judgment. The decision of the Court will be discussed with particular emphasis on the consideration of privacy concerns. It is argued that there are certain unsatisfactory elements in the decision and that the divergence between judgments leaves the law in an undesirable state of uncertainty.

II THE FACTS

Mr Brooker went to Constable Croft's home at 9:20 am, knowing that she had been on night shift and would be trying to sleep. He knocked on her door for three minutes. Constable Croft answered the door and instructed Mr Brooker to leave whereupon he moved to the street, a mere three metres from Constable Croft's home, and began to sing protest songs while playing his guitar. Constable Croft called the police who arrived and asked Mr Brooker to leave. He refused and was subsequently arrested for intimidation.

In the District Court,[2] the charge of intimidation was substituted for one of disorderly conduct under section 4(1)(a) of the Act. Mr Brooker was duly convicted of the charge. The conviction was upheld in the High Court[3] and by a unanimous Court of Appeal.[4] In the Supreme Court, three of the five Justices allowed the appeal.

1 [2007] NZSC 30 ["*Brooker*"].

2 *Police v Brooker* (30 June 2003) unreported, District Court, Greymouth, Callaghan DCJ.

3 *Brooker v Police* (16 October 2003) unreported, High Court, Greymouth, CRI 2003-418-000004, Hansen J.

4 *R v Brooker* (2004) 22 CRNZ 162 (CA).

III THE JUDGMENT OF THE SUPREME COURT

The Majority

1 Elias CJ

Elias CJ allowed the appeal holding that the courts below erred in law. Her Honour held that they had misconstrued the relevant provision of the Act in two principal respects. First, they erroneously treated section 4(1)(a) as being "protective of the privacy and feelings of the individual who is the subject of expressive conduct, even if the conduct is not disruptive of public order";[5] and, second, they mistakenly accepted *Melser v Police*[6] as correctly stating the test for disorderly behaviour.[7]

The Chief Justice affirmed the importance of privacy in the home, but disallowed any use of section 4(1)(a) for the protection of privacy, stating that behaviour not disruptive of public order will fall outside its ambit.[8]

This reasoning presupposes that privacy concerns do not fall within the rubric of public order. An explicit definition of public order was not attempted, although it was stated that it does not include private affronts or annoyance to a person present or to whom the behaviour is directed.[9] It is implicit in the judgment that public order relates simply to order in or near a public place and that it will be infringed by behaviour that inhibits normal public use of that place.[10] It was conceded that interference with the "ordinary and customary use" of a residential area may be more easily created than in a non-residential area.[11] It was also accepted that the victimization or bullying that are inherent in a sustained or intrusive protest outside a particular home would be likely to disrupt public order due to the alarm or perception of threat generated.[12]

Two criticisms of this reasoning may be made. First, if the alarm or threat perception was on the part of the person who was the target of the protest, then it seems illogical to assert that public disorder is not also disrupted by the infringement of their interest in residential privacy. The alarm felt or threat perceived is as much a private affront as the invasion of privacy. Second, if the alarm or threat perception was felt by the other residents, it would most likely be due to the fear of the same thing happening to them. It then seems somewhat strange to say that their interests should

5 See *Brooker*, supra note 1, [11] per Elias CJ.

6 [1967] NZLR 437 (CA).

7 See *Brooker*, supra note 1, [12] per Elias CJ.

8 Ibid [41].

9 Ibid [33], [40].

10 See the authorities cited at ibid [31]–[33] and the statement at [40]: "If 'disorderly behaviour' is not anchored to the protection of order in and near public places and can be used to protect other values identified by the judge, the register of rights and freedoms contained in the New Zealand Bill of Rights Act may well be distorted."

11 Ibid [47].

12 Ibid.

be prospectively protected while Constable Croft's are ignored. It may be true that threatening or alarming behaviour disrupts public order to a greater extent, but it would seem that the difference between that and the disruption caused by infringement of residential privacy to the order of a residential neighbourhood is one of degree rather than kind.

2 Tipping J

Tipping J also rejected the *Melser* test for disorderly behaviour. He reformulated the test as follows: "[c]onduct in a qualifying location is disorderly if, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear."[13] A qualifying location is one that is in, or within view or hearing of, a public place.[14] The involvement of section 14 meant that what a reasonable citizen should be expected to bear would be greater[15] and the court is required to "balance the competing interests of those exercising their right to freedom of expression ... against the legitimate interests and expectations of those affected by that exercise".[16]

Given these statements one would expect privacy concerns to feature in Tipping J's judgment. However, privacy was not mentioned let alone considered. The protest action occurred in a residential neighbourhood and was directed at a particular resident in her home. These facts should surely have come within the matters of time, place, and circumstance. Moreover, given the importance accorded to the enjoyment of residential tranquillity, an aspect of the "right" to privacy, by the common law and statute,[17] it seems remiss that it was not considered as a legitimate interest and expectation in the balancing exercise.

Tipping J concluded that it was doubtful whether the behaviour was capable of being regarded as disorderly "within the correct legal meaning of that concept"[18] and that when freedom of expression was factored in, it was beyond reasonable doubt.[19] That conclusion was justified on the basis that Mr Brooker's actions did not involve a "public element", more particularly that the conduct was "in no way apt to disturb anyone in the vicinity. It was at this stage a purely one-on-one encounter".[20] In terms of Tipping J's test for disorderly behaviour, the fact that something is a one-on-one encounter would not appear to negate the disorderly nature of the behaviour. Moreover, Mr Brooker was in a qualifying location as he was within view of a public place.

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13 Ibid [90].
14 Ibid [89].
15 Ibid [91].
16 Ibid.
17 See the discussion of Blanchard J at ibid [60]; McGrath J at [123]–[129]; and Thomas J at [214]–[225].
18 Ibid [93].
19 Ibid [94].
20 Ibid.

3 Blanchard J

Blanchard J joined Elias CJ and Tipping J in rejecting the *Melser* test.[21] In order to come within section 4(1)(a), the behaviour must be "within view of a public place" and "substantially [disturb] the normal functioning of life in the environs of that place".[22] In terms of a test for disorderly behaviour, Blanchard J stated that the behaviour must meet the following criteria:[23]

> It must cause a disturbance of good order which in the particular circumstances of time and place any affected members of the public could not reasonably be expected to endure because of its intensity or its duration or a combination of both those factors.

A characterization of behaviour as disorderly "depends not only upon what the defendant says and does but also upon where and when the behaviour occurs and its effect on the lives of other people".[24] Where the NZBORA is involved, the protected right must be "specifically considered and weighed against the value of public order".[25] Again, public order is not explicitly defined in the judgment, but it may be surmised that Blanchard J considers public order to be closely linked to the ability of the public to be free to live their lives as normal in the place concerned.

Blanchard J does give some consideration to privacy when his Honour states that what has to be endured by residents in an exclusively or predominantly residential area will be less than other non-residential areas.[26] The rationale for this distinction is that "the common law has long recognised that men and women are entitled to feel secure in their homes, to enjoy residential tranquillity — an element of the right to privacy".[27] This interest in residential privacy may be "an important consideration in assessing whether the conduct of the defendant has disturbed public order and is therefore in breach of the statutory prohibition on disorderly behaviour".[28]

From a privacy perspective, this is encouraging. Physical privacy, approximating to the first of Prosser's four formulations,[29] is recognized as an aspect of the *right* to privacy. Moreover, the privacy concerns are considered relevant to the balancing exercise involved in a case such as this that involves both a protest action, an exercise of the section 14 right to freedom of expression, and a charge of disorderly conduct under the

21 Ibid [63].
22 Ibid [56].
23 Ibid.
24 Ibid [57].
25 Ibid [59].
26 Ibid [60].
27 Ibid.
28 Ibid.
29 Prosser, "Privacy" 48 Cal LR 383 (1960) cited in Todd (ed), *The Law of Torts in New Zealand* (3 ed, 2001) at 910.

Act. This is implicit recognition that protection of privacy interests forms part of the concept of public order, contrary to the judgment of Elias CJ. In the end analysis, however, Mr Brooker succeeded in his appeal as the disturbance caused to Constable Croft "was not especially intensive, nor was it extensive".[30]

The Minority

1 McGrath J

For McGrath J, the essential issue in the appeal was whether Mr Brooker's protest activity had reached the threshold to warrant conviction under the Act.[31] He concluded that it had and dismissed the appeal.[32] McGrath J noted that *Melser* had been rightly criticized for incorporating into disorderly behaviour the notion of the "right thinking person, sometimes referred to as the 'person of decent instincts'".[33] In light of the enactment of NZBORA, it was necessary for the Court to reconsider the meaning and application of the disorderly behaviour provisions in the Act. This involved identification of "the main features of the protected right involved and the relevant countervailing values and societal interests".[34]

Freedom of expression was identified as a right "which is basic to our democratic system".[35] The first countervailing interest that was said to compete with freedom of expression in this case was that of protecting public order and it was noted that the disorderly provisions of the Act in question were concerned with this interest.[36] McGrath J commented that, although excluding conduct that takes place "within the private sphere",[37] the public element of section 4(1)(a) would be satisfied where the conduct is visible from a public place, even if the disruption or harmful impact is felt exclusively by a single person who is on private premises.[38] From this, conduct in "the private sphere" must be conduct that takes place on private premises and that is not visible from a public place: that is, inside the home.

McGrath J gave extensive consideration to the concept of privacy. His Honour cited international instruments, statutes, and common law authority in support of protecting the privacy interest at issue, namely Constable Croft's "*right* to be free from unwanted physical access intrusion into the privacy of her home".[39] McGrath J then concluded that he regarded "the

30 See Brooker, supra note 1, [69].
31 Ibid [98].
32 Ibid [99], [147]–[148].
33 Ibid [112].
34 Ibid [113].
35 Ibid [114].
36 Ibid [118].
37 Ibid [119].
38 Ibid. The public element was that the conduct takes place in, or within view of, any public place.
39 Ibid [123] (emphasis added).

interests of New Zealand citizens to be free from unwanted intrusions into their home environment ... as a value that, in the abstract, is close to being as compelling as freedom of speech".[40] This is a strong recognition of the importance of privacy vis-à-vis freedom of expression and, although obiter, will no doubt be seen to lend weight to the argument that the protection of one's seclusion and solitude, the first Prosser formulation, should be given greater protection at common law in New Zealand.

It was stated that, under section 5, the determination of whether Mr Brooker's conduct constituted disorderly behaviour fell within section 4(1)(a) required a weighing of freedom of expression against the competing interests of protecting public order and residential privacy in the circumstances of the particular case. Under this balancing exercise, it was held that the disturbance caused to Constable Croft was of a "highly disruptive"[41] nature and was a "serious departure from community expectations of enjoying a peaceful environment in one's own home".[42] The infringement of her privacy interests, because of the time, manner, and place of the protest, was in excess of what a citizen should be expected to tolerate in their own home[43] and was therefore disorderly within the meaning of section 4(1)(a). McGrath J appears to reject the opinion shared by Elias CJ, Blanchard, and Thomas JJ that the residential character of the location was an important consideration. Rather, the key factor was that the protest took place at her front door and on her doorstep.[44] This would imply that the expectation of residential privacy may be just as strong where the location is not predominantly residential.

2 Thomas J

Thomas J expressed surprise that the three Justices in the majority had allowed the appeal. His Honour formulated the test under section 4(1)(a) as follows:[45]

> A person behaves in a disorderly manner if [they] cause a disturbance or annoyance to any person/s or interfere with the rights or interests of another person/s to such a degree that a reasonable person would regard the behaviour as disorderly. In determining this question, regard shall be had to the time, place and circumstance of the behaviour, the rights and interests of the alleged offender, the rights and interests of the person/s affected by the behaviour and the interest of the public in protecting the rights and interests in issue.

This broad test for disorderly behaviour is apt to take into account privacy

40 Ibid [129].
41 Ibid [141].
42 Ibid.
43 Ibid [146].
44 Ibid [139].
45 Ibid [199].

concerns if they are raised on the facts of a particular case. Thomas J stated that he preferred to regard privacy as a right rather than a value and traversed several arguments in favour of this approach.[46] In the end, his Honour stops short of concluding that it is a right stating that "only the proverbial whisker prevents the issue being approached as a conflict between competing rights".[47] This has important consequences for the balancing exercise, as when a right is balanced against a value, the right normally assumes a dominant importance and the exercise is vertical rather than horizontal.[48] However, Thomas J states that the correct approach is to reduce both freedom of expression and privacy to their underlying values, then balance them as fundamental values rather than as a right against a value.[49] The rationale for this is that the dispute is between citizen and citizen, rather than citizen and state.[50]

With respect, it is submitted that this reasoning is questionable. First, Mr Brooker has been charged with a criminal offence and the dispute is therefore between a citizen and the state. The action complained of is the use of section 4(1)(a) by the police to limit his right to protest. Second, even if the dispute is characterized as one between citizens, a right should still be accorded greater weight than a value. It is true that fundamental values underlie both freedom of expression and privacy. However, the reason that a value is given the status of a right is surely that it is considered to be of great importance. Therefore, even if both are reduced to the status of fundamental values, freedom of expression, as a starting point, should be accorded a dominant status by reason of the fact that it has been deemed valuable enough to be given rights status. It would seem that a less circuitous, and perhaps more intellectually honest, path is to simply proclaim that the privacy interest involved was a right and should, therefore, be accorded a similar status to freedom of expression.

In the end, Thomas J held that freedom of expression, in the circumstances of the case, should not be accorded great weight and that Mr Brooker's protest did not merit the full panoply of protection that it may enjoy in the abstract.[51] Privacy, or more particularly the value of being let alone in the home in a residential area, on the other hand, was accorded considerable weight.[52] It was remarked that "in some circumstances, such as the present, the public interest in privacy is every bit as important as the right to freedom of expression and the right to protest".[53] The fact that the protest took place in a residential area outside the home of a particular individual at whom it was directed was considered to be an important factor.[54]

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46 Ibid [214]–[229].
47 Ibid [230].
48 See the discussion of Thomas J, ibid [209]–[211].
49 Ibid [231].
50 Ibid [212].
51 Ibid [274].
52 Ibid [275].
53 Ibid [276].
54 Ibid.

V CONCLUSION

An important function served by a final appellate court is to provide certainty in the law. Moreover, certainty is promoted when the law is stated clearly. It is argued that the Supreme Court has failed to fulfil this function in this case. Clearly, privacy was an issue that needed to be dealt with either by excluding it from consideration or incorporating it in some capacity. The decisions of the majority either expressly disallowed consideration of privacy, stating that it may be an important factor but without giving it explicit consideration, or did not mention privacy, let alone consider its relevance to the case. In the minority, both Justices gave privacy pride of place and dismissed the appeal, although both adopted different approaches to the task of balancing the competing interests. Accordingly, a lower court faced with a similar case will face difficulty synthesizing a common ratio on the relevance of privacy to a charge under section 4(1)(a).

However, there are some commonalities that may be taken from the case: first, three of the five sitting Justices thought that privacy was a relevant concern;[55] second, the same number thought that the fact the protest took place in a residential area was relevant to the balancing exercise under section 4(1)(a); third, the physical aspect of privacy was recognized as being of great importance by four of the Justices;[56] and, lastly, (and not strictly related to privacy), four of the Justices rejected the *Melser* test for disorderly behaviour. Given the lack of clarity and certainty in this judgment in relation to privacy and its relationship to section 4(1)(a), it may, indeed, be true that the last word on the matter has not been said.

55 Blanchard, McGrath, and Thomas JJ.

56 Elias CJ and Blanchard, McGrath, and Thomas JJ.

Putting the Heat on Public Authorities: The Supreme Court Mandates a Shot at Accountability

DONNA-MAREE CROSS

The High Court and Court of Appeal have traditionally been reluctant to find a cause of action in negligence where the defendant is a public authority, where the case is of omission as opposed to commission, and where the immediate wrongdoer is a third party. In April 2007, the Supreme Court first considered, on a strike out basis, a case that involved all three of these elements: *Couch v Attorney-General.*[1] In June 2008, it unanimously found that Susan Couch's negligence claim against the Probation Service for injuries she suffered at the hands of William Bell should not be struck out: the Supreme Court was not prepared to rebuff the asserted cause of action without appropriate testing.

Beyond this conclusion, however, the Supreme Court was divided: the majority of Blanchard, Tipping, and McGrath JJ separated from Elias CJ and Anderson J as to the approach to be taken in ascertaining whether a duty of care can arise in these circumstances.

I BACKGROUND

On 8 December 2001, Bell seriously injured Couch during his robbery of the Mt Wellington Returned Services Association (the "RSA") where Bell and Couch worked. Bell was later convicted of the attempted murder of Couch, as well as the murder of three of her fellow employees.

At the time of the robbery Bell was on parole pursuant to the Criminal Justice Act 1985 ("the Act") for his first offence of serious violence, an aggravated robbery of a petrol station. Prior to his release from prison, Bell had been psychologically assessed to be at high risk of further offending, particularly if he did not attend to his known problem of alcohol abuse, and to have low motivation to deal with his offending and his alcohol dependency. The pre-release report recommended that Bell receive close supervision. These facts, along with the circumstances of Bell's prior offending, were known to the Probation Service and the probation officer responsible for Bell.

Bell was subject to standard conditions provided by section 107B

1 *Couch v Attorney General* [2008] NZSC 45 ["*Couch*"].

of the Act as to reporting to a probation officer, notification of place of residence, and notification of employment.[2] Section 125(1)(a) of the Act provides that it is the duty of every probation officer "to supervise all persons placed under the officer's supervision ... and to ensure that the conditions of the sentence or of the release are complied with". The probation officer also had control of where Bell could work.[3] In addition to the standard conditions, the Parole Board imposed special conditions on Bell under section 107C of the Act, which provides for special conditions to be imposed that the Board thinks "necessary to protect the public or any person or class of persons who may be affected by the release of the offender", or for the offender's rehabilitation or welfare.[4] The special conditions imposed on Bell included that he attend various programmes to assist his rehabilitation and continue to live at an address approved by his probation officer.

As it turned out, Bell was not closely supervised, did not attend the programmes to assist his rehabilitation, and did not continue to live at an address approved by his probation officer. The probation officer did not keep a number of appointments with Bell and failed to require him to report at all for significant periods. Neither did the probation officer check the suitability of his living circumstances after he changed his address from that specified on his release (where he was known to have family support). Further, the probation officer supported Bell's decision to undertake a liquor licensing course with a view to obtaining employment that entailed the sale of liquor, and the Probation Service placed Bell at the RSA for work experience. Counsel for the Attorney-General acknowledged that the supervision of Bell was deficient, that the probation officer supervising Bell was inexperienced and overworked, and that the Mangere Branch to which Bell reported was inadequate and the training of its officers was deficient.[5]

II THE CLAIM

Couch sought $2.5 million in exemplary damages against the Attorney General.[6] She made three arguments: first, the Probation Service of the Department of Corrections and the probation officer responsible for his

2 Note that s 107B of the Act was subsequently repealed by s 166(a) of the Sentencing Act 2002.

3 Criminal Justice Act 1985, s 107B(e).

4 Both the minority and the majority agreed that no condition was imposed on Bell focusing directly on a particular person or a class of persons — the conditions were all directed at the protection of the public generally.

5 *Couch*, supra note 1, [12].

6 It remains a live issue whether s 319 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 applies in the present case. Potential objections Couch will need to overcome include the fact that s 319 does not extend to intentional torts, and that such damages ought not, in principle, to be available for vicarious liability. Of course, as Elias CJ noted at paragraph [10] of the minority judgment, these arguments may not provide an answer to the claims made directly against the Probation Service for what might be called systematic failings.

supervision (collectively, the "Probation Service")[7] should not have permitted Bell's placement for work experience at the RSA, where the combination of alcohol and cash exacerbated the risk of Bell reoffending violently; secondly, the probation officer should have warned the RSA of the risk Bell posed; and, thirdly, her injuries would not have occurred if the Probation Service had acted with the standard of care reasonably to be expected of those with statutory obligations to supervise a known violent offender who had been assessed by the Probation Service psychologists as at high risk of reoffending.

Couch's claim was barely developed in the Court of Appeal, and remained unsatisfactory in the Supreme Court, with no distinct pleading of the bases on which the Probation Service or the supervising probation officer were liable.[8] This was unsatisfactory because the existence and scope of any duties of care owed by the Probation Service directly and derivatively through the probation officer may have been quite different.[9]

III THE COURT OF APPEAL

Prior to *Couch*, an action had been brought by Mr Hobson, the husband of one of the women killed at the RSA clubrooms, apparently on behalf of both himself and his wife.[10] The High Court struck out Hobson's claim on the basis that it disclosed no cause of action, as the claimed duty of care to the victims of Bell's violence could not be differentiated from a duty to anyone who happened to come within his vicinity. It therefore failed the requirement that there be sufficient proximity.[11] This was upheld by the Court of Appeal.[12]

Couch's claim was heard in the same Court of Appeal hearing, having been removed from the High Court under rule 419 of the High Court Rules. It was similarly struck out on the basis that the Probation Service owed no duty of care to her.[13] Justice Hammond dissented; his Honour considered that the strike-out was premature, because it was not possible to be confident without further development of the facts and argument that sufficient proximity could not be established or must be negated for reasons of policy.[14] His Honour did not expressly adopt or reject the special risk

7 The Attorney-General effectively accepted vicarious responsibility if negligence is established against the probation officer in this case. In the alternative, the probation officer would be joined. For the purposes of this strike-out consideration it was considered proper to proceed on the assumption that vicarious liability of the Probation Service for any negligence of the probation officer had been pleaded and admitted.

8 *Couch*, supra note 1, [30], [128].

9 Ibid [30] per Elias CJ.

10 See *Hobson v Attorney-General* [2005] 2 NZLR 220 (HC), [23]–[24].

11 Ibid.

12 *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA) ["*Hobson*"].

13 Ibid.

14 Ibid [86].

approach, which the majority in the Supreme Court later held as the correct approach in cases involving omissions and harm caused by third parties.

IV THE SUPREME COURT'S DECISION

The question before the Supreme Court was whether the circumstances relied on by the plaintiff were capable of giving rise to a duty of care owed by the Probation Service such that Couch's claim should not be struck out. The Supreme Court was unanimous: the claim was not so clearly untenable as to be suitable for pre-emptory determination on untested facts.

Nonetheless, a warning recurs throughout the judgments. The first of these came from Elias CJ:[15]

> A decision that a claim is not so clearly bad that it should be struck out says little about its eventual merit. Here the plaintiff may well face difficulties in establishing that the Probation Service was in breach of any duty, particularly to the standard of fault required to justify exemplary damages.

Elias CJ also noted that the strike-out jurisdiction is to be "'sparingly employed' ... both to prevent injustice to claimants and to avoid skewing the law with confident propositions of legal principle or assumptions about policy considerations undisciplined by facts".[16] Indeed, it is clear that it is often not easy to decide whether a duty of care not previously recognized by authority is owed to the plaintiff.[17] Particular care is necessary in areas where the law is confused or developing; negligence for the exercise or non-exercise of a statutory duty or power being one such area.[18]

V THE SPLIT

The Supreme Court split three to two. The minority differed from the majority in the approach to be taken in ascertaining whether a duty of care can arise in these circumstances.[19]

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15 *Couch*, supra note 1, [37] per Elias CJ (dissenting).

16 Ibid [31]–[32].

17 *Takaro Properties Limited (in rec) v Rowling* [1978] 2 NZLR 314, 332 (CA) per Woodhouse J, cited by Elias CJ in *Couch*, supra note 1, [32].

18 At [33], Elias CJ refers to both *X v Bedfordshire County Council* [1995] 2 AC 633 (HL) and *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL). See also Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 (HL) ["*Gorringe*"], where at 1059 his Lordship observes that the context when negligence arises in the exercise of statutory duties and powers is a subject of great complexity and very much an evolving area of the law.

19 *Couch*, supra note 1, [4] per Elias CJ (dissenting).

The Majority: The More Limited Approach to Duty

Justice Tipping, on behalf of the majority, concluded that a duty of care to take all reasonable steps to prevent harm inflicted by a third party arises only where:[20]

> [T]he plaintiff, either as an individual or as a member of an 'identifiable and sufficiently delineated class' is known to the defendant to be 'the subject of a distinct and special risk' of the harm suffered because of a particular vulnerability.

His Honour ultimately traced the requirement for a special relationship to the judgment of Lord Diplock in *Home Office v Dorset Yacht Company*,[21] and found that this general approach has been used and maintained with some consistency in common law jurisdictions through to the present time.[22]

Justice Tipping explained that whether the relationship is sufficiently special (or whether a special risk was present) is conventionally assessed by reference to the concept of control.[23] The majority thought that it was possible that Couch would be able to establish that the Probation Service, through the probation officer, had sufficient ability to control Bell in a way that would have prevented the harm that Couch suffered and, as a result, that a special relationship existed between Couch and Bell for the purposes of this strike-out application.

The relationship between the Probation Service and Couch must also be sufficiently proximate. This requires foreseeability of harm and an assessment of the nature of the risk posed by Bell to Couch. The more specific and obvious that risk, the stronger the case for holding that the Probation Service — which had sufficient power and ability to eliminate, or at least reduce, the risk — owed a duty.[24] Ultimately, to establish a duty of care Couch must demonstrate that, either as an individual or as a member of an identifiable and sufficiently delineated class, she was or should have been known by the defendants to be the subject of a distinct and special risk of suffering harm of the kind that she sustained at the hands of Bell. The necessary risk must be distinct in the sense that it is clearly apparent and special in the sense that the plaintiff's individual circumstances, or her membership of the necessary class, rendered her particularly vulnerable to suffering the harm that she did from Bell.[25]

The pleadings did not raise an arguable case that Couch was at a special and distinct risk. In particular, the majority stated that Couch's

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20 Ibid [4], per Elias CJ (dissenting), quoting the judgment of Tipping J at [112].

21 [1970] 2 All ER 294 (HL) ["*Dorset Yacht*"].

22 *Couch*, supra note 1, [86]–[97] per Tipping J.

23 Ibid [82], [86]–[91].

24 Ibid [85].

25 Ibid [112].

membership to a class, which was in more frequent physical proximity to Bell than the rest of the public — being employees at the RSA with Bell — was not enough to create the requisite special and distinct risk,[26] especially because there was nothing in Bell's history to suggest that those whom he was in frequent contact with, or whom he worked with, were the subject of enhanced risk.[27] Secondly, the environment encompassing the alcohol dimension was not thought to create the necessary risk either — there was no suggestion that the presence of alcohol on the premises had anything to do with Bell's decision to rob it; nor was it suggested that Bell was under the influence of alcohol at the time of the offending.[28]

Nevertheless, the majority went on to consider whether on the available material there was a reasonable possibility that Couch may yet be able to formulate an arguable claim that she was at special risk, and concluded (whilst expressly not setting down any ultimate view on the question) that there was.[29] The majority posited the following: Bell was known to be in constant need of money to feed his alcohol addiction; he was allowed to work at premises holding significant amounts of cash; he was able to find out about the security systems and arrangements in force; this made the RSA a predictable target for a robbery; anyone who might be present at the robbery was at a greater risk than the public generally; and those present were particularly vulnerable because Bell had exhibited a tendency to commit random violence during a robbery.[30]

The Minority: Casting the Net of Duty Wider

The minority did not read Lord Diplock's judgment in *Dorset Yacht* as suggesting a rule of general application that duties of care can only be owed to members of a confined group.[31] Indeed, the minority stated the following:[32]

> Requiring such test to be satisfied in all cases where harm results from third party intervention seems to us to introduce undesirable rigidity into the general organising principles for the tort of negligence applied in New Zealand.

Thus, they held such a test to be inconsistent with modern authorities as to approaching the question of duty of care in novel fact scenarios.[33]

The minority held that whether there is a sufficient relationship of

26 Ibid [120].
27 Ibid.
28 Ibid [121].
29 Ibid [124].
30 Ibid.
31 Ibid [45] per Elias CJ (dissenting).
32 Ibid [4].
33 Ibid.

proximity between the person injured by the parolee and the Probation Service turns on a broad inquiry and is a matter of judgment arrived at principally by analogy with existing cases. This broad inquiry required no better organizing tools than the general principles of negligence applied since *Anns v London Borough of Merton*.[34] Key to the ultimate assessment was the purpose of the statute and the ability of individuals to protect themselves from harm of the sort suffered.[35] Mason J in *Sutherland Shire Council* came to the same view.[36]

With reference to the present case the minority disagreed with Chambers J in the Court of Appeal, who thought that Couch belonged to a class "as wide as society itself".[37] In fact, the minority (in contrast to the majority) did "not think it [could] be confidently said that a duty of care was not owed to her as a member of the public".[38] After all, it is in the nature of public functions that those foreseeably at risk if statutory responsibilities are discharged negligently will be a wide class, perhaps as wide as the general public if the responsibilities are imposed for public protection (as the duties imposed by the Act upon the Probation Service explicitly are) and if the risk warrants it.[39]

Elias CJ and Anderson J limited actual liability by the need to show a breach of care and causation as well as by the principles of remoteness of damage.[40] Moreover, any breach would have to be a significant departure from proper standards of care to warrant liability for exemplary damages. In principle, therefore, the minority did not see a decisive impediment to proximity in the breadth of the class to whom the Probation Service might owe a duty of care in the supervision of a parolee. Much will ultimately depend upon the nature of the risk and whether it was significant enough to import the necessary relationship in any individual case.[41]

The minority commented that the approach of the majority of the Court of Appeal "effectively makes the Probation Service immune from an action for negligence by someone injured by a parolee, no matter how great the foreseeable risk and no matter how gross the want of care in supervision".[42] Their Honours voiced their disapproval of this approach:[43]

> Such result does not sit well with s 6 of the Crown Proceedings Act 1950 or s 27(3) of the New Zealand Bill of Rights Act 1990. As importantly, it may be based on erroneous assumptions. If the

34 See ibid [4], citing *Anns v London Borough of Merton* [1978] AC 728 (HL).

35 *Couch*, supra note 1, [62] per Elias CJ (dissenting).

36 *Sutherland Shire Council v Heyman* 157 CLR 424 (HCA); cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 (HCA) and *Gorringe*, supra note 18 (retreat from a concept of general reliance).

37 *Hobson*, supra note 12, [170].

38 *Couch*, supra note 1, [40] per Elias CJ (dissenting).

39 See ibid.

40 Ibid [67].

41 Ibid.

42 Ibid [36].

43 Ibid.

> policy of promoting the reintegration of parolees is examined in considering the question of breach at trial, no such blanket immunity will be imposed on the basis of hypothetical facts.

Ultimately, the minority thought that *Dorset Yacht* illustrated that "statutory authority does not licen[s]e needless harm, carelessly caused".[44] A key message to be taken from the minority judgment is that "[p]roper and necessary limits to liability in negligence do not require blanket immunity through over-restriction of the circumstances in which a duty of care arises."[45] If tortious or criminal action is the "very kind of thing" likely to result from such lack of care, the damage will not be too remote.[46]

VI CONCLUSION

Although only decided on a strike-out application, this "first look" by the Supreme Court at the law of negligence in the context of omissions by public authorities, where the immediate wrongdoer is a third party, should not go unobserved. It provides a chance for accountability, and it can be said confidently that Couch's case will neither be an isolated scenario, nor an isolated opportunity. Admittedly, the definition and application of this area of the law may be confused and developing, and the Supreme Court decision is academically interesting from this perspective. More practically, regardless of which approach of the two set out by the Supreme Court is taken, the courts now appear to have a role in determining whether a public authority is liable in negligence to a victim of a third party's wrongdoing.

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44 Ibid [55].

45 Ibid [34].

46 *Dorset Yacht*, supra note 21, 1028 per Lord Reid, quoted in *Couch*, supra note 1, [54] per Tipping J.