THORNDON
CHAMBERS

PUBLIC LAW UPDATE

Matthew Smith
Thorndon Chambers

Overview

1. This paper looks at six areas of public law where there have been notable case-law developments, focusing in particular upon cases decided in the past two years. Most of these cases arose in judicial review proceedings. And the statutory contexts often differed significanty from one case to another. Nonetheless, there are some important points of points of principle that the cases stand for. On this basis, they may be relevant to DOC – either because the principles stated in the cases may be applicable to the interpretation or application of a statute that DOC is responsible for administering, or because they may help DOC to decide on an appropriate stance to take in litigation.

Error of law

2. At the 'litigation end' of public law, the most likely reason why a public body will lose (or has lost) a judicial review proceeding is because it has committed an error of law. In this regard the Supreme Court has recently confirmed that "*[a]ny material error of law by a public body in exercising its statutory powers will be reviewed by the courts*" (*Unison* [2008] 1 NZLR 42 (SC) at [75]). The consequence is that resolution of public law problems, including by way of judicial review, will often present "*essentially*" an issue "*of statutory interpretation*" for legal advisers and, as a 'backstop', for resolution by the courts (*Marlborough Lines* HC Wellington CIV-2010-485-1150, 12 October 2010 at [76]). Justice Fogarty made this point well in his *Whangamata Marina Society* [2007] 1 NZLR 252 (HC) judgment, where His Honour wrote that (at [33]): "*To resolve this issue it is necessary to examine the nature of the task set by Parliament for the Minister. For when considering judicial review the Courts have long recognised that it is impossible to judge the limits of authority of a decision maker without first understanding thoroughly the task that has been set by Parliament.*" It follows that the best thing you can do to avoid a successful judicial review challenge is to understand the statutory frameworks within which statutory powers of decision sit.

3. It has often, and rightly, been stressed that in (public) law "*context is everything*" (*McGuire* [2002] 2 NZLR 577 (PC) at [9]). That said, there are a handful of well recognised errors of law, which may be helpful to identify as dangers to be avoided wherever possible. Possibly the most common error of law is where a decision-maker has asked

itself the wrong question (*Vodafone* [2011] NZSC 138 at [15]-[16]). That may have resulted from "*the power [being] exercised for a purpose that is not within the contemplation of the enabling statute*", or from the fact that the decision-maker has otherwise applied "*the wrong legal test in exercising the power*" (*Unison* [2008] 1 NZLR 42 (SC) at [52]). To the end of avoiding pitfalls like these, the Supreme Court set out the following advice in *Unison* on how a decision-maker should identify important limits to its powers of decision:

> **[53]** A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker 'so uses his discretion as to thwart or run counter to the policy and objects of the Act'. A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.
>
> **[54]** Ascertaining the purpose for which a power is given is an exercise in statutory interpretation which is not always straightforward. This is partly because legislative regimes differ in the specificity with which they grant powers. In this area the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case. They must be careful to avoid crossing the line between those concepts.

4. To those comments it may be helpful to note – and avoid – some of the factors that are commonly associated with misconstruing a statutory power and so committing an error of law. Chief among them is glossing the statutory text. Cooke J as the then was warned against "*trying to elucidate a phrase in a statute to the extent of supplying an exhaustive definition, or something which practitioners may seize upon as skin thereto, when the Legislature itself has perhaps deliberately held its hand. Such attempts are apt to start as many difficulties as they solve*" (*Blencraft Manufacturing* [1974] 1 NZLR 295 (SC) at p303). This warning is still good law. Other factors commonly associated with error of law include enlarging a deliberately narrow discretion (*Genesis* [2008] 1 NZLR 803 (CA) at [40] (wrong to interpret statutory exception to "*in effect overwhelm*" a statutory prohibition)), and failing to ensure that an approach or model is relevant to and 'fits' the context in which the model has to be applied (*Squid Fishery Management* CA39/04, 13 July 2004 at [93]).

5. While the case-law on the error of law points noted above generally concerned statutory powers of decision, the same legal principles also apply to decisions made under regulations/rules/instruments, and decisions applying policy guidance developed to inform the exercise of a statutory discretion. It should also be noted that a 'correctness' standard of judicial review is applied for questions of statutory interpretation (*Central Plains* [2010] 2 NZLR 363 (CA) at [83]), as well as for other 'pure law' which the courts

decide (*Peters* [1999] 2 NZLR 164 (CA) at p188). This means that for a point of 'law' the court will identify what the single 'right' answer is, and substitute that answer for any different answer the decision-maker has given. The court is even able to substitute what it sees as the 'one right answer' where it accepts the decision-maker has interpreted the statute correctly. This was recently confirmed by the NZSC in *Vodafone*, where the majority (Blanchard, McGrath and Gault JJ) held that the Commerce Commission's interpretation of the statute was correct, but it had nonetheless exercised its judgment about what was 'net cost' in a way that contradicted the true and only reasonable conclusion available on the facts. In doing that the Commission erred in law (at [65]).

Remedies and remedial discretion

6. It has long been emphasised that "*[i]n general remedies in this field are discretionary*" (*Bulk Gas Users* [1983] NZLR 129 (CA) at p136). The NZCA has, however, recently emphasised that while that is so, the "*starting point*" is that a plaintiff who makes out one or more judicial review grounds is entitled to relief; that "*there must be extremely strong reasons to decline to grant relief*" to a successful plaintiff (*Air Nelson* [2008] NZAR 139 (CA) at [60]-[61]). Subject to that strong presumption, the courts have identified a number of considerations relevant to the discretion as to whether relief should be granted and if so in what form. They include "*opportunism*" or other strategic 'gaming' of a situation by the plaintiff (*Air Nelson* at [63]); whether granting a remedy would serve any useful purpose (*Air Nelson* at [65]); how long the plaintiff delayed before commencing the proceeding, and what prejudice that has caused to the defendant, to third parties, to industry stakeholders, or to public administration more broadly (*Air Nelson* at [66]-[70]; *Unison Networks* CA284/05, 19 December 2006 at [83]); and whether any of the decision-maker's errors had been "*substantially cured*" since the decision was made (*Unison Networks* at [83]). A public body wishing to advance remedial discretion arguments like these will of course need to ensure that it has a proper evidential basis for doing so.

7. Where it is appropriate to grant relief in judicial review, the most common form that relief takes is a declaration that there has been reviewable error, an order setting the decision aside (certiorari), and an order requiring the decision to be remade. Prohibition and mandamus are relatively less common judicial review remedies. Prohibition does what its name suggests. Its issue is less common nowadays, as the same result can effectively be achieved in the court granting a declaration that proposed action would be unlawful. Mandamus "*is available to enforce the performance of a statutory duty resting on the body being reviewed, which duty is clearly ascertainable from the relevant statute*" (*Rothwell* [2006] 1 NZLR 531 (HC) at [6]). A recent example of its issue was an order by the NZHC directing the Maori Land Court to issue an overdue decision without delay (*Ngunguru Coastal Investments* [2011] NZAR 354 (HC) at [35]). In addition to these more orthodox judicial review remedies, there are a handful of cases where judges have been persuaded to 'substitute' their decision for that of the nominated decision-maker. The majority's

decision in the NZSC in *Haronga* is the most recent example of 'substitutionary' relief (*Haronga* [2011] NZSC 53 at [100]-[111]). The feature common to all of the 'substitutionary relief' cases was the view of the court that there was only 'one right answer'. Where the decision is not a binary one, or where there are contested health, safety or ecological concerns, a 'substitutionary' order is not likely to be granted.

8. A remedy sometimes overlooked by judicial review plaintiffs and defendants alike is an order under s4(5) of the Judicature Amendment Act 1972. Section 4(5) gives the court flexibility to direct reconsideration of a decision "*either generally or in respect of any specified matters*" that has been the subject of the plainitff's judicial review challenge, as well as to give "*such directions as [the court] thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration*". This discretion enables plaintiffs and defendants alike to ask the court to provide directions on such issues as whether the plaintiff's situation should be addressed as at the time of the original decision or "*as it then pertains*" (*Vilceanu* [2008] NZCA 486 at [11]); on how in practical terms the process of reconsideration should proceed (*Whangamata Marina Society* [2007] 1 NZLR 252 (HC) at [174]); on whether it is appropriate for the same/original decision-maker to reconsider the decision (*Tamil X* [2011] 1 NZLR 721 (SC) at [101]); on whether it is appropriate to direct a reconsideration without formally quashing the original decision (*Air Nelson* [2008] NZAR 139 (CA) at [73]-[75]); and on whether a decision might be "*void for one stipulated purpose and legally effective for another*" (*Martin* [1990] 2 NZLR 209 (HC) at pp240-241). Guidance can also be provided under s4(5) on whether the invalidity of one decision is 'contagious' for others, for example because the decision-maker has applied the same erroneous approach in a number of decisions (*Vodafone* [2011] NZSC 138 at [75]-[76]), or because two decisions are inherently inter-related (*Ngati Kahu* HC Whangarei CIV-2010-488-348, 29 September 2011 at [121]).

Scarcity of resources

9. It was accepted in the 1990s that the content of administrative law requirements, and in particular the Crown's Treaty of Waitangi obligations, might expand and contract with the state of the economy (*Broadcasting Assets* [1994] 1 NZLR 513 (PC) at p517 ("*in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant*")). This may have relevance in the current economy, which has been said at the governmental level to give rise to an operating environment characterised by a (re)prioritisation of public finances, public sector restructures, and an emphasis upon 'doing more with less' in the way of financial resources and personnel.

10. There are, however, some important limits to scarcity of resources as a public law justification or defence. I want to consider three limits reflected in recent English case-law. The first is that budgetary concerns are no bar to judicial review intervention by the

High Court. In other words, the fact that the relevant context for decision-making is "*financial resources in a tight budget*" does "*not excuse*" the need for compliance with legal requirements (*Rahman* [2011] EWHC 944 (Admin) at [46]). Reflecting this, the English Courts have said that they will supervise the legality of public law decision-making through judicial review even where proceedings concern "*a very major decision with a patently political and heavy macro-economic content, made at the highest level in the immediate aftermath of a general election and change of government, and patently intended to help achieve economic demands from the Treasury*" (*Luton BC* [2011] EWHC 217 (Admin) at [48]).

11. A second limit to scarcity of resources as a public law justification or defence is that mandatory statutory requirements must be observed regardless of resource allocation difficulties that may be caused in doing so. In other words, scarcity of resources does not displace the usual need to comply with the statutory duties that Parliament has set for a public body to meet. This point comes through in a number of recent English cases which have held that funding cuts were invalid because of a failure to have "*due regard*" to public sector equality duties set out in the Race Relations, Disability Discrimination, and Sex Discrimination Acts (eg, *Hajrula* [2011] EWHC 861 (Admin); *Luton BC*; *Rahman*). The "*due regard*" requirements contained in the Acts just noted were express requirements, operating in effect as statutory pre-conditions for a lawful decision. And in all three cases it was held that the failure adequately to address those pre-conditions constituted reviewable errors of law justifying a setting aside of the decisions.

12. Recent English case-law also holds that informed, individualised decisions may need to be made even where government directives require costs to be cut 'across the board' by a public body. More particularly, any 'need for speed' inherent in a cost cutting agenda does not necessarily displace a requirement to consult affected parties about proposed cost cutting changes, particularly if individuals or entities have grounds for a legitimate expectation to be consulted before (cost cutting) changes are made to their detriment. The *Luton BC* case is notable here for its holding that consultation was required notwithstanding that the decision was made at the highest level of government immediately following an election and under pressure from the Treasury to cut costs at the national level. The court stressed in coming to that decision that a failure to consult had been problematic in contributing to a failure to identify the effects of funding cuts on "*individual projects*" on the "*more case by case basis*" necessary, gven that the affected parties had spent considerable sums in reliance upon the status quo (at [93]-[97], [118], [122]). Similarly, the Court in *Rahman* emphasised that changes appeared to have been rushed through in part "*by the hopes of the advantages to be derived from a new policy*" and in a way which hinted at the pursuit of "*policy based evidence rather than evidence based policy*" (at [35]). That focus on policy over evidence reinforced the need for consultation with closely affected parties to in fact identify the true impact "*of termination of funding with the*

service providers who… would have been best placed to explain the consequences of termination of funding in the absence of satisfactory alternative provision or service users" (at [35]).

13. This English case-law has reinforced the availability of judicial review to ensure that public sector funding decisions are made fairly, reasonably and in accordance with the law, even though a scarcity of resources concern is present (and may be paramount). What emerging New Zealand case-law there is, is to similar effect. As a recent example, the NZHC refused to accept that resource scarcity meant the Judicial Conduct Commissioner's statutory duty to deal with a complaint "*as soon as practicable after receiving it*" should be read down to allow the Commissioner to deal with a complaint "*whenever he can get to it*" having regard to the realities of his under-resourced office (*Deliu* [2012] NZHC 356 at [49]-[50]). The court did, however, recognise that resource scarcity may affect what remedy is appropriate. On the facts, the court in *Deliu* refused to grant mandamus as it would not be "*practically effective, in that it will not result in better compliance by the [Commissioner] with his statutory obligations*" (at [53]). A formal declaration was said to be inappropriate for the same reasons (at [55]). The result was that the court declined the plaintiff formal relief (at [57]), but directed that a copy of its judgment was to be "*sent to the Attorney-General and the Minister of Justice*" to take appropriate action (at [60]). While scale costs were not ordered by the court at the conclusion of the case, that was because the plaintiff did not seek them (at [62]-[63]).

14. Finally on resource scarcity, our NZCA is notable for having held that the guarantees given by the ACC legislation "*would be undermined"* if the Corporation's statutory duty to pay fees to physiotherapists which were reasonable by New Zealand standards *"could be limited because the levies or the contributions from public monies were not adjusted for inflation or for increased demand for treatment*" (*NZ Society of Physiotherapists* [1988] 2 NZLR 641 (CA) at p645). This suggests that Courts may see requests for additional appropriations as a lesser evil than failing to perform or under-performing important statutory duties.

Facts-based review

15. I turn now to consider public law developments in the area of fact-based judicial review. The case-law here is settling around four heads of vulnerability or challenge. They are, first, insufficient inquiry/information; second, mistake of fact; third, flawed factual reasoning; and fourth, unreasonable findings of fact. While each head of vulnerability or challenge is considered separately below, two defences are common to each. The first is that if there are "*opposing or differing views*" and those views each "*could reasonably and therefore legitimately be adopted*", then it "*cannot be wrong to adopt any one of them*" (*Air New Zealand* [2009] NZAR 138 (HC) at [44]). The second is that "*questions of judgment and of unverifiable opinion are outwith this ground of challenge*" (*Francis Wildman* [2005] EWHC 1573 (Admin) at [15]). In other words, if you can persuade the court that a finding of fact is a genuine value judgment call, then the Court is unlikely to set it aside.

16. The insufficient inquiry/information head of vulnerability/challenge has the result that a decision-maker must not only ask the right question, but s/he must take objectively reasonable steps to acquaint him or herself with the information relevant to answering the question correctly (described in one case as the "*essential facts*"; *Minister of Conservation* [2009] 3 NZLR 465 (CA) at [114]). Where that level of information has not been obtained, the decision will be vulnerable to judicial review, even if the right question has in fact been asked (*CREEDNZ* [1981] 1 NZLR 172 (CA) at p200). Note that the duty to find essential facts does not prevent the nominated decision-maker from delegating inquiries to officials (*Whangamata Marina Society* [2007] 1 NZLR 252 (HC) at [9]). But if the briefing paper or report that results from such inquiries is not "*fair, accurate and adequate*" in its summary of information, its analysis and recommendations, then a decision which relies on the paper or report may find itself vulnerable to being set aside (*Air Nelson* [2008] NZAR 139 (CA) at [40], [51], [53]; *NZ Federation of Commercial Fishermen* HC Wellington CIV-2008-485-2016, 23 February 2010 at [22], [242]-[244]).

17. While it is yet to be definitively embraced as a stand-alone judicial review ground, mistake of fact "*has been recognised on numerous occasions, particularly by Lord Cooke*" as a head of vulnerability/challenge (*Lalli* [2009] NZAR 720 (HC) at [77]). It was also relatively recently applied by the NZCA (*Minister of Conservation* [2009] 3 NZLR 465 at [59], [71]-[72], [74]). To jeopardise the validity of a decision on mistake of fact grounds, a plaintiff needs to show that the fact which has been mistakenly accepted by the decision-maker as true is "*an established one or an established and recognised opinion*" (*NZ Fishing Industry Association* [1988] 1 NZLR 544 (CA) at p552), and that it was "*material*" to the decision made by the decision-maker (*Goulden* [1985] 2 NZLR 378 (CA) at p381). Note that the mistake of fact in *Daganayasi* was the Minister's statement that he had obtained the best and most up-to-date medical advice available when he had not done so (at pp145, 149). This suggests a need for some caution before making bold information-based claims in briefing papers or reports to a decision-maker, or in decision documents.

18. The flawed factual reasoning head of vulnerability/challenge applies if a factual finding is arrived at by an unfair process (*Ramsay* [2006] NZAR 136 (CA) at [35]); if a finding is not supported by probative evidence, or is inconsistent with the evidence that was before the decision-maker (*Pulman* (2008) 18 PRNZ 955 (HC) at [44]; *Moffatt* HC Dunedin CIV-2010-409-2397, 24 June 2011 at [76]); or if the finding otherwise presents itself to the court as "*an illogical conclusion*" (*A v District Court at Manukau* HC Auckland CIV-2008-404-4177, 12 January 2009 at [58]). Probative evidence has been held in this context to mean "'*some' evidence of probative value to support the decision*" (*Discount Brands* [2004] 3 NZLR 619 (CA) at [57]). And reflecting that approach, it has recently been emphasised that "*if evidence is not accepted, or doubted or regarded as not persuasive, then a finding of fact could not be made on the basis of that evidence*" (*B v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2009-485-1297, 22 February 2010 at [29]).

19. The final fact-based head of vulnerability/challenge applies to unreasonable findings of fact. Where the decision made on the facts "*was so unreasonable and perverse, ignoring relevant factors or being based on irrelevant factors, that there was a legal error to justify the Court's intervention*" then a judicial review of the decision is likely to succeed (*Walsh* [2010] NZAR 101 (HC) at [155]). Such situations are, however, not likely to be frequent. That is because decisions which qualify as unreasonable as a matter of public law have been described as ones which "*strike us [as] wrong with the force of a five-week old dead, unrefrigerated fish*" (*Lab Tests* [2009] 1 NZLR 776 at [366] (Hammond J)). That said, it should be noted that where a factual finding cannot be understood by the reviewing court, it may infer that there must have been an error of law in arriving at it (*Bryson* [2005] 3 NZLR 721 (SC) at [26]). This has the potential to make the decision subject to appeal on a 'question of law', instead of or in addition to being judicially reviewable.

Māori customary rights

20. DOC has a statutory duty to interpret and administer the Conservation Act "*so as to give effect to the principles of the Treaty of Waitangi*" (s4). The recent decision of the NZCA in *Takamore* [2011] NZCA 587 has confirmed that, in addition to Treaty principles, Māori customary rights should be recognised and accommodated as appropriate by decision-makers who are subject to Treaty clauses like s4 of the Conservation Act. This conclusion follows from two inter-related holdings of the *Takamore* majority (Glazebrook and Wild JJ): first, that in general the common law should as far as reasonably possible be applied and developed consistently with the Treaty of Waitangi (at [249], [254]); and, second and following on from that, that Māori customary rights should be integrated into the common law (at [16], [239]-[242], [254]) – either on account of Article II of the Treaty (protecting Māori rangatiratanga and taonga), or Article IV of the Treaty (oral promise at time of signing that Māori customs were to be protected), having guaranteed the active protection of Māori customs (at [243]-[249]). (The minority judge, Chambers J, did not consider it appropriate to address these broader issues (at [297]-[322]).)

21. The factual question in *Takamore* was whether and if so how Tūhoe burial customs impacted on the common law duties of an executrix to dispose of the body of a deceased, and in particular her discretion to choose the location of burial. In principle, the NZCA majority reasoned that relevant Māori customs should be taken into account by the executrix as a relevant cultural consideration when she determines the method and place of burial (at [17], [107], [255], [259]-[260]). The NZCA majority went on to find, however, that the Tūhoe custom was not reasonable; with reasonableness being one of four pre-conditions a custom must meet if it is to be integrated into the common law. This latter conclusion was based on evidence before the Court suggesting that the Tūhoe custom authorised the use of force through the ability to take the deceased's body without agreement. The majority reasoned that resorting to the use of physical force to settle

private disputes was repugnant to the rule of law, and on this basis they said that it was not appropriate to give effect to Tūhoe's burial customs (at [14], [163]-[166], [175]).

22. The *Takamore* holding that Māori customary rights should be integrated into the common law (which relevantly includes the law of judicial review) as appropriate is in one sense nothing novel. Since the *Lands* case, the Treaty principles have been held to include active protection (*Lands* [1987] 1 NZLR 641 (CA) at pp664, 702, 717), which can sometimes require iwi preferential treatment (*Whalewatching* [1995] 3 NZLR 553 (CA) at pp561-562). Viewed in this context, *Takamore* does nothing particularly novel in referring to (and seemingly endorsing) the indirect incorporation of the Treaty of Waitangi by such means as recognising Treaty rights as implicit mandatory relevant considerations, and potentially as providing the basis for legitimate expectations (at [248]).

23. Where *Takamore* does break some new ground is in confirming that Māori customary rights can extend beyond land and interests in land. *Takamore* is particularly helpful in this regard, as it sets out a legal framework for determining what qualifies as a Māori "*custom*" which is to be recognised and accommodated by the courts and by public bodies. Five criteria are identified by the majority in their judgment: (i) the custom should be long-standing; (ii) it must have continued without interruption since its origin; (iii) it must be reasonable; (iv) it must be certain in its terms; and (v) it must not have been displaced by Parliament through clear statutory wording (at [13], [121]-[134]). But note the emphasis in *Takamore* that "*Māori customary law is not fixed*" (at [122]), but rather it "*has its basis in broad values, and [a] capacity for change and variations between iwi and hapū*" (at [132]). These observations are consistent with the past emphasis of the NZCA that the Treaty is a "*living instrument*" (*Lands* [1987] 1 NZLR 641 (CA) at pp655-656), with the clear implication that the rights and interests it protects may "*evolve from generation to generation as conditions change*" (*Fisheries* [1990] 2 NZLR 641 (CA) at pp655-656).

24. An important issue following the *Takamore* confirmation that Māori customary rights should be integrated into the common law, but not addressed by the majority in their judgment, is whether and if so to what extent a public body needs to proactively investigate whether any Māori customs may be relevant to a decision it is making. Where customary rights have specifically been raised by Māori as relevant to the decision being made, case-law – and common sense – holds that they must be specifically taken into account (*Ngatiwai Trust Board* HC Wellington CP39/98, 22 December 1998 at p22). Where Māori custom bearing on a decision has not specifically been raised, the Treaty obligation flowing from s4 of the Conservation Act is to make an informed decision, consistent with the Treaty principle of partnership. Practically this has been said to require investigating, understanding and giving "*proper regard*" to Māori rights and interests. Proper regard has relevantly been held to require seeking "*comment*" from affected iwi on the decision proposed, and giving "*adequate consideration*" thse iwi rights and interests and the "*weight*" they should be accorded in any balancing of

competing interests (*Ngati Awa* HC Wellington CIV-2006-485-1025, 17 July 2008 at [116]). There may also need to be "*extensive consultation and cooperation*" with iwi to identify relevant customs (*Lands* [1987] 1 NZLR 641 (CA) at p683). It is not likely to be helpful for me to be any more prescriptive than this, as the background facts and the context for any decision will be all important in determining how much proactivity is required.

25. Where a decision-maker has considered Treaty principles or Māori custom bearing on the exercise of their discretion, how intrusively are courts likely to review the decision that is ultimately made? In the case of Treaty principles, the courts have rejected an argument that the manner in which the Crown chooses to fulfil its Treaty obligations is a matter of high policy subject only to intervention for *Wednesbury* unreasonableness (*Broadcasting Assets* [1994] 1 NZLR 513 (PC) at p524). Instead the issue of Treaty compliance is for the courts to determine on a correctness basis; or, in Lord Woolf's words, "*a matter on which the Court must form its own judgment on the evidence before the Court*" (*ibid*.). This approach, which is likely to apply to Māori customary rights as well as to Treaty principles, was confirmed by a NZSC majority in the recent *Haronga* holding that little deference was due to the Crown's policy preference for district-wide Treaty settlements with large natural groupings (*Haronga* [2011] NZSC 53 at para [98]).

Candour, disclosure and evidence

26. Where a public body like DOC is a judicial review defendant, it has a duty to help the court "*to be as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the [decision-maker] whose decision is under review*" (*Fiordland Venison* [1978] 2 NZLR 341 (CA) at p346). That means full and candid disclosure of all relevant facts and, where it is not apparent from the contemporaneous documents, the reasoning behind the decision that is under challenge (*NZ Fishing Industry Association* [1988] 1 NZLR 544 (CA) at p554; *Inder* HC Christchurch CIV-2009-409-1219, 28 May 2010 at [30]). In other words, defendants should conduct judicial review proceedings with "*all their cards up face up on the table*", recognising that "*the vast majority of the cards will start in the [defendant's] hands*" (*Huddleston* [1986] 2 All ER 941 at 945). If the court feels that a defendant has been lacking in candour, it may approach all of the evidence presented by the defendant to the court "*with considerable caution and parse the words used by the [defendant's] deponents with considerable care*" (*Downes* [2006] NIQB 77 at [30]).

27. As to disclosure, the starting point is to consider the facts and the grounds of judicial review that have been pleaded by the plaintiff in its statement of claim (or if that has not yet been filed, the heads of complaint the plaintiff has identified in correspondence). The duty of a judicial review defendant is to disclose anything relevant to particular complaints about the decision, and anything about the decision-making process that would be relevant to the Court's decision on whether relief is appropriate and if it is what type of remedy should be granted. The test for disclosure of documents is one of

relevance and necessity (*Ngati Awa* HC Wellington CIV-2006-485-1025, 28 March 2007 at [6]). Note that if it becomes apparent in reviewing documents that there is another flaw in the decision-making process that makes it unlikely the same decision would be reached again, this should be disclosed to the plaintiff – who, it must be remembered, is reliant on materials held by the defendant in order to make an informed – and if necessary, amended – claim (*Hook* [1976] 1 WLR 1052 at p1058). Note too that the responsibility to get disclosure correct ultimately lies on legal advisers. This means that disclosure must be the product of both an inquiry to gather relevant material in DOC's possession, and a final evaluation of relevance/necessity by legal advisers.

28. Similarly, a defendant cannot be selective in the material which it provides to the court. In the absence of a confidentiality or a public interest immunity justification, a defendant should exhibit as primary evidence any document to which it refers, rather than providing "*second-hand evidence of the nature of its contents*" (*CREEDNZ* [1981] 1 NZLR 172 (CA) at p182; see also *Tweed* [2007] 1 AC 650 at [4], [33]). Similarly, actual decision-makers and not their advisers should provide any affidavit which explains their decision-making. The implication is that an affidavit from a departmental official "*which includes some claims as to what was the Minister's view and what he took into account*" may well be inadmissible as opinion or hearsay evidence (*NZ Fishing Industry Association* [1988] 1 NZLR 544 (CA) at p553). It has also been held that without "*an affidavit stating the grounds upon which a decision is made, the Court is left looking at such evidence as it does in fact have. In that situation, the Court can be justified in drawing inferences which are adverse to the decision maker which had means of knowledge, and could have given evidence, but did not do so*" (*Healthcare Providers* HC Wellington CIV-2007-485-1814, 7 December 2007 at [166]).

29. Affidavits which are filed with the Court must also comply with the rules of evidence. They should not contain "*argumentative*" material (*University of Auckland* [2010] NZAR 1 (HC) at [28]), or venture "*past evidence into fields of opinion*" (NZ *Federation of Commercial Fishermen* HC Wellington CP237/95, 24 April 1997 at p4). Judicial review affidavits should also be drafted "*in clear unambiguous language*" (*Downes* [2006] NIQB 77 at [31]), which has been said to require that:

> The language must not deliberately or unintentionally obscure areas of central relevance and draftsmen should look carefully at the wording used in any draft to ensure that it does not contain any ambiguity or is economical with the truth of the situation. There can be no place in affidavits in judicial review applications for what in modern parlance is called 'spin'. Public bodies and central government agencies in particular are involved in the provision of fair and just public administration and must present their cases dispassionately and in the public interest. Justice lies at the heart of public interest and can only be served by openness in assisting the court to arrive at a proper and just decision. The judicial restraints on matters such as discovery and cross-examination would not

> long survive if lack of frankness and openness were to become commonplace in judicial review applications.

30. As to content, the court in judicial review "*in general at least*" is limited to "*the situation, including the information, as it was at the time of the decision*" (*Zaoui* [2006] 1 NZLR 289 (SC) at [68]). This has led to a distinction being drawn between *ex post facto* evidence going to the decision that was made, and *ex post facto* evidence going to whether and if so what relief should be granted by the court if the judicial review application is successful. As to the former, it has been held by the courts to be wrong in principle for a defendant "*to file an affidavit after the event seeking to offer further explanations for the decision made*" (*Abbott* HC New Plymouth CIV-2004-443-660, 20 April 2005 at [22]), although the door has not been entirely closed on such evidence (*Auckland RC* [2007] NZRMA 535 (HC) at [75] (it is all "*a question of probative value and weight*")). The quid pro quo is that a plaintiff should not "*endeavour to impugn a [] decision by later generated material which was never before the [decision-maker] at the relevant time*" (*Discount Brands* [2004] 3 NZLR 619 (CA) at [46]).

31. As noted earlier, *ex post facto* evidence can legitimately be included in an affidavit if it goes to remedial discretion. Such evidence might explain how the defendant is doing "*all it can genuinely do to meet the statutory duty*" (*Air Nelson* [2008] NZAR 139 (CA) at [74]); that granting relief would bring about "*inequity to third parties*" who have spent considerable sums of money in reliance upon the status quo (*Tap* CA48/06, 13 December 2006 at [59]); that "*considerable disruption*" would be caused to an affected industry and to key stakeholders in it if the challenged decision is set aside (*Unison Networks* CA284/05, 19 December 2006 at [87]); or that "*great uncertainty could, and almost surely would, arise*" if relief were granted (*Winther* [2010] 3 NZLR 56 (HC) at [32]). It remains unclear whether evidence can be given that the "*same outcome*" would be reached in the event of a reconsideration of the decision. There are both cases encouraging such evidence (*Northcote Mainstreet* [2006] NZRMA 137 (HC) at [280]) and cases which heavily criticise its provision by public body defendants (*Lalli* [2009] NZAR 720 (HC) at [90], [96]-[97]).

Paper given at the DOC National Law Conference

23 March 2012