The Supreme Court – A Judge’s View

Rt Hon Sir Peter Blanchard

Introduction

The Judges appointed to any new court face challenges in its early years, especially so when the court is borne in circumstances of political controversy agitated by some members of the legal and commercial communities and when the court has no permanent home and is susceptible to dis-establishment by a simple majority of Parliament.

That the Supreme Court has survived its first 10 years in good health and now housed in a fine purpose-built structure demonstrates that early doubts and anxieties have been overcome. Happily, one no longer hears (unrealistic) calls for restoration of appeals to the Judicial Committee of the Privy Council or for the court to be folded down into a second level of the Court of Appeal.

A discussion of the achievements (or otherwise) of the court’s jurisprudence during its first decade is better left to someone other than one of its judges. That will be thoroughly mulled over in other conference papers and I leave it to other contributors, for it is unconvincing when a judge who has taken part in a case offers praise, or an attempted defence of the decision to which he or she was a party or, having dissented, extra-judicially attacks the reasoning of colleagues.

The establishment debate – a missing element

I intend therefore to confine myself to describing some of the processes with which the first judges of the court had to engage and the physical situation in which we found ourselves. I will first, however, say something about a missing element in the intense public and professional debate which preceded the creation of the court on 1 January 2004 by the enactment of the Supreme Court Act 2003. I do so because it has some relevance to any assessment of the court’s achievements. That disappointing void in the argument about whether to replace the Privy Council at the top of New Zealand’s court system was the failure of any commentator of any persuasion to examine what cases were actually going to the
Privy Council and what was happening there. In the bluster of opinion, no one seemed to care much about those facts, although they were surely central to the access to justice argument.

In a very real sense, New Zealand’s final court before 2004 was for practical purposes the Court of Appeal. We simply did not have any significant number of second level appeals, which are regarded as of fundamental importance in other jurisdictions. The Court of Appeal was both a volume error-correction court and the court which struggled to find time to reflect upon and formulate our law in the difficult cases. That it had been able to perform both roles was only because of the hard work of the judges, assisted in divisional courts by High Court judges, and by the leadership of those brilliant jurists Sir Owen Woodhouse, Lord Cooke of Thorndon and Sir Ivor Richardson, to name those who led the court for lengthy periods in more recent decades.

Why do I say that we almost did not have second level appeals? Consider the figures. For each year in the 1990s there were only about 6 appeals heard in London. In the year 2000 there were 6. Then, interestingly, when abolition was mooted the number suddenly doubled: 13 in 2001, 12 in 2002, 11 in 2003 and again in 2004 (being appeals lodged before abolition). These were still very modest numbers of appeals considering that the Court of Appeal was then hearing and deciding over 150 civil appeals and about 350 criminal appeals per year. Only about 2% of Court of Appeal decisions were proceeding to a second appeal.

There was another factor which went unremarked in the discussion about access to justice. It was that many of the cases that did go to London did not deserve a second appeal. They were cases of no interest other than to the parties themselves (in other words, they had no precedent value) or where the proposed appeal was hopelessly optimistic and bound to fail because it was unarguable, as the Privy Council found. Such appeals could be brought because the Privy Council Rules allowed them as of right where as little as $5,000 was in issue. The Court of Appeal had no ability to decline to give them leave when standard conditions, such as security for costs, had been met.

Looking back at the final 5 years before abolition, and with the experience of the leave to appeal system which operates under the Supreme Court Act, it is clear to me that in that last period of full-time operation of Privy Council appeals as many as 17 out of the total of 53
appeals were in one or other of these categories (some in both). So there were over the 5 years only about 36 cases (roughly 7 per year) which would now justify an appeal to the Supreme Court.

In contrast, and even though the Supreme Court started slowly in its first full year (2005), it has decided by the end of September 2014 over 220 cases selected from over 1,130 applications for leave.¹ In the year ending 30 June 2014 the court received 174 applications for leave and granted leave in 35 cases.

The fact was that the Privy Council, through no fault of its own, was not providing New Zealand with final court guidance in large areas of our law because under its rules, or for practical reasons, many important cases could not or did not proceed to London. During the 5 year period I have surveyed the Privy Council heard only 2 criminal appeals. I believe it heard only about 10 such appeals since 1840, including some brought quite recently. In contrast, the Supreme Court has already decided about 70 criminal appeals in its initial decade.

The other glaring omissions from Privy Council appeals were in the areas of family law, human rights cases, employment law and almost anything needing relatively speedy decision, such as an application for habeas corpus. Sensible litigants in all kinds of cases often considered that the sum of money at stake and/or the inevitable delay did not justify going to London, even when the question involved had general or public importance.

In deciding more than 220 civil and criminal appeals since 2004 the Supreme Court has been able to settle the course of New Zealand law and give guidance to the courts below it on many areas of the law, including, importantly, on aspects of our criminal law, which it has benchmarked against what is done in comparable jurisdictions. The court has normally not thought it necessary to depart markedly from prior law as laid down before 2004 in the New Zealand courts. Continuity in our law has been an important value for the new court.

¹ Allowance needs to be made in the latter figure for abandoned appeals and cases awaiting decision. The latest Ministry of Justice statistics show that, as at 30 June 2014, there were 31 active appeals awaiting hearing or judgment.
The place of Privy Council decisions

The court has been asked on several occasions to depart from a decision of the Privy Council on a New Zealand appeal but has only once done so. That was in *Couch v Attorney-General (No. 2)* where the court emphasised that, although it did not consider itself bound by decisions of the Privy Council, it would be slow to depart from a Privy Council authority and would do so only for good reason and not merely because the Supreme Court itself would have made a different decision. In *Couch* the majority concluded that the Privy Council decision in *Bottrill v A* (itself a majority view on the point in question) had been out of step with the previously understood law, had reversed a decision of the Court of Appeal consistent with previous authority and that there had been no general reliance upon the *Bottrill* decision. It was suggested that guidance on such matters could be found in decisions of the High Court of Australia. I would add that this will also be a source of guidance when, inevitably, at some future time the court is first asked to depart from one of its own decisions. I would expect that the court will only rarely refuse to follow a Privy Council authority or one of its own.

Personnel and Assistance

With that background concerning the position of the Privy Council, I turn to the challenges faced by the judges of the new court. I can say at once that they did not include any lack of familiarity with one another. Justices Gault, Keith, Tipping and I had been colleagues for many years on the Court of Appeal and enjoyed working together. When Justices Gault and Keith retired at the end of 2005, they were replaced by Justices McGrath and Anderson, with whom Justice Tipping and I had also sat congenially in the Court of Appeal. And all of us were likewise used to sitting with Chief Justice Elias when she presided from time to time in that court. She was able to have us all work harmoniously as a team to get the new court up and running.

We received assistance from several quarters. The Ministry of Justice found accommodation for us at comparatively short notice and provided staffing including our registrar, Gordon Thatcher, who later coped admirably with the shift into our permanent building, and our

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experienced librarian, Sarah Cleghorn who took responsibility for building from scratch a substantial collection of texts and reports. The Rules Committee and Parliamentary Counsel prepared a set of rules for the Court in consultation with the judges. The judges of the High Court of Australia were most encouraging when the Chief Justice and I visited them early in 2004. We gained from them and their registrar much helpful advice about the organisation of a final court, in particular in relation to its rules and the creation of a library. It helped that the High Court was by chance engaged in the process of re-writing its own rules for the first time in 50 years.

Colloquia with other senior courts

The cordial relationship with the High Court has continued. Beginning in 2007 in Ottawa, judges of that court have joined with our judges and judges from the Supreme Court of Canada (and latterly judges of the Final Court of Appeal of Hong Kong) in a series of colloquia for which each participant prepares a paper on a current legal issue which is the subject of lively exchanges in an informal atmosphere. One of these meetings was timed to coincide with the first sitting of the Supreme Court in its new building in 2010, attended by the judges representing the other 3 final courts. A colloquium has since been held in Canberra and another is planned for Hong Kong. As these are the courts against which the Supreme Court seeks to measure itself, it is a great pleasure to have regular contacts of this kind which help to lift the profile of the court.

Accommodation

The major difficulty in the first 6 years of the existence of the court was that no provision had been made when establishing it for a dedicated court building. My personal view was that, given the political opposition to the creation of the court, and the fact that the Supreme Court Act was passed by a narrow simple majority only, it was possible that on a change of government, it might be vulnerable to disestablishment, particularly if it had been obliged to make one or more deeply unpopular decisions. As it transpired, however, the National-led government elected in 2008 has proved to be very supportive of the court and, with the

\(^5\) Supreme Court Rules 2004.
exception of the *Saxmere*\(^6\) decision about Justice Wilson’s conflict of interest in a Court of Appeal case, none of the court’s judgments to date has attracted more than passing attention beyond professional and academic circles.

The arrangements rather hastily made for the housing of the new court consisted of a medium-sized courtroom and a registry office in the basement of the High Court building on Molesworth St and chambers on the top floor of the Old Government Building close by in Lambton Quay – the latter building already housing the Law School of Victoria University of Wellington. The separation of courtroom and chambers was awkward on wet and/or windy Wellington days (we avoided the extravagance of having Government cars transport us the short distance and went on foot) or when an appeal attracted the attention of the TV stations. It was not unknown for the judges to be filmed at close quarters while getting from one building to the other for a hearing though, interestingly, only cursory attention seemed to be paid by that medium when judgments were eventually delivered.

The temporary courtroom was functional but not attractive and, although air-conditioned, tended to get quite hot by the end of a day’s sitting. The judges’ retiring room was not a place where anyone would want to linger. Neither the courtroom nor the retiring room had any natural light.

Our chambers and common room were comfortable enough but law clerks, and in some cases associates, could not be sited next to their judges. There was no space for display of anything more than a very basic judicial library. When purchased, most books had to be stored in a room in the High Court basement. On the other hand, we had available to us at the other end of the building, via its entrance on the ground floor, the Law School library. We also greatly enjoyed our frequent contacts in the corridors with members of the faculty. This could be salutary if one encountered an academic who was not favourably impressed with a recent judgment of the court.

The Labour-led government decided in 2007 that the court should have a new building on the site once occupied by the Wellington Magistrate’s Court (long since demolished and replaced

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by an area which the public had been using as a park) and alongside the old Supreme Court building dating from about 1880 and in a terrible state of disrepair, having not been occupied since the mid-1990s. The cost of restoration of the old building was a major component of the overall expenditure.

The judges were fully consulted throughout the design and building processes and one of our number, Justice McGrath, was a member of the building committee set up by the Ministry of Justice to undertake a supervisory role. The judges did not venture an opinion on the aesthetics of the design but concentrated on its functionality. Our expressions of opinion were almost always accepted. We were able, for instance, to veto a courtroom detail which would have put “busy” horizontal decoration on the wall behind the bench of the kind that reportedly caused headaches for counsel in the Court of Appeal before its courtrooms were renovated.

There are 6 sets of chambers on the upper floor together with a spare room for use by an additional judge when, in anticipation of a retirement, a sixth permanent judge has been appointed. There is also a generous common room space which is used for judicial conferences about cases. In the old Supreme Court building, to which the new building is connected, an old courtroom has been converted into a dining room but it is used only occasionally (for example, a lunch for Prince William when he opened the building) because of budgetary constraints – the judges usually buy their own lunches and fund any hospitality!

The new Supreme Court building is in my view, a great success. While opinions differ over the exterior, the courtroom is an architectural masterpiece which both judges and counsel enjoy. The chambers are pleasant in appearance and comfortable. The library arrangements work well and provide enough shelving for a large and expanding collection. The court is now secure in a building of which the country can be justly proud. We were, however, fortunate in the timing of the decision to construct it. Had work not been underway before the Global Financial Crisis, I very much doubt that any government would have proceeded.

A new type of judging

I have often been asked “What is the difference between being a member of the Supreme Court and sitting in the Court of Appeal?” The cynical answer would be that you are no
longer susceptible to being overturned by a higher court. On the other hand, you are even more likely to have your work picked apart sentence by sentence, or even word by word at times, by academic and other commentators. Thus there is no feeling of infallibility. As Justice Robert Jackson of the United States Supreme Court once said:

“Reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals … would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.”

And he was not dissenting at the time!

The greatest advantage enjoyed by a judge of a final court is release from the relentless number of run-of-the-mill cases, in between and around which an intermediate court judge struggles to find the time to identify, let alone ponder, the difficult and important questions raised by the comparative handful of cases which go on to the final court. Furthermore, by the time a case has been found worthy of a grant of leave for a second appeal the issues needing determination will have undergone delineation and refinement, and each final court judge has the time and resources (in terms of law clerks, library and the opportunity of talking through the issues in depth with several other experienced jurists) to produce a better quality of judgment. The hearing of a case is better prepared for. So are judicial conferences. Comments and criticisms of one’s draft reasons are more fully thought through. The benefits of collegiality are greater when the same judges are sitting together on most appeals and gathering for afternoon tea on each working day with the opportunity of informally discussing cases.

Importantly, the final court also has the considerable advantage of seeing the views of the Court of Appeal. The well-considered reasons of that court can greatly assist, even if, in the end, the Supreme Court disagrees with them.

The lesser number of cases in the Supreme Court also allows the judges to read around the subject of an appeal, utilising the court’s fine library, including the access which all New Zealand judges have to electronic materials through the judicial library system. The Court

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subscribes to a wide range of legal periodicals which are frequently a source of ideas for development or application in judgments.

The jurisdiction of the Supreme Court

It was important for the court at a very early stage to get to understand the statutory provisions concerning its jurisdiction contained in the Supreme Court Act. The judges had not been consulted about its drafting. The jurisdictional provisions in the Act were not as straightforward as might have been hoped. All appeals are brought only by leave of the Court. In an ideal world all cases which get as far as the Court of Appeal should be candidates for leave to appeal. But, of course, in an ideal world you do not suffer from unrealistic, sometimes obsessed, litigants who cannot take a well-reasoned “no” for an answer. Probably for that reason, the Supreme Court Act provides that an appeal from a refusal by the Court of Appeal to grant leave to appeal or special leave to appeal to that Court cannot be subject of an appeal to the Supreme Court. The court confirmed that early on. But the ingenuity of litigants in person, and the occasional counsel, caused the Court to have to give numerous rulings on related questions, for example, that there is no jurisdiction to hear an appeal against the Court of Appeal’s refusal to recall its judgment refusing leave, or against its refusal to permit an applicant to withdraw a notice of abandonment, to reopen an appeal, or to allow additional time for the lodging of an appeal. Nor has the Court been enthusiastic about the bringing of a direct (leapfrog) appeal from the High Court after the applicant has already been refused leave by the Court of Appeal. In all but extremely compelling circumstances that will be an abuse.

An important, and I think unwise, jurisdictional bar also exists in s 163 of the Accident Compensation Act 2001, which prevents the court from granting leave and hearing an appeal

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8 Supreme Court Act 2003, s 12.
9 s 7.
in an accident compensation case that came into the court system at the level of the District Court. This does not mean, however, that the Supreme Court has had nothing to say on the interpretation of the 2001 Act: Allenby v H\textsuperscript{18} was a High Court civil proceeding for damages against a doctor in relation to an allegedly bungled sterilisation and so escaped the bar in s 163.

Originally no pre-trial appeal could come to the court after a decision on it by the Court of Appeal,\textsuperscript{19} although, if the point remained live after a trial at which the accused was convicted, it could be taken on a conviction appeal under s 385 of the Crimes Act 1961,\textsuperscript{20} and in an exceptional circumstance a direct appeal from the High Court’s pre-trial ruling might in theory have been possible (though I know of none in practice). The bar on pre-trial appeals was removed by the enactment of s 379B of the Crimes Act\textsuperscript{21} by s 8 of the Crimes Amendment Act (No 2) 2008 but the court has been sparing in giving leave. In \textit{R v Hamed},\textsuperscript{22} an interlocutory matter in the case arising out of the Urewera police raids, Elias CJ, writing for a 5 judge bench, pointed out that the fact that a pre-trial appeal to the Court of Appeal requires leave is itself an indication that such appeals pre-trial are not in the normal course.\textsuperscript{23} Moreover, it must in accordance with s 13(4) of the Supreme Court Act be “necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.” In most instances where an arguable point of general or public importance arises on an interlocutory application under s 344A of the Crimes Act,\textsuperscript{24} the Court said that it will not be necessary to hear the appeal before the trial.\textsuperscript{25} But the threshold may more readily be passed where correction by appeal following conclusion of the trial is not available.\textsuperscript{26} The Chief Justice added:

\begin{quote}
“The statutory stricture is also consistent with the proper reluctance of final courts of appeal to supplant the responsibility of the intermediate Court of Appeal in supervising trial practice, a responsibility that must be exercised with some expedition.”
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\begin{footnotes}
\item[18] [2012] NZSC 33, [2012] 3 NZLR 425.
\item[20] Now s 229 of the Criminal Procedure Act 2011.
\item[21] Now s 223 of the Criminal Procedure Act.
\item[22] [2011] NZSC 27, [2011] 3 NZLR 725.
\item[23] At [5].
\item[24] Now s 215 of the Criminal Procedure Act.
\item[25] At [12].
\item[26] At [13].
\end{footnotes}
In the particular case, leave was granted because the Court of Appeal, overturning the High Court, had reached its conclusion about the lawfulness of the obtaining of some evidence on the basis of statutory interpretation and that would bind the trial judge who could not therefore revisit the point at the trial.

The criteria for leave

If a case does not face a jurisdictional bar, it must still meet the leave criteria in section 13 of the Supreme Court Act. The Court has to be satisfied that it is in the interests of justice for it to hear and determine the appeal, which will be so if it involves a matter of general or public importance or if a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard. The time on leave applications is taken up with isolating the issues and determining whether these criteria are met.

Public and general importance is a well-understood test that excludes disputes which are largely factual or involve construction of unique documentation. Substantial miscarriage of justice is harder. It may have been included with criminal cases in mind, drawn from section 385 of the Crimes Act 1961. In a paper for the New Zealand Law Society in 2004 I said:

> It seems improbable that the legislature was contemplating that the Supreme Court would have to review every criminal appeal in which application was made, to see if there might have been a miscarriage of justice in the determination of the facts or in relation to the application of settled law to the facts. The Court of Appeal last year decided nearly 200 appeals against conviction. Human nature being what it is, no doubt a large proportion of those persons whose appeals were unsuccessful continue to regard themselves as having suffered from a substantial miscarriage of justice. The Supreme Court would become swamped if it gave leave in any significant percentage of those cases. Obviously leave would be granted if the proposed appeal involved an arguable question of law of general application, ie going beyond mere application of settled principle to particular facts. But, where that is not the position, it would seem unlikely that leave would be granted, save perhaps in an exceptional case where there was a real concern both about the result of the trial and about the manner in which the Court of Appeal had reviewed it. That said, however, it is my personal opinion that even

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27 Including the subsets, a matter of general commercial importance or a significant issue relating to the Treaty of Waitangi.
28 In the case of an interlocutory appeal, the Court must also be satisfied that it is in the interests of justice to hear and determine the appeal before the proceeding concerned is concluded (Supreme Court Act 203, s 13(4)), and leapfrog appeals are expressly prohibited (Supreme Court Act 2003, s 8(c)).
such exceptional cases, which are fortunately rare, are better reviewed by the process of a Governor-General’s reference under section 406 of the Crimes Act than by a second level appellate Court. I am unaware of any other jurisdiction where the final court of appeal is prepared to conduct an essentially factual review in a criminal (or civil) case.

In practice, the court has not so far given leave in a criminal case except where there appeared to be a significant legal issue. However, it has not actually had to consider an application which did not raise such a point but nonetheless left it with a concern about the guilt of the applicant or the fairness of the trial process.

On its face, the miscarriage ground applies also to civil appeals. But the court has taken the view that, in that connection, it must have been intended to enable to court to review decisions of the Court of Appeal on questions of fact, or on questions of law which are not of general or public importance, in the rare case of a sufficiently apparent error, made or left uncorrected by the Court of Appeal, of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case. In a speech the Chief Justice has said that this ground for leave allows scope for correction of error which, uncorrected, would be an affront to the legal system. Happily such cases appear only rarely.

At times when the numbers of cases qualifying for leave reduces because of the type of appeals which the Court of Appeal has been hearing (for example, if it has undertaken a blitz on criminal appeals to clear a back-log) there could have been a temptation to make up the numbers by granting leave to cases that the court would ordinarily not agree to hear. The court has however been conscious of the requirement in s 14 that it must not give leave unless a proposed appeal meets the criteria. It has tried at all times, including in its first years when “business” was slow, to maintain a consistent approach in making leave decisions.

The Supreme Court Act makes no mention of the arguability of an appeal. There is no express discretion to reject an appeal that meets the criteria – to pick and choose cases, as other final courts can do. An otherwise qualifying application is not to be rejected merely because it does not look especially promising, all the more so if the result looks as if it is

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probably right but the reasoning supporting the result is problematical. But the Court took from the outset the stance that it cannot be in the interests of justice that a second appeal be permitted in order ventilate an argument which is quite obviously hopeless – where the result is plainly right and the reasons given are supportable. It is implicit in section 13 that the matter of public or general importance must be a matter which is truly arguable. So, for example, leave was declined in one case where the issues were said to be capable of qualifying for leave because on the best possible view of the facts and the law from the applicant’s point of view, the Court did not consider it had sufficient prospects of success to warrant a grant of leave.32 And in another early case a proposed appeal challenging the interpretation of a statutory provision was refused leave because there had been a consistent and unanimous view taken below (this would have been a fourth level appeal under the Social Security Act 1964) that had been “undoubtedly correct” 33. Moreover, an arguable point must lead somewhere. It will not be enough to have a genuinely arguable issue if the point exists, as it were, in a vacuum or if, in order for the appeal to succeed, it would be necessary also for the appellant to succeed on a further or on a logically prior point that is obviously hopeless. In one case where it was contended the Court of Appeal had applied the wrong legal test, the judgment refusing leave said that the law was sufficiently clear and settled and that whatever might be the relevant nuances of that law, the applicant would necessarily fail on the facts concurrently found by the courts below.34

The court has been criticised for taking this approach because, it was said, it had a responsibility to expound the law for the guidance of all courts. 35 But this criticism failed to appreciate the cost to the parties of a full second appeal hearing that would obviously be futile, to say nothing of the danger of attempting to refine the law in the absence of a realistic contest. It can sometimes do more harm than good to use a hopeless factual scenario as a springboard for articulating principles of law.

Another opinion I have heard voiced is that the court should give reasons when it grants leave to appeal and that consequently nobody knows in advance of the hearing why leave has been given. The court is not obliged by its statute to do this, and rightly so. It is implicit in the approved grounds for leave that the court considers that those grounds are arguable and meet

the leave criteria. To say more would give the appearance of adopting a position prematurely. As well, the court’s view may change when it considers the case in more depth. In one case, which I will not identify, counsel for the respondent actually sought to have the court explain why it had granted leave. We declined and might have embarrassed counsel if we had acceded to counsel’s request because we had formed the provisional view that the Court of Appeal was plainly wrong (the substantial miscarriage of justice ground). As it happened, we came to appreciate in preparing for the hearing that the case also qualified on the general and public importance ground and was a lot harder than we had believed when granting leave. So reasons for leave would perhaps also have embarrassed the court!

The Supreme Court Act allows leave decisions to be made by any 2 of the permanent judges. The court has, however, generally adopted the practice of involving at least 3 judges so that an unsuccessful applicant has the reassurance of knowing that a majority of the court has considered the application. It departs from this practice on occasion where it is obvious that the application must fail (or succeed) or where determination is needed urgently and a third judge is not available.

Most applications for leave are decided on the basis of the written submissions of the parties. It has been the practice to grant leave if, after discussion amongst the panel (orally or by exchange of emails) any one of them feels strongly that the appeal should be heard. If the panel is still unsure, or if it wants to explore the proposed grounds with counsel and tease out what will or will not be included in the argument of the appeal, the panel will direct an oral hearing, which may take place by video link if counsel wish it.

Although the Act requires the court to give short-form reasons for declining leave, it gives no indication about the precedent value of those reasons, which are sometimes reported in the Procedure Reports of New Zealand or the New Zealand Law Reports. My view is that, while what is said in the reasons may give useful guidance as an opinion of a majority of the court, and may in a practical sense settle a point of law, it does not represent the considered portion of the whole court formed after oral argument. It is plainly open to the court to take a different view if the same point arises in a later case. It also seems to me that in a later case a lower court need not regard itself as bound by what the leave panel has said about the law, although one can understand that it might well hesitate before declining to follow it.
While the grounds of appeal identified in the order granting leave set the parameters within which argument is to range, they are not treated with the same rigidity as those stipulated in a case stated, being capable of amendment by leave of the court at any time.36 The court has been wary of allowing an appellant to advance an argument that has not been run below, particularly if there was a considered decision not to run the argument or to concede the point in the lower courts. The court said in Otago Station Estates Ltd v Parker37 that it would not allow this course in a civil case if there was any possibility that the outcome might have been affected if the point had been taken earlier. The court would need to be sure beyond doubt that it had before it all the facts bearing on the new contention as completely as if the matter had been in issue at the trial. The same would of course apply if a respondent was seeking to support the judgment below on a ground not previously advanced.

Law reports

Reference to the law reports leads me to mention the very recent move by the New Zealand Council of Law Reporting to publish volumes containing all the reports of cases heard by the Supreme Court since its inception (they having previously been scattered through the NZLRs) and, for the future, to have a separate volume of Supreme Court cases as part of the NZLR series. It is hoped that this segregation of the work of the court will enhance its status by putting it, in terms of reporting, on much the same basis as the other senior Commonwealth courts. It is something that, as a former member of the Council, I welcome, hoping as I do so that it does not undermine the financial viability of the rest of the NZLRs in what is a very small market.

A protocol exists between the NZLR editor and the court under which draft headnotes are referred to the judges for approval before publication. The judges’ clerks perform a valuable role in checking the accuracy of a headnote, subject to the supervision of the judge responsible for the reasons (or majority reasons) given by the court.

36 Supreme Court Rules 2004, r 29.
Law clerks

I should say something more about the court’s law clerks. They are recruited with the help of the Deans of the law schools and are drawn from the top students in their year. There is an interview process and a judge will usually also look at the written work of the applicants before selecting his or her clerk. Clerks are generally appointed for 2 years but 1 year appointments may be made in order to avoid having too many clerks leaving the court at the same time. It is obviously desirable that there should always be at least 2 clerks who have already had the experience of working in the court for a year and can guide those in their first year.

The use which each judge makes of a clerk varies according to the work habits of the judge. But I should say at once that they do not write the reasons for judgment! My impression (and my own practice) was that the clerks did not participate much in the leave process unless requested to do a particular field of research.

In preparation for the hearing of an appeal one or more of the clerks is asked to prepare a memorandum summarising the case and directing attention to the issues, perhaps venturing comment on how they could be resolved. That may well lead to a request by a judge for further research by his or her clerk. Before the hearing the judge and the clerk discuss the case in some detail in light of the written submissions, trying to identify the key points on which, as it then appears, the decision of the court might turn. After the hearing and a conference on the case by the judges at which clerks are not present (they are never invited to sit in on conferences), a judge tasked with preparing reasons for judgment will either ask for further work by his or her clerk on a matter arising from the hearing or the conference or will begin writing the reasons. Once they are in draft, the clerk will be asked to undertake a critical reading and come back with suggestions for improvement and perhaps with additional authorities to support the position being taken in the draft, which might be revised several times before being circulated to the other judges. Their suggestions and the reasons drafted by other judges (concurring or dissenting) are also given to the clerk for comment.

38 The Chief Justice has 2 clerks and the other judges each have 1.
Before any judgement is delivered it is proofread by the author’s clerk and again by another clerk (ironically known as the “blind clerk”) who has not been much involved in the post-hearing process and will bring a fresh set of eyes to the textual scrutiny. Sad to say, despite all this attention, it is far from unknown for clerical errors to be detected after delivery of judgment, even at the stage when it is being readied for publication in the law reports.

**Quorum – Acting judges**

The Act provides that 5 judges must sit on each appeal, although the quorum can drop to 4 (as has happened), or even to 3, if a judge or judges become unavailable shortly before the hearing or while judgment is reserved. But the court cannot make a fixture if it is known that less than 5 judges will be able to sit. Normally there are only 5 permanent judges. The problem of achieving a quorum could largely be overcome if the sixth position provided for under the Act were to be filled all of the time, but that would mean that, unless the court were to sit with an even number of judges, a choice of which of them dropped out for a particular case would have to be made, with the attendant risk that the losing litigant, with no ability to appeal further, might question how that choice had been made. Furthermore, at this stage of its development the court does not in my view have a sufficient workload to justify the appointment of a sixth judge except when a retirement is imminent; early removal of the new appointee from his or her work in the Court of Appeal helps minimise the number of conflicts arising when cases arrive from that court.

In a small country like New Zealand disqualification of a judge because of personal association with a litigant is not uncommon. As well, because the Court of Appeal is quite small and, unlike Australia or Canada, virtually all cases come to the Supreme Court via that one court, there can be an acute problem immediately after a judge has been promoted, especially if, as has happened, that coincides with the absence of one or more of the other permanent judges.

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39 Supreme Court Act, s 30.
40 s 17(1).
41 The absences that have caused the most difficulty in the past, because they coincided, were Wilson J’s decision to cease sitting on appeals pending resolution of an inquiry by the Judicial Conduct Commissioner concerning the Saxmere case (and then to retire) and Tipping J’s unavailability at that time because of a serious family illness and bereavement. Judges are usually not absent by reason of taking sabbatical leave as the Court goes into recess twice a year to cater for this.
The solution provided by the Act is for retired Supreme Court or Court of Appeal judges under the age of 75 to be able to be appointed as additional judges to sit on appeals (but not leave applications) when permanent judges cannot.\(^{42}\) Having been a permanent judge for over 8 years and now, surviving my first statutory senility, appointed as an additional judge, I am in a position to evaluate these arrangements. I do not believe they work well. There are 2 problems. First, there may not be enough of us at any given time to allow for lengthy absences from New Zealand, illness and unwillingness to continue serving as a judge after retirement. At the moment, and until Justice McGrath’s retirement next year there are only 3 additional judges, of whom 2 are not likely to be available either at all or for large parts of the year. There is an understandable reluctance to pick and choose between retired Court of Appeal judges to fill vacancies. Secondly, and this is my greater concern, when someone has retired they are not necessarily keeping up with changes in the law, especially to statute law, they may be living at a distance from the court and they may have no facilities or enthusiasm for judgment writing. That puts an extra burden on the permanent judges who may get limited input from an additional judge. There is a danger too that additional judges could regard themselves as merely making up numbers, as I suspect happens sometimes when retired judges sit on the Privy Council.\(^{43}\)

It seems to me that the better solution for filling the temporary gaps in the Supreme Court’s quorum would be to enable the court to call up the most senior unconflicted and available current Court of Appeal judge. The Bar Association has in the past strongly opposed this course but I thought at the time they were wrong and further experience, from both sides of the fence, has merely strengthened my opinion. Of course, I understand the theoretical point that the promoted judge may act in a way that will not prejudice a chance of being permanently promoted. But that is (rather insulting) theory and I am certain it does not happen now when a judge sits in the Court of Appeal.\(^{44}\)

\(^{42}\) s 23 Supreme Court Act.
\(^{43}\) This may be happening less frequently – only one case listed for the current (Michaelmas) term will involve a retired judge.
\(^{44}\) Since writing this I have found in cl 109 of the Judicature Modernisation Bill now before Parliament provision for a Court of Appeal judge to be appointed by the Chief Justice, in consultation with the President of the Court of Appeal, to sit on a Supreme Court appeal.
Lack of specialist appellate bar

The Supreme Court has been to a degree handicapped in its work by the variable quality of the arguments presented to it. Quality of judgment tends to reflect not only the quality of the judges but also the quality of the counsel heard by the court. Other final courts rarely have to hear from anyone other than respected senior counsel. But although New Zealand’s best counsel are the equal of those who appear regularly before the Supreme Courts of the United Kingdom and Canada and the High Court of Australia, New Zealand does not yet have a specialist appellate bar who will appear on both sides in every case and can be relied upon to put forward the best possible arguments for the parties. Too often, I was left feeling that there might be more to a case than counsel had put forward.

The court cannot refuse leave, in a case that would otherwise be granted leave, because it is unlikely to get from instructed counsel submissions that will do justice to the case. Nor can it make leave conditional on senior counsel being brought in or the appointment of an amicus to present argument for someone already represented. Occasionally the situation might be helped by an intervener but that event cannot be depended on.

In time, no doubt, a recognised appellate bar will emerge and those who are not up to the requisite standard will cease to appear in the court. It may be necessary for the court to be quite blunt with them if they do not – something I have been told has long since happened in Australia. A partial solution may be for the legal aid authorities to restrict grants of aid for Supreme Court cases to senior counsel and others certified by the court as competent to argue appeals before it.

Some minor suggestions

(a) Recall applications

In the last 4 or 5 years there has been a steady rise in the number of applications to recall the judgments of the court. The vast majority are vain attempts to have the whole matter reconsidered. I can remember only one instance where the criticisms made by counsel of a leave judgment had some merit, but even then they did not persuade the leave panel to reverse its decision and grant leave.
Almost always the applicant seeking the recall is a litigant in person, often acting in a manner which justifies the epithet “abusive” in both senses of the word. Sometimes the application even seeks recusal of one or more judges in an attempt to “stack” the court if there is a re-hearing.

The time of all the judges who sat on the appeal or application for leave should not have to be taken up with applications that plainly do not raise any sound criticism of the original decision, and that the rules of court should permit them to be dealt with peremptorily, without the giving of further reasons. A single judge should be able to direct the registrar to tell the applicant that recall has been declined, and the rules should make that decision final. The present situation in which the court issues a further judgment by all those who have considered the case is a complete waste of the court’s resources, nor is it ever likely to appease an abusive litigant. Some of them have been known to make successive applications to recall a judgment and then to recall the (unsuccessful) recall judgment!

(b) Sequencing of reasons

The court has to date followed the traditional practice that, if more than one judge has written on a case, their reasons appear in their order of seniority even where the reasons of someone other than the senior judge represent the view of the majority. In contrast, the Supreme Court of the United Kingdom gives the first place to the reasons which attract the greatest support, followed by any concurrence and only then do the reasons of a dissenter appear. This is much clearer and avoids a journalist or other reader falling into the error of believing that what is stated in the first judge’s reasons necessarily reflect the views of the court.

Conclusion

After 10 years the Supreme Court has passed through its formative stage and is now solidly established at the top of our court system. I believe it has been a success and has brought to the system a dimension that was largely absent before 2004. I believe also that the court now
has both professional and public acceptance. As I said at the outset of this paper, however, I leave it to others to assess the jurisprudential contributions of the court.