Public Issues Committee

Auckland District Law Society

Discussion Paper

FISHING AND JUDICIAL ACTIVISM

Introduction

1. The role of the courts, and the extent to which judges assume an activist approach to their role, are matters of occasional public debate.[1] In a Family Law Journal editorial on the subject,[2] Principal Family Court Judge Peter Boshier referred to a paper he had presented to the 1998 Family Law Conference.[3] It had received publicity, especially as it amounted to judge-initiated debate on the law. Calling for creative interpretation of matrimonial property legislation, he said, "This will of course involve social policy issues. After all, what would the public rather have: a statute firmly set in the social mores of the 1970s or a statute that lives and evolves with our society? Law does not exist in a vacuum, but is an evolutionary process. Development of the law is dependent on counsel being prepared to push boundaries, and challenge judges to find ways to flesh the bones of the Act and do justice to all parties." (pp.58-9)

2. Socially active law-making by the courts is not of course confined to the family law field. The "Lands case" (*New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (HC and CA)) was an historic court case, in that it was the first to attempt to distill some principles out of the Treaty of Waitangi. But it was also an example of judicial activism: the Court, in discussing the obligations of the Crown towards Maori, spoke of "utmost good faith", duties "analogous to fiduciary duties", "active protection", "fullest

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1 Paul O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago: University of Chicago Press, 2003); Kenneth M. Holland (ed.), *Judicial Activism in Comparative Perspective* (London: Palgrave Macmillan, 1991); Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1988). From early 1980s the Court of Appeal of New Zealand was especially active. See Taggart, *Judicial Review of Administrative Action in the 1980s* (1986). Note that the debate about activism extends to civil law countries. For a comment on the position in the Netherlands see M. de Werd and R. de Winter, "Judicial Activism in the Netherlands: Who Cares?" in B. Bakker et al (eds.), *Judicial Control – Comparative Essays on Judicial Review* (1996), 8.

2 Peter Boshier "Editorial: Judicial activism and law reform" (September 1999) Butterworths Family Law Journal 51-52.

3 Peter Boshier, "Developments in Matrimonial Property Law" (1998) Family Law Conference, 31st August-2nd September 1998, Christchurch, New Zealand Law Society 51-69.

extent practicable", "infinitely more than a formality", and "insist that it be honoured." The result was the judicial creation of a range of overarching Treaty principles, since widely adopted by Parliament, in the courts and in government policy.

3. Judicial activism isn't necessarily a bad thing. In a recent chapter Professor Bruce Harris examined judicial creativity in New Zealand's appellate courts.[4] He argues that judicial creativity is a natural and vital part of how the three branches of government work together to provide a single comprehensive system. The selection of appellate decisions discussed in the chapter displays the range of judicial creativity and restraint in the New Zealand jurisdiction. Both an appreciation of the degree of creativity which the system of government expects of the courts and the ongoing confidence the community maintains in the courts, suggest that the New Zealand appellate courts – notwithstanding the strident concerns of a small group of business and academic commentators – are perceived to be maintaining an appropriate balance between creativity and restraint.

4. However, from time to time judgments come from the courts, especially the appellate courts, that raise questions about the appropriate boundaries of activism; where is it appropriate for the courts to be creative, and when should they leave the matter to Parliament?

5. One recent case, which may be seen as an example which illustrates this, is the Supreme Court decision in *New Zealand Recreational Fishing Council Inc v Sanford Ltd*.[5] The New Zealand Big Game Fishing Council Inc and the New Zealand Recreational Fishing Council Inc were the appellants in an appeal from the decision of the Court of Appeal.[6] The majority and minority judgments of the Court gave the Minister of Fisheries wide and narrow discretion respectively. The former may be seen as being more activist, though ultimately judicial decisions are inherently liable to criticism on various grounds.

Majority Decision – Blanchard, Tipping, McGrath and Wilson JJ, minority – Elias CJ

6. The judgment of the Supreme Court was delivered on 28 May 2009. The majority decision was given by McGrath J. The dissenting judgment was given by Elias CJ. The former may be seen as wider, the latter as narrower, in scope. Although on one level this could be regarded as a distinction based on technical interpretation of the Fisheries Act 1996, it is also possible to see it as indicative of a greater and lesser degree of judicial activism.

Significant difference between majority and minority decisions

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4 Bruce Harris, "Judicial Activism in New Zealand's Appellate Courts" in Brice Dickson(ed.), *Judicial Activism in Common Law Supreme Courts* (Oxford: Oxford University Press, 2007) 273-322.

5 [2009] NZSC 54; SC 40/2008.

6 CA163/07 [2008 NZCA 160, dated 11 June 2008].

7. The significant difference between the majority and minority decisions relates to both the approach to, and the extent and limitations of, Ministerial discretion in making decisions under ss 20 and 21 of the Fisheries Act 1996 ("the Act"), and how those decisions fit in to the scheme of the Act as a whole.

8. In the majority view ss 20 and 21 were seen as conferring a wide discretion on the Minister to fully allocate or apportion the total allowable catch (TAC) among the commercial and non-commercial (recreational and Maori customary). By contrast, the Chief Justice viewed s 21, in particular, as requiring the Minister to first deduct from the TAC mortality to the fishery caused by non-commercial fishing and all other mortality caused by fishing to make sure that the TAC is not exceeded, and then to set the total allowable commercial catch between zero and the balance of the TAC. The Chief Justice held that this was not "a discretion to allocate the proportion of the TAC he thinks appropriate for non-commercial interests." [21]

Majority decision

9. The majority of the Court ("the majority") held that the Minister in making the decisions under ss 20 and 21 of "allowing for" non-commercial fishing interests and all other mortality under s 21(1), and setting the TACC under s 20, has a wide discretion so long as the decisions are "reasonable in all the circumstances" bearing in mind the limited resource in which there are other interests [61]. In that regard, the Minister can adopt catch history so long as catch history provides a reasonable basis for assessments of allocations. [64] The same applies to the TACC although it may be reasonable for this to be set at [61], [65].

10. Those decisions, according to the majority, effectively involve "allocations" of the TAC which is fully apportioned among competing commercial and non-commercial interests whilst recognising that the TACC may be set at zero [41] and [61].

11. In addition, whilst holding that in setting the TACC the Minister must have regard the TAC, and allow for mortality to the stock caused by both non-commercial (recreational and Maori customary) and all other mortality (illegal fishing) [48], crucially the "utilisation whilst ensuring sustainability" purpose of the Act contained in s 8 provided only "contextual guidance" [54], [60] as to the nature of "recreational interests. That is " interests in the 'utilisation" of fisheries by fishing to enable them to provide for their social, economic and cultural wellbeing [54] but different to commercial fishing interest entitlements [55].

12. Also, in recognising that the 'allocation for recreational interests" could be nil [55, footnote 28], the so-called "allowance ... represents what the Minister considers recreational interests should be able to catch but also all they will be able to catch." [56]

13. More particularly, the majority rejected the argument that s 8 has any greater part to play in the Minister's decisions under ss 20 and 21 other than that the Minister must "promote the policy and objects of the Act" *(Unison)*, and "bear in mind and conform with the purposes of the (Act)" *(Westhaven Shellfish)* [59].

Minority decision

14. The majority decision is to be contrasted with the judgment of the Chief Justice. In a more narrowly reasoned (or less activist) judgment, the Chief Justice disagreed with the majority approach that ss 20 and the 21 procedure "is a mechanism for allocating the fish stock within the TAC between commercial and non-commercial interests" in respect of which " the Minister quantifies 'an allowance' for recreational fishing interests under s 21 in arriving at the TACC… under s 20." In the Chief Justice's opinion "ss 20 and 21 set up a mechanism for deciding what stock should be made available to recreational fishers" "is misconceived." [4]

15. In further disagreeing with the majority view, the Chief Justice held that the only discretion the Minister has when he or she makes decisions under ss 20 and 21, is at what stock level to set the TACC, namely, between zero and the balance of the TAC. This is after allowing for mortality caused by non-commercial (recreational and Maori customary) fishing, and all other mortality caused by fishing [32] being an "estimate of actual loss, rather than what *should* (as held by the majority) be lost," and "not a policy decision" [26].

16. Importantly, and contrary to the majority, the Chief Justice held that:

    a. a TACC may be set at less than the difference between the TAC and non-commercial mortality allowed for under s 21(1) being a discretionary determination based on the best available information "acting within the purpose and principles of the Act." [22], [31], [32]

    b. it is open to the Minister to be conservative in setting the TACC where the stock, in respect of which there are social and cultural values, is under pressure, and that "s 20 is not the vehicle for adjusting access between recreational and Maori interests on the one hand, and commercial fishers on the other" the control of recreational fishing to be found in regulations. [32]

    c. "the s 20 determination must be in accordance with the policies and principles (ss 8 and 9) of the Act and taken after consultation with the relevant interests." [32]

17. In finding that s 21(1) is concerned with ascertaining what is available for the TACC, the Chief Justice held that a determination under s 20 means that the Minister must consider the different objects of the Act and take into account the views of those interests. [30]

What the decision meant for noncommercial fishers?

18. The decision meant the continuation of the status quo by the Ministry of Fisheries, and an "allocation" by the Minister of Fisheries, following a "proportional" or "apportionment" approach, by effectively treating non-commercial fishing interests as non-commercial fishing quota alongside commercial quota (Part 4 of the Act).

19. This follows from the confirmation by the majority of the Court of Appeal "broad brush" approach namely, "it is for the Minister to decide the basis on which decisions to set the commercial catch are taken" and that "in making

decisions under s 21 where the Minister is properly informed and acting within the statutory framework described is satisfied that "catch history …provides a reasonable basis for assessments of allocations" then "it is open to the Minister to take that approach."[64]

20. By contrast the Chief Justice's minority judgment contains focused on the Chief Justice's view of the scheme of the Act. First, setting the TAC decision, then setting the TACC decisions preceded by the process of "allowing for," that is, deducting non-commercial fishing mortality and all other mortality, and related consultation; then the way in which the decisions under ss 20 and 21 in particular must be made.

21. The Chief Justice referred to a lower TAC, and perhaps a lower TACC in a particular fishery either depleted or "under pressure" to enable abundance and as a consequence larger fish available for non-commercial fishing interests previously not able to be caught without significantly increased non-commercial fishing effort.

Judicial activism and judicial review

22. The Canadian judiciary provides probably the best example in the common law world of judicial activism.[7] But New Zealand has not been far behind, with superior judges especially being determined to reflect contemporary thinks, or keep abreast of the times.[8] The growth of judicial review in the course of the late 20th century and into the early part of this century has extended the scope of judicial activism.

23. It has been said that it is the anti-majoritarianism implicit in judicial activism that is its most serious fault.[9] Judge-made law lacks the legitimacy of law made by representative assemblies such as Parliament. The broad-brush, rather than closely analytical approach risks the courts moving too far into policymaking of a loose type, uninhibited both by political accountability and by tightly-binding precedent. This makes the courts more of a power unto themselves than has hitherto been the case.

Conclusions

24. Though the Supreme Court decision in *New Zealand Recreational Fishing Council Inc v Sanford Ltd*[10] may not be in the same league of Lord Cooke of Thorndon's judgment in *New Zealand Maori Council v Attorney General*,[11] it can nonetheless be seen as an example of judicial activism. Lord Cooke, the

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7 M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Wall & Thompson, Toronto, 1989).

8 John Smellie, "Fornalism, Fairness and Efficiency: Civil Adjudication in New Zealand" (1996) New Zealand Law Review 254-274 (part 2).

9 James Allan, "The Rise of Judicial Activism in New Zealand" (1997) 4(4) Agenda 465-474, 471.

10 [2009] NZSC 54; SC 40/2008.

11 [1987] 1 NZLR 641 (HC & CA).

Father of Judicial Activism in New Zealand, led the Court of Appeal in a more activist direction. The new Supreme Court may lack the self-imposed public policy restraint of the Judicial Committee of the Privy Council, and it is freer to develop the law in accordance with social and political considerations. The effect will potentially be a more activist final appellate court. This could expose the courts to criticism.

25. The broad-brush approach taken by the appellate courts, coupled with the apparently greater difficulty of being heard (notwithstanding the rationale of the establishment of the Supreme Court to increase public access to justice), adds to the difficulties facing a litigant. Though Lord Cooke may be gone, there is no reason to suppose that another Cooke will not emerge to challenge the status quo, and even throw into doubt the intention of Parliament.

26. The question of the immunity of judges from political criticism – if such an immunity exists – has recently been raised in New Zealand by a number of political events. There was some criticism of judges and of elements of the judiciary during the debate on the abolition of appeals to the Privy Council – including claims that the Privy Council was "out-of touch", or that the Court of Appeal was activist or less capable than it should be when dealing with commercial appeals. In an address to the Legal Research Foundation, the then Solicitor-General, Terence Arnold, QC, called for this criticism to end, for it undermined the judiciary as a whole.[12]

27. The Court of Appeal ruling which led to acrimony between the Government and Maori over the foreshore and seabed moved the Government to break with convention by openly criticising the courts. More recently, the former Deputy Prime Minister, Dr the Hon Michael Cullen, suggested that the courts were challenging the supremacy of Parliament.[13] Whether this was motivated by the Court of Appeal decision, or whether it had a more general basis, it was a significant statement. These events raise serious questions about the nature of criticism of judges and the judiciary. More importantly, these raise questions about the respective roles of Parliament and the courts in New Zealand.

28. Whenever the courts make high profile decisions there is the potential for criticism. Sometimes this may be justified, but ultimately much depends upon the court's ability to steer between Charybdis and Scylla; of avoiding expressing political views, and becoming a mere mouthpiece for platitudes, a dry narrator of unchanging black letter law.

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12 Terence Arnold, "Update on the Supreme Court", Annual General Meeting, Legal Research Foundation Inc., Auckland, 7 August 2004. Text available at <http://www.Crownlaw.govt.nz/uploads/UpdateSC.PDF>.

13 Hon Michael Cullen, "Human Rights and the Foreshore and Seabed", Human Rights Commission Speakers Forum, Wellington, 1st June 2004. Available at <http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=19914>. See also Hon Michael Cullen, "Observations on the Role of Government" <http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=17678>.