# NOTES AND COMMENT

## The Tort of Refusing to Contract?

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### 1 *Stininato* and *Stratford Racing*

There are now two decisions of the New Zealand Court of Appeal where the Court has indicated, if not held, that a person can at common law be compelled to make a contract with another party. Not only that, but people can be compelled to associate with one another by being required to admit as a member of a club or society persons whom they do not want to admit, if the court adjudges their conduct unreasonable. The decisions are *Stininato v Auckland Boxing Association Inc*,[1] and *Stratford Racing Club Inc v Adlam*.[2]

It is probable that a common law duty to contract-and-associate need not have been dealt with in *Stininato*, since the defendant was a member of a statutorily-sanctioned oligopoly, where the statutory hook would have permitted judicial oversight of the Association's conduct. And the issue need not have been addressed in *Stratford*, since the applicant had been a member of the Club and had grounds for arguing that he had been improperly excluded. He had a contractual hook, from which to argue that the club committee had acted ultra vires, and in breach of fiduciary duty, both in relation to him and in the general conduct of the club's affairs.

Technical though such hooks may seem, they are crucially important. They both legitimise and control judicial intervention. For present purposes, what matters is that the judges in these two cases indicated a preparedness to throw off those fetters, and assert a general common law jurisdiction.

Though it be painted on an inch thick, nothing can disguise the lack of pedigree of this jurisdiction, and the radicality of these well-meaning interventions. Nor should we see the phrase "judicial review" in this context as involving anything less than the creation of a new tort. No breach of statutory or contractual duty is involved. The Court in *Stininato* left open the possibility of damages for breach of the duty.

There are a number of objections. Three are covered here.

1 [1978] 1 NZLR 1.

2 [2008] NZCA 92. For a more traditional approach to judicial review of private bodies, see *Hopper v North Shore Aero Club Inc* [2007] NZAR 354 (CA).

## 2 The Objections

### *2.1 Non-democratic change to the common law*

To the extent that a tort of refusing to contract, even one that applies only to certain people or organisations, is inconsistent both with specific common law precedent and with the fabric of the common law (as I believe it is), there arise fundamental constitutional issues about the role of judges in our society.

There can be no objection to judges "making law" in the sense of deciding a legal issue where there is no positive law (ie no ruling, unequivocal statutory provision or binding principle on point). They are, indeed, obliged to make a ruling in such situations. But there can be objections to judges changing positive law.

To the extent that curial law-changing may be a necessary evil, it needs a far more careful justificatory and methodological process than some judges currently adopt. And certainly one better than that adopted in *Stininato*. Not only is law change of this sort without democratic sanction, but our curial mechanisms mean that there need not even be consensus amongst the judges as to the change. Only those judges who get to hear the matter get to decide. Having a court of final appeal works well as a mechanism for settling indeterminate points, but, even allowing for lower court hearings, a bare majority of a final court is a poor mechanism for deliberate change in the law.

The old Court of Exchequer Chamber came closer to an appropriate mechanism. A similar process of consultation was adopted in the famous case of *Allen v Flood*,[3] a case pertinent to the current topic where the House of Lords called on the assistance of eight Queen's Bench judges. The result was a highly divided judiciary, which in itself might have supported the conclusion of the 6-3 majority of the House of Lords not to expand the reach of the common law.[4]

Fundamental though these issues are, they are not my main objection to a tort of refusing to contract.

### *2.2 One law for some, and another law for others*

The more specific objection to this egregious tort is that it takes the common law into serious regulation of the distribution of power within society. Hence, the new tort applies not to everyone, but only to the powerful, and is premised on their abuse of power.

The common law, with minor qualifications, has not attempted to regulate the impact of the distribution of economic power. *No* one may defame another, *no* one may negligently damage another's person or tangible property, *all* persons must keep their contracts, and so on. Repackaging the new tort as "no one may unreasonably refuse to contract", or that "organisations cannot refuse to contract" cannot disguise the fact that the attributes of the defendant are at its core, and that discrimination is at play.

In philosophical terms, the focus of the common law is on attaining corrective justice, not distributive justice. To the extent that distributive concerns figure in common law rules, they are largely presumptions that are subject to subordination by private ordering. Why would this be so? Attaining distributive justice is intrinsically political. It is, inter alia, what we have governments for. Not only

3 [1898] AC 1.

4 For a more detailed discussion of the issue, see P Watts, "The Judge as Casual Lawmaker" in R Bigwood (ed), *Legal Method in New Zealand*, Wellington, Butterworths, 2001, at p175.

might one expect the solutions to alter regularly with changes of the democratic will, in a way that the common law is not set up to do, but it may indeed be desirable for some rules to be cyclical.

Even where one might expect some sort of consensus, once the judges self-engage with distributive justice there will be little stopping point to their being invited to intervene by groups frustrated with a lack of political progress. One cannot imagine courts ordering the nationalisation of businesses on the application of the Crown or other litigant, but once one loses all humility by taking upon oneself the task of regulating the exercise of others' privileges then little can be ruled out.

It is important, therefore, that the judges deny to themselves the power to discriminate amongst citizens, or even types of person, in common law rules. It belittles the neutrality of their role, and politicisation is almost inevitable. One is likely to find, for instance, that jockey clubs are pushed around, but that schools which forbid students playing for teams as part of a scheme to prevent the rich schools over-recruiting talented sportspeople will be left to their so-called freedoms.

### *2.3 The road to despotism—led by the judges*

Not everyone would agree that the foregoing is the strongest objection to a tort of refusing to contract. Others would point out that this is a tort of omission, and one that interferes with fundamental freedoms. The freedom to contract necessarily implies the freedom not to contract, and the freedom to associate necessarily implies the freedom not to associate. No one, powerful or not, should have to justify why he or she does not want to contract or associate. These freedoms, they would argue, should bind legislatures, let alone judges.

In this regard, in the *Stratford* case Chambers J (for a panel that included John Hansen and Heath JJ) was, with respect, plainly wrong when he stated in relation to the New Zealand Bill of Rights Act 1990 that it was "the disappointed applicants [for membership] who have been unfairly deprived of their right to associate with other members of the club".[5] No one has the right under the 1990 Act that others befriend them. Chambers J's interpretation turns the Act on its head. Furthermore, to the extent that s 3 of the 1990 Act binds the courts in their judgment-writing, as opposed to the way they conduct court proceedings, it is suggested that the judge was wrong to suggest that there was an inconsistency in the appellants' invocation, as private persons, of the 1990 Act. The scope of s 3 is, however, unsettled, and this writer is no advocate for construing the section as requiring the judges to reinterpret the common law whenever it is perceived to be inconsistent, let alone out of line, with the Bill of Rights.

It should also be observed that in *Sky City Auckland Ltd v Wu*[6] Chambers J, at first instance, went so far as to hold that anyone who runs a business has a duty to contract with all-comers unless there are reasonable grounds for refusing to treat. This too shows little regard for individual autonomy as a value, at least in relation to business-owners.

There is much to be said for leaving to the conscience of the individual, or the group for that matter, whether or not to withhold services from the supplicant. The freedom to behave badly, and to behave well without having the law tell one that one has anyway to do so, is a valuable aspect of individual autonomy. Further, any abuse of rights doctrine that might be invented (or borrowed from civilian legal systems) to constrain these freedoms is unlikely to be able to reach the reasons that might have caused the defendant to appear to be behaving badly. Often, the complainant may be no more respectable than

5 [2008] NZCA 92, at para 59.

6 [2002] NZAR 441, reversed on appeal: [2002] 3 NZLR 621.

the defendant, and indeed may be worse (he may have, for instance, molested children but the defendant cannot prove this and does not feel the issue can be litigated). Anyway, to constrain these freedoms in this way is really to abrogate them, because who needs the freedom to behave well?

Even so, I would not found my case on these freedoms, or at least not on the freedoms alone. The common law does not provide some sort of political ideal, as opposed to a starting point. Some judges may have seen it that way, and some commentators may view the common law as sufficient, but for the most part there has always been a dual system of a bedrock of common law added to with statutory regulation. Concentrations of power and economic inequalities raise political issues that legislatures should be free to address, and I have little enthusiasm for giving judges a gate-keeping role through a bill of rights.[7] In short, there may be no room for nanny judges, but there is a place for a nanny state. There certainly is not room for a regime where judges and state vie as social reformers.

## 3 The Prior Law and Its Mistreatment

A good starting point as to the common law, though there are other cases, is *R v The Benchers of Lincoln's Inn*.[8] The applicant for mandamus in this case was seeking to become a member of Lincoln's Inn. He was declined membership without a hearing, and when he sought reasons was given none. It is not apparent that there could have been any objection to him, though of course the judges may have been privy to more than they let on. The applicant, appearing in person, is reported as saying:[9]

> "If this Court has no jurisdiction, this consequence will follow, that the benchers may arbitrarily refuse to admit as a member of the society any individual who is under no personal disability, and thereby prevent him from practising the law as a barrister . . . ."

The Court of King's Bench, comprising four judges of very considerable eminence, held that there was nothing they could do. It is worth setting out some of the statements:

> Abbott CJ (later Lord Tenterden): "I am of opinion that this Court has no power to compel the benchers of this society to permit any individual to become a member of the society, or to assign any reasons why they do not admit him. There is not any instance where a mandamus has been applied for to compel any such society to admit a person a member. . . . The very term 'voluntary society' imports in it a discretion in the individuals composing it to admit or reject members as they please."[10]
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> Bayley J: "Every individual, however, has not an inchoate right to be admitted a member of any of these societies. They make their own rules as to the admission of members; and even if they act capriciously upon the subject, this Court can give no remedy in such a case; because in fact there has been no violation of any right."[11]
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> Littledale J: "In all the cases that have come before the Judges, the persons applying have been themselves members of the society. . . . But here, the Court is called up on to control the society in the admission of their members. Now, as far as the admission of members is concerned, these are

7 Indeed, rights protection in the United States constitution has, I believe, driven the courts there to misstate the common law in order to mitigate the rigidity of the constitutional protection of property rights. Hence, the fiction of the concept of "businesses affected with a public interest" that figures in United States case law: see P Watts, "The Forging of Public Claims on Private Businesses" (2003) 119 LQR 380.

8 (1825) 4 B & C 855; 107 ER 1277.

9 Ibid, at p 857; at p 1278.

10 Ibid at p 858; at p 1278.

11 Ibid, at pp 859–860; at p 1279.

> voluntary societies, not submitting to any government. They may in their discretion admit or not as they please, and this Court has no power to compel them to admit any individual."[12]

Holroyd J delivered a similar judgment.

This case, in its ratio, is directly inconsistent with the dicta in *Stininato* and *Stratford*. Livelihood was as much at stake in the *Lincoln's Inn* case as any other. To the extent that this case represents the state of English law as at 1840, which it does, it became part of New Zealand law at that date, and prima facie remains New Zealand law, owing to s 5 of the Imperial Laws Application Act 1999.

Yet neither in *Stininato* nor in *Stratford* was *Lincoln's Inn* referred to. Instead, in *Stininato* heaviest reliance was placed on a series of decisions of Lord Denning MR, admittedly reached with the concurrence of other members of the English Court of Appeal. While perfectly sound on orthodox areas of the law, Lord Denning recognised no bounds to his jurisdiction, and to his abilities to set the world to rights. If an attitude like his were widespread, the golden goose of respect for the judiciary would be slaughtered. The Court in *Stratford* appears to have thought that citation of authority was unnecessary, though one expects that *Stininato* was in mind.

The most significant of Lord Denning's decisions is *Nagle v Feilden*,[13] concerned with a jockey club's refusal to admit women trainers. Lord Denning exploited the fact that only a strike-out was at issue, and that therefore no hard decisions had to be made, to leave the door open to the radical notions that have been taken up in *Stininato* and *Stratford*. The principal part of the reasoning in *Nagle* was demonstrably unsound. In particular, the Court perverted the doctrine of restraint of trade, which at most involves the court in declining to give its aid to certain types of contractual provision,[14] into suggesting that powerful parties can be *forced* to offer work to someone. The difference between a court declining to enforce a contract, and compelling a contract is night and day. It is true that the restraint of trade doctrine is directed at promoting distributive justice, but it is really only a limited case of the courts withholding the court's power from the powerful, and not one imposing duties upon them. Lord Denning's attempt, therefore, to set up the *Taylors of Ipswich* case[15] against the *Lincoln's Inn* case was a sleight of hand.

Using the law to assist to change people's prejudices, which was what was at issue in *Nagle*, is a job for the legislature, not for judges. Because people's deep-seated sentiments are at issue, careful thought needs to be given to what should be targeted, and to how best to frame remedies and sanctions, which will ultimately be penal. Not only is litigation not the means to do this, but judges who take the task upon themselves can fairly be charged with sanctimony. Hence, we have the provisions of the Human Rights Act 1993.

The fallacies of *Nagle* did not escape the attention of Hoffmann LJ in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*.[16] This was a case where it was held that any application of the rules of natural justice to the Jockey Club, which held a virtual monopoly over racing in England, but solely as a result of the private accumulation of business, was dependent on a defeasible implication in contracts of membership. There was no other source of jurisdiction. Because the Aga Khan was a

12 Ibid, at pp 860–861; at p 1279.

13 [1966] 2 QB 633.

14 As was the case in *Blackler v NZ Rugby Football League Inc* [1968] NZLR 547, relied upon in the *Stininato* case.

15 (1614) 11 Co Rep 53a; 77 ER 1218.

16 [1993] 1 WLR 909.

member, this meant that the Court of Appeal did not have to address the position of non-members. It is clear, however, that Hoffmann LJ could not see any source of jurisdiction for non-members. He stated:[17]

> "There is an improvisatory air about [*Nagle*] and the possibility of obtaining an injunction has probably not survived *Siskina v Distos Compania Naviera SA* [1979] AC 210."

Of a piece with *Nagle* was Lord Denning's attempt in *Lloyds Bank Ltd v Bundy* to foment the idea that the common law has a doctrine controlling inequality of bargaining power.[18] The validity of this idea, which would also have involved the court dabbling in distributive justice, was refuted by the House of Lords in *National Westminster Bank plc v Morgan*.[19]

In *Stininato*, Cooke J also relied upon what he said were the obiter dicta of a majority of the House of Lords in *Weinberger v Inglis*.[20] It is not clear what is to be made by counting the dicta of the House of Lords on a point so fundamental as this, in a case where it appears that the *Lincoln's Inn* case was not cited, and the issue of forcing membership was not really discussed. Furthermore, it is not at all clear that there was a majority that took the views attributed to them by Cooke J, and certainly not one that could extend to a duty to admit newcomers to a voluntary organisation.

In *Weinberger*, the substantive defendant was the London Stock Exchange, which at that stage performed no statutory functions.[21] In the midst of the First World War, a vocal minority of members put pressure on the Committee of the Exchange not to renew the membership of members of German birth. The Committee declined to adopt a blanket rule, but did exclude from renewal some 57 out of 107 German-born members (German-born applicants were expected to make a special case for continued inclusion). Amongst those excluded was Mr Weinberger, who had been a naturalised British citizen since 1892, and had been an unimpeachable member of the Exchange for 21 years. His wife was British-born (though of German origin) and four of her brothers had been fighting in the War on the British side. Of those brothers, two had been killed in service, one was partially blinded in combat, and the fourth was still fighting in France. His sons were in the officers' training corps, being too young to fight, and his wife and daughters were actively engaged in supporting the war effort. While it was plain that their Lordships had great sympathy with the appellant, they considered that, there being no evidence of bad faith on the part of the Committee, the Court could not go behind the Committee's decisions.

Lord Birkenhead LC indicated, but not much more, his antipathy to an argument that the Exchange was totally beyond the Court's jurisdiction. His dicta extended, however, only to those who had been members, rather than to newcomers. And even then he thought the source of any rights would have to be an existing contract. He stated:[22]

> "Had the inquiry been pursued [namely that the Exchange could act exactly as it pleased], I should have thought it necessary to consider whether the member had not in addition contracted with the Committee to purchase the expectation that he would in due course be re-elected, unless the

17 Ibid, at p 933.

18 [1975] QB 326.

19 [1985] AC 686.

20 [1919] AC 606.

21 Cf *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815, in itself a problematic case.

22 [1919] AC 606, at p 616.

Committee concluded in good faith and after considering the matter properly, that he was not eligible for re-election."

Lord Parmoor, perhaps, took a stronger line, but again his remarks were addressed only to members whose applications for renewal had been declined. Lord Atkinson and Lord Buckmaster seem to me not to have expressed an opinion on the Exchange's contention that it was a body not subject to judicial oversight. On the other hand, Lord Wrenbury, the former Buckley LJ, while sympathetic to the appellant's plight, made it clear that he was doubtful whether the appellant had standing to bring the proceedings.

## 4 Common Callings, Lord Hale, Conspiracy to Injure, Unconscionability, and Privilege of Incorporation

A word or two should be addressed to other material that has been promoted as giving doctrinal validity to judicial control of private power.

### *4.1 Common callings*

The most significant makeweight in the case for a common law of distributive justice is the ancient law dealing with common callings, relating principally to carriers, ferries, and innkeepers. The great majority of the cases are directed merely to the scope of implied terms in these businesses. To the extent, however, that these terms are not based on genuine agreement and cannot be contracted out of, they are examples of distributive justice. There are also some cases that suggest, if not hold, that those in common callings cannot withhold services.

The origins and justifications of this law are obscure. One major weakness of recourse to it to justify a general doctrine regulating private power in modern times is that the law is so ancient that it pre-dates the separation of powers in the British constitution. In other words, it arises at a time before the King's Bench judges saw themselves as separate from the King's executive. In all events, from the time of *Newton v Trigg* in 1690,[23] it was plain that the law of common callings was not of general application. Eyres J stated:

"[Innkeepers] do not deal upon contracts as others do; they only make bills, in which they cannot set unreasonable rates; if they do, they are indictable for extortion, which other sellers are not."

As for the right to work at common law, referred to by Lord Denning in *Nagle*, it has no pedigree, let alone an ancient one. One ancient view, which it is hard to square with, is that only the charity of others, not legal right, can supply the indigent's need for meat and drink.[24]

### *4.2 Lord Hale*

Support for a common law power of business regulation is often placed on the extra-judicial writings of Lord Hale CJ from the late 17th century. As I have explained elsewhere,[25] Lord Hale was founding his material on *state-founded* monopolies or oligopolies (the monopoly may be derived from prerogative grant or from statute). Because the monopoly arises under state privilege, it is legitimate for the courts to infer that the state would intend abuses of the privilege to be controlled.

23 (1690) 1 Shower's KB 268; 89 ER 566.

24 *Dive v Maningham* (1550) 1 Plowd 60, at p 68; 75 ER 96, at pp 108–109.

25 Watts (2003) 119 LQR 380. But cf M Taggart, "Public Utilities and Public Law" in P Joseph (ed), *Essays on the Constitution*, Wellington, Brookers, 1995, at p 222.

### *4.3 The tort of conspiracy*

The tort of conspiracy to injure by lawful means looks to be founded in distributive justice; the combination of persons, which the tort requires, is unlikely to be successful in its object of causing economic damage to the plaintiff if it does not possess some sort of economic power. To the extent that the putative wrong of refusing to contract applies only to groups or organisations, the tort of conspiracy to injure might be thought to support an action applicable to societies.

This is a decidedly anomalous tort, as the dicta of Lord Diplock for the House of Lords in *Lonrho Ltd v Shell Petroleum Co Ltd*[26] make clear. Its very recognition in *Quinn v Leathem* was highly political.[27] *Quinn* was a last-ditch attempt by certain judges to control the power of trade unions, following the confirmation by the House of Lords in *Mogul SS Co Ltd v McGregor, Gow & Co*,[28] *Bradford Corp v Pickles*,[29] and *Allen v Flood*[30] that the common law does not have an abuse-of-rights doctrine, even where malice is in play. It is not at all to be wondered at that *Quinn's* venture into the field of distributive justice resulted swiftly in legislative protection of trade unions under the Trade Disputes Act 1906.

The tort requires action, not omission, and it requires a predominant object of causing injury for its own sake. A yet further extension of the law, therefore, would be needed before conspiracy could embrace the dicta fomented in *Stininato* and *Stratford*. Thus, a refusal to contract would be an omission for these purposes, and would be beyond the scope of the existing precedents. As for improper purpose, most high-handed as the conduct of the committee of the jockey club in *Stratford* was, for example, the committee appears not to have been motivated by a desire to injure, but rather a single-minded and misguided belief that only the existing personnel knew what was good for the club.

### *4.4 Unconscionability*

Equity's "unconscionable bargains" and "undue influence" doctrines can be quickly dismissed as sources of authority for present purposes. For one thing, the doctrines are not concerned with a lack of bargaining power (which was the immediate impetus for the House of Lords' comments in *National Westminster v Morgan*[31]), but with the protection of persons who have sub-standard levels of judgment, either temporary or permanent. Claimants may indeed have great bargaining power, for example by being the owner of a strategically valuable property, but be unaware that they possess the power. Also, the doctrines allow the claimant only to back out of a contract or other transaction, and could not be used to require a defendant to make a contract.

### *4.5 Implication in statutes and charters of incorporation*

One other argument might be that the privilege of incorporation, under statute or charter, justifies judicial control at the instigation of non-members. This involves a far-fetched implication. It is, thus, inconceivable that the legislature could have intended ordinary trading companies to be required to admit new shareholders, or otherwise to be subject to complaint by non-members as to the conduct of

26 [1982] AC 173, at pp 188–189.

27 [1901] 1 AC 495. There were dicta in earlier cases, but it was *Quinn* that gave the tort life.

28 [1891] AC 25.

29 [1895] AC 587.

30 [1898] AC 1.

31 [1985] AC 686.

their affairs.[32] There is no reason to think the position is different with incorporated societies; eccentricity and exclusiveness are almost hallmarks of them. Anyway, economic power is neither intrinsic to, nor confined to, corporations. The powerful Lincoln's Inn, the subject of the *Lincoln's Inn* case, has been an unincorporated body since it was founded in the 1400s.

## 5 Conclusion

The courts should not confer on themselves a jurisdiction to control conduct that would otherwise be lawful on the basis that the defendant, alone or in combination, wields too much power. Problems of might should be left to the legislature to deal with, or, in the case of abuse of powers within clubs and societies, to actions brought by members to enforce express or implied undertakings by those who assume management of the organisation. In particular, the courts do not have an inherent jurisdiction to compel private persons or bodies to make contracts with non-members.

Where a statutory or contractual hook can be found, then the reach of the Court's powers can be quite extensive, though always subject to contrary indication in the relevant statute or contract. In most private societies there will usually be some altruistic members who are willing to challenge arbitrary and self-serving conduct by the management of the organisation, as indeed was the case in *Stratford*. Standing should not be extended to outsiders.

*This note was accepted for publication on 10 May 2008.*

32 The radical end of the corporate social responsibility movement would have the judges socialise the corporate form, but this too involves the perversion of the common law. See P Watts, "The Attempt to Nationalise the Company–Introducing 'Stakeholder' Ideology into the Foundations of Company Law" [2005] CSLB 103.