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# Address On The Retirement Of The Honourable Justice Handley AO

**THE SUPREME COURT**
**OF NEW SOUTH WALES**
**BANCO COURT**

**SPIGELMAN CJ**
**AND THE JUDGES**
**OF**
**THE SURPEME**
**COURT**

**Friday 15**
**December 2006**

FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE K R HANDLEY AO
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES

1 **SPIGELMAN CJ:** We gather here today to commemorate a significant landmark in the legal career of the Honourable Justice Kenneth Handley who is by force of statute required to retire as a fulltime judge of this court. Over a period of more than thirty years at the bar and seventeen years in this court your Honour has been one of the most accomplished all round lawyers it has ever been our privilege to know. You have been and remain the quintessential lawyer's lawyer.

2 Your Honour's encyclopaedic knowledge of the law is of such breadth as to inspire admiration by lawyers throughout Australia and in England. Perhaps your most notable characteristic, to which anyone who has seen you at work will attest, is your astonishing recall of the detail of cases and of the order of events in times past. This extends not only to the precise volume of the Commonwealth Law Reports, and often enough the very page, on which a principle or a telling phrase is to be found but also to the decisions of the higher courts of England extending to obscure volumes reporting Privy Counsel cases and Indian appeals of the late nineteenth century.

3 No-one who appeared in the Court of Appeal over the last seventeen years was in any doubt of the significance of the single volume with its single place mark of a report, not on anyone's list of authorities, which your Honour strategically placed before you as the case commenced or which your Honour called for with precise reference during the course of a hearing.

4 The breadth and depth of your knowledge of the law is reflected in your articles in learned periodicals both here and abroad and in three books. As Justice Dyson Heydon said recently, when launching your latest book on *Estoppel*, for a sitting judge to have produced three volumes of such high scholarship "is an achievement which must be regarded as unique in the strictness sense".

5 Your legal learning is, of course, also reflected in the judgments your Honour has delivered over the course of seventeen years, many of which will stand the test of time and which as a collective body of work will long remain a monument of your Honour's term of office. Your judgments manifest your prodigious work ethic, your intensity of application to the task at hand, and your unerring eye for the point.

6 According to a computer search during your Honour's term of office you have sat on more than one thousand five hundred published cases over ninety per year. A sample of these cases suggest that well over fifty per cent involve substantive judgments, that is many more than fifty fully reasoned judgments per year. All of the others however required your Honour's detailed attention and received it. The author of the main judgment, as my personal experience attests, almost always benefited considerably from your Honour's suggestions and references, not only, but not least, in errors of grammar and punctuation.

7 Your Honour has always been a strong team player, a quality much appreciated by your fellow

judges.

8 There are too many judgments of your Honour's to summarise on an occasion such as this. They are without exception of the highest order, succinct, to the point and expressed in clear elegant prose. That they are also lawyerly to a fault is not a criticism. That after all is the principal characteristic that an appellate court judgment ought display.

9 There is no area of the procedural or substantive of law to which your Honour did not contribute. You have written significant judgments on company law, equity, insurance, valuation, real property, tort, contracts, and the full range of statutory regimes with which this court is concerned including workers compensation, motor accidents, limitation of actions and, in recent years, building industry security of payments and the Civil Liability Act. Across the entire field of this court's jurisdiction your Honour has manifested a reliable and sure judgment.

10 Your Honour's contribution extended well beyond that of the judgments you wrote. In this Court your Honour served as chair of the Education Committee and as a member of the Policy and Planning Committee, making an important contribution to the quality of the knowledge of your fellow judges, and therefore to the quality of our work, and to the effective administration of the Court. You were always a source of wise counsel to me and I intend that to continue.

11 Consistently with the restraints upon all of us who adopt a judicial life, your Honour has made a major contribution to the community. Most notably as Chancellor of the Anglican Diocese of Sydney for twenty-three years and on the Council of your old school, Cranbrook, from 1974, since 1999 as President. To these tasks you brought the same admirable qualities that you also brought to the legal profession as a barrister and as a leader of the bar, notably as President of the New South Wales Bar Association, and as President of the Australian Bar Association and to your work as a judge.

12 I refer to your capacity for hard work, your conscientiousness, your strong sense of civic duty, your personal loyalty, generosity and trustworthiness. These qualities are all such that association with you in any endeavour is a pleasure. My only hesitation arises from the profound suspicion that must necessarily be held of a person who does not appear to have any enemies.

13 Your Honour's strong sense of responsibility and loyalty has never been better displayed than in your long association, commencing in your youth, with Fiji. It is regrettable that today it is again topical to recall your Honour's service as a member of the judiciary of Fiji after the last attempted coup.

14 You hold a commission on the final Court of Appeal of that nation, together with two other judges of this Court of Appeal. Furthermore, two recently retired judges of this court continue to hold commissions on the Court of Appeal of Fiji, being the intermediate appellate court of that nation, upon which you also served prior to your elevation to that Supreme Court.

15 In February 2001 your Honour sat as one of the judges of the Fiji Court of Appeal to determine whether the 1997 constitution of Fiji had been abrogated by the military appointed government that took over in May the previous year. Together with your fellow judges you arrived at a time of considerable tension in Fiji, personally protected by the army and special branch, amid a high level of security at the airport, at your hotel and in and around the court. This included snipers on the roof of the court building and a personal escort of two special branch officers when out walking, to whom was added a jeep full of soldiers when you went to church, to face the particular hazards of that expedition.

16 The court unanimously held that the Constitution remained in force as the supreme law of Fiji. The military installed government accepted your decision and resigned. The new President dissolved Parliament, called a general election, albeit reappointing the government on a caretaker basis. This was the most dramatic possible affirmation of the significance of the rule of law. It is a contribution you may be called upon to make again and, one trusts, to do so soon. I know from my own direct experience when I myself sat as a judge of the Supreme Court of Fiji, on a constitutional case of considerable significance but with a lower sense of threat than you experienced, just how much your own role was appreciated in that nation.

17 This occasion should not pass without an acknowledgement of the contribution to the collegial life of the court that has been made by your wife Di. Long suffering is an adjective that would come to mind, but for the fact that she has never manifested any indication of suffering at all. She has shared many of your own interests and qualities, including your strong sense of civic duty and a very real

understanding of the life of the profession and the significance of the judicial role.

18 Your Honour, I know I speak on behalf of all of the judges of the court when I thank you most profoundly for your contribution to the law and to this court, and to the way that you and Di have enriched all our lives.

19 I and we look forward to a continued association because of your decision to accept appointment as an acting judge. I could not be more pleased personally that your Honour has agreed to do so. You will I am sure be assailed by tempters and temptresses bearing highly lucrative offers to devote yourself entirely to commercial arbitration. I trust you will respond in your inimitable style: “Get thee behind me Satan”.

20 I know you would not be retiring but for statutory compulsion. It would be wasteful, bordering on the ridiculous, if you could not serve as an acting judge for more than three years because of the existing statutory prohibition.

21 The remorselessness of the demographic challenges facing Australia is such that compulsory retiring ages need to be reviewed. Some such age is, of course, appropriate for judges in view of the inability to remove a judge whose decline in powers does not quite reach the required depths. However, as your own energy and mental acuity attests, an increase in the age to seventy-five for judges and seventy-eight for acting judges is now appropriate.

22 At your swearing-in you concluded with a reference to the prophet Micah, explaining that what you would seek to do as a judge was, then quoting from the Old Testament: “to act justly, to love mercy and walk humbly with my God”. You have achieved all three in a long and distinguished judicial career and we all look forward to your continued contribution of the same character.

23 **THE HONOURABLE R J DEBUS MP, ATTORNEY GENERAL OF NEW SOUTH WALES:** May it please the Court. Your Honour it is my great pleasure to speak upon your retirement as a member of the Court of Appeal of New South Wales and to express my appreciation for your valued service to the State. It has always been my understanding that you are regarded by your brethren as an exemplar in the role of a judge of the Court of Appeal and I make the observation that I have now been lobbied three times today, once publicly concerning the statutory age of the retirement of judges.

24 This your Honour is my final swearing out in my role as Attorney General and I do not get one of these myself. I, instead, will be the beneficiary of an Australian Labor Party fundraiser where rubber chicken, cask wine and good humour will abound until the bladders within the casks have been wrung dry. Imagine a Barry McKenzie movie and double it. Enough of my own jealousy.

25 Your Honour you were born in Sydney, the child of Claude and Olwen. You attended Beecroft Grammar School in your primary years before embarking upon secondary studies at Cranbrook School and while you were at school your father worked as the private secretary for the Colonial Sugar Refining Company in Fiji, effectively making Fiji your home away from home during school holidays and as his Honour the Chief Justice has just demonstrated, you maintain a fondness that has not dimmed for that place.

26 You were among the top students in your year at Cranbrook. Some say that it was your overwhelming familiarity with the school library and its contents which gave you the edge. You soared to the lofty heights of librarian and were involved, I am told, in a Discussion Group that in March 1951 sponsored the topic “That the Arts have moved away from the Common People”. It helpfully included a comparison between the Greek theatre in the time of Pericles and modern motion pictures.

27 It is unclear how the common people profited from this discussion, but it is plain to me that it was less illuminating on a practical and ethereal level than the topic in Term two of 1951 “The effect of Clothes on the World Today”.

28 Your Honour reported at the time that the discussion investigated why “showy and unusual clothes are worn with special attention being paid to bodgies, widgies and the wearers of zoot suits. It was said that they were worn to attract attention, raise the wearer’s morale and as an escape”. Unlike the clothes we are all wearing today.

29 Your Honour went to the University of Sydney when you left school and where you maintained your extraordinarily high academic standards. You are remembered as a tremendously learned and popular student who spent almost every spare minute studying. I say “almost” because you were once seen selling tickets for a Bohemian Bacchanal.

30 It is unfortunate that your friends and associates during this time listened closely to what you said, otherwise we would have missed an expression of your most heart-felt desire when you were reported to have said “I want to be like Sir Edmund Herring, a soldier, a scholar and a saint”.

31 Having already taken care of the scholar part you threw yourself wholeheartedly into the University Regiment and you later served with the 17/18th Battalion based on the North Shore.

32 A life long association with the Anglican Church was also kindled during that time.

33 Obviously University life was agreeable for you graduated with distinctions in your Arts Degree and with First Class Honours in Law.

34 The first old Cranbrookian to be appointed as a judge was Bruce Mcfarlan QC, who was appointed to the Supreme Court in July 1959 and you were Justice Mcfarlan’s first associate. You later made the leap to the Bar where you were fortunate to read with Sir Laurence Street.

35 Your career at the Bar, over 14 years as a junior and 17 as a silk, was extremely busy and successful and you appeared on numerous occasions in the High Court and the Privy Council.

36 I am advised that you were also extremely fit and preferred walking up the ten or so flights of stairs to your chambers instead of taking the lift. Your former colleague, Justice Meagher, was not known to share your embrace of the stairwell.

37 In one very substantial litigation exercise I am informed involving several prominent banks, you led a team of barristers, including David Bennett, Arthur Emmett and Tony Meagher, vast amounts of work were completed in a dwelling which became affectionately known as “Camp Handley”. “Camp Handley” was an egalitarian establishment where everyone did their bit, except David Bennett who took the liberty of having smoked salmon shipped in.

38 You were a talented and quite exceptionally hard-working leader who knew how to get the best out of people. You were known to be a dedicated learned and formidable counsel.

39 You were appointed to the New South Wales Court of Appeal sixteen years ago. I am told by those who have served with you that when you arrived in the Court of Appeal you repeatedly demonstrated an encyclopaedic knowledge of case law.

40 Your only rival in this respect was the now retired Justice Michael McHugh. Whenever a point arose you would name the relevant cases and their citations and most disconcertingly of all, the place on the page where the governing principle was stated. His Honour the Chief Justice has also referred to this characteristic.

41 In an age of Google, mobiles and text messages Justice Michael Kirby reminds me that we will never again see such a sharply focused intelligence and recollection of the case books.

42 I am also told that you were a great talker on the Bench. At least one of your colleagues recalls, I should say fondly, that “Justice Handley added an hour to every case I have heard”.

43 You also balanced a heavy judicial workload with some extra curricular work as the author of numerous law journal articles and as the editor of several important works, including the third edition of The Doctrine of Res Judicata and more recently a book entirely on your own entitled Estoppel by Conduct and Election. Neither book threatened the CSIRO Diet book or the latest Harry Potter in sales but they were extremely well received in the legal profession.

44 Your Honour’s dedication to writings that others might cruelly describe as obscure came as no

surprise to me. My exposure to your Honour's powers of persuasion was in equal parts memorable and disturbing. The object of your campaign was not a rule stemming from the Magna Carta or international convention but the principle of set-off. You relentlessly pursued me about it as a hound would a fox. I found it easier to crumple at an early stage in this debate and to yield to your insistence that a savings provision should be inserted in the Imperial Acts Application Act 1969 to include a provision similar to the savings provisions included in the Civil Procedure Acts Repeal Act 1879 in the United Kingdom and the Statute Law Revision and Civil Procedure Act 1883 in the United Kingdom. This meant framing a Westbury Savings provision which preserved the doctrines and principles established by the Statutes of Set-off. It was no easy concession.

45 At the end of this process your Honour I felt not unlike Basil Fawlty did at the end of entertaining his German guests at Fawlty Towers, drained and a little emotional.

46 Your Honour's dedication to the Bar and to your Church and your school are demonstrated through your many contributions. For the Bar in your presidencies of the New South Wales and Australian Associations; for the Anglican Church in many roles but particularly as Chancellor of the Diocese of Sydney; for Cranbrook, on the Council of which you have served from 1974.

47 You have a loving wife, Di, four sons, David who is the founder of Sculpture by the Sea, Duncan, John and Mark, and four grandchildren.

48 I am told that your wife has taught you everything you know about art and, what is more, taught you to appreciate it as well.

49 One thing is sure as the Chief Justice has just demonstrated, you will not be idle in your retirement. Your energies will be consumed in further appearances in this Court but also I hope in your interests of trekking, swimming and art.

50 When looking back at your rich career, no objective person could fail to see one thing, you are a good man and a person who believed in the highest standards. You have made a difference to which we all say "well done" and on behalf of the Bar I thank you for your invaluable contribution to this State.

51 **MS J McPHIE, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES: MCPHIE:** May it please the Court. On behalf of the solicitors of New South Wales, it is a privilege to be given the opportunity to thank and bid farewell to your Honour in his retirement from the Bench of the Supreme Court of New South Wales.

52 I would like to echo and endorse the tributes made by the Chief Justice and Mr Attorney, and join with them and your colleagues today in remembering and celebrating your long and distinguished career, and to wish you well in your retirement, or what we now learn to be your semi-retirement, but so pleased that your experience and style will not be lost to us at this point in time.

53 More than words I think as the attendance of the well wishers here today is the testimony to the esteem with which you are held within the legal profession and the wider community. We have heard of your early education at Cranbrook and it seems that you enjoyed your educational experience so much that you have continued a long relationship with the school. It has been said that you have been a member of the Cranbrook school council since 1974 and president since 1999. Your Honour and your four sons were also educated there, and you were named Old Cranbrookian of the year in 1998.

54 Your Honour was called to the New South Wales Bar in 1959 and we have heard that you rose to the position of Queens Counsel in 1973. Why I re-state that, I would like to embellish, because during this time you built an imposing reputation across fields of litigation, particularly concentrating on equity and commercial work, intellectual property and industrial relations. You became known as an extremely thorough, fearless, persuasive defender of the law, and a strong leader and mentor for the legal profession.

55 Friend and colleague Justice Heydon recently spoke on Justice Handley's time at the Bar and I would like to quote him by saying, "Ken Handley was feared greatly by opponents not just for his learning, his dedication and his pitiless precision but also for his first rate skills as a cross-examiner of

experts in recondite fields of knowledge."

56 During his Honour's seventeen years as silk, you not only excelled in litigation but you worked tirelessly to serve and promote the legal profession, for which I thank you.

57 As we have heard, you were appointed as a Judge of the New South Wales Court of Appeal in 1990, bringing to the Bench a unique mix of knowledge, skill, untiring dedication, and absolute commitment and uncanny recall. Your Honour's unique mix of skills has not only benefited the Bench but you have been highly committed to the community work.

58 We have heard from Mr Attorney about your work as the Chancellor of the Anglican Diocese of Sydney from 1980 to 2003, but further, you were a member of the Appellate Tribunal of the Anglican Church from 1980 to 2004.

59 It is no surprise that the Australian community thanked you for your community and professional work by appointing your Honour an Officer of the Order of Australia, for which we congratulate you.

60 During your illustrious career, as we have heard from the Chief Justice, you managed to attend Cambridge as a visiting Fellow in 1995 and in 1998, and we have also heard of your work with the Fijian Court of Appeal from 1996 to 2003, and you are still a part time member of that court.

61 Your Honour, on behalf of the many solicitors who have appeared before you, I would like to extend the profession's gratitude for your contribution which you have made to them and the community of New South Wales. Your retirement will leave a considerable void in the judiciary, but I am pleased that that is not lost to us at this time. I have no doubt when you do have more time that your service to the greater community will continue and your legacy and contribution will undoubtedly make the community a better place for your longer hours that you will afford to give them.

62 We do wish you well, your Honour, and hope that you enjoy your retirement when it finally comes, but for the meantime we are pleased that you will be back on this Bench as an Acting Judge. May it please the Court.

63 **HANDLEY JA:** Thank you, Chief Justice, for your generous remarks. Thank you, Mr Attorney, for your generous remarks and for making time to be here. Your support for the Court over many years is greatly appreciated and you will be missed. Thank you, Ms McPhie, for your speech and the research that lay behind it. I should also thank you, Mr Attorney, for the research that lay behind your speech. I didn't think when I was misconducting myself at Cranbrook in 1950 or '51 that I would have it repeated in front of me in 2006. I thought there was a statute of limitations.

64 Everyone is saying good things about me so it must be like this at a funeral. Of course, this is the retirement ceremony you have when you don't have a retirement.

65 Although I have been here a long time, there are Judges still serving who were on the Bench when I was appointed - Justices Bryson, Grove, Hodgson, Studdert, Sully, Young and Windeyer.

66 Speakers and victims on these occasions avoid the ruthless honesty of Oliver Cromwell who wanted his portrait painted warts and all. The much lamented Harold Glass had a very different view. He said that flattery of the judiciary was so important that it had to have priority over all other Court business.

67 Courts are not the only places where language has layers of meaning. A reference for an incompetent employee who was leaving to pursue fresh challenges stated: "I cannot recommend him too highly or say enough good things about him. I have no other employee with whom I can adequately compare him. The amount he knows will surprise you. You will be fortunate if you can get him to work for you."

68 There is also a code for school reports which I picked up over the years. If you read that your son is easy going it means he's bone idle. If you read that he's helpful it means he's a creep. If he's reliable, that means he dobs in his mates. If he's forging his way ahead, he's cheating. And if all his work is of a high standard, you know that you and your wife are ambitious, middle class parents.

69 Counsel's increasing irritation with a Judge's inability to see the obvious merit in his or her argument is masked, as we know, by growing obsequiousness which moves from "with respect your Honour" step by step to "with the most profound respect your Honour," which cannot be translated in polite company.

70 A short tempered Judge will be told at his much awaited retirement "your Honour did not suffer fools gladly." I'm glad no one used that expression of me today. Some years ago the Presiding Judge in the Court of Appeal gave a short extempore judgment endorsing in fulsome terms the judgment of the trial Judge and finishing "and there is nothing that I can possibly add." The second Judge immediately said "I agree" and the third Judge said he agreed with the second Judge. It will not surprise you to know that Mr Justice Meagher was the second Judge.

71 My two really important achievements are not in print. Twice I persuaded colleagues to leave things out. A draft judgment in a Family Provision case included the sentence "the deceased left a modest estate of $800,000." I said to the author that some would kill for less and happily modest came out. In the other case, a family dog charged a bicycle and its rider was injured. His action against the dog owner succeeded and the case came to us, but the Court was divided. Roddy Meagher, whose own dog had a well deserved reputation for ferocity, would have allowed the appeal because the accused was only being playful. His colleagues disagreed, but judgment was delayed for a considerable time until I managed to persuade Roddy to tone down a sentence which read "the accident occurred at X street in Y which the Court was informed was a suburb of Sydney."

72 My great failure has been to persuade colleagues to write shorter judgments. I am a disciple of Blaise Pasquale, the 17th century French philosopher, who once apologised saying he would have written a shorter letter if he had more time.

73 I am about to leave through the front door but, as has been mentioned, next year I sneak in through the back door. By consent of Diana and the Chief Justice I have sentenced myself to three more years of community service at a less intense level, to be served by way of periodic detention with a minimum term of twelve months. The English have a pun for retired Judges who do this sort of thing. We are called retreads.

74 There are some I must acknowledge. Sir Laurence Street and I go back to the early fifties. Gordon Samuels and I go back to the middle fifties. He was coming but unfortunately he has had to go to hospital, but fortunately there is nothing acute. He should be out in a day or so.

75 The solicitors present include John Currie and Nick Carson. They sent me some of the most important briefs I ever received, the first ten. Moreover, they kept sending them. Thank you. I also thank former colleagues and the Judges and former Judges of other Courts who are here. Thank you, Chief Justice Gleeson, for coming today. It's very important that you keep an eye on the major source of your work. I am delighted that Joe Campbell is to be my successor. We also go back a long way.

76 I must thank my three long serving associates: Margaret Anderson, who is here, Jennifer Donaldson, who is in England, and Lynn Nielsen, who is my current associate. Their patience was extraordinary, particularly when retyping the drafts of my books. Fortunately they only had to type one each. They did a hundred and one things for me that enabled me to concentrate on my real job.

77 There are also a number of my former tipstaves here and my current tipstaff of course, and they did a lot for me by way of personal things and also legal research from time to time when I hit a brick wall. They also were able to use this machine called a computer that I am having to come to terms with as I face retirement, or semi-retirement.

78 Although I am past the Biblical three score and ten, not all see me that way. I invited Lady Byers to come, who was going to be present, except Gwen Macgregor's funeral is this morning and she's gone there. When I asked her to come she said "Good Lord, the babies are retiring."

79 I found judicial life fulfilling and did not look back. At the Bar I had years in the scrum which was hard work and I was ready for the quieter life of a referee. If you know most of the rules and are fair most of the time, you don't get booed too often. I have fulfilled my ambition to stay off the front page of the Sydney Morning Herald. It is the old story, if the bridge stays up there's no news. Life in the Court of Appeal is hard work, but we are a happy Court with a great collegiate spirit. We respect our

differences and know that none of us is as smart as all of us. Judicial life gave me the great privilege of long leave, which enabled me to write my books. Senior lawyers build up a lot of intellectual capital, but it becomes a wasting asset. Scholarly articles and books can capture this intellectual capital, preserve it and pass it on.

80 I take pride of the appropriate kind in my long association with the Anglican Diocese of Sydney. It actually believes in the fundamentals of the Christian faith and unlike some Anglican Dioceses it accommodates every shade of Anglican worship within its borders. There is room for legitimate differences of opinion on some questions, but this is not the time and case to explore them. I believe that in this audience, my eyes are slightly misty, there are two of the Archbishops I formerly served, Harry Goodhew and Peter Jensen. Thank you for your fellowship and Godly example. I think Bishop Cameron is also here. He married Di and I in 1963, was at my swearing in, and we stayed in touch.

81 I have not had to apply a Human Rights Act and I am grateful for that. There is no such thing as a free human right. Every one comes at a cost which must be borne by the community or other individuals. The reach of laws against terrorism, the legalisation of the abortion pill, scientific experiments with human embryos and of euthanasia raise political and moral questions which cannot and should not be settled by judicial decision. Most people have opinions on these matters and a Judge's opinion is no better than that of anyone else.

82 Judges do not have democratic legitimacy. We are not elected by the people and, except in extreme cases, we are not accountable to them. We have no business deciding political questions. The statutory text enacted by Parliament has democratic legitimacy, but under the rule of law its meaning and application are proper questions for a Court. The Court seeks to be faithful to the text of ordinary legislation and Parliament is the master. The position is different with Human Rights Acts because of the wide general language in which they are expressed. They are a blank canvas onto which Judges can and do project their moral and political views. The process was described by Humpty Dumpty in Alice and Wonderland: "When I use a word it means just what I choose it to mean, neither more or less. The question is who is the master." Under a Human Rights Act the Court is the master.

83 The results are there for all to see. In 1973 in *Roe v Wade* the US Supreme Court decided that States could not criminalise all abortions. It laid down different legal regimes for each trimester, which made it harder to obtain a lawful abortion at later stages of the pregnancy. Whatever one thinks about abortion, and I'm not expressing an opinion on that, one can only marvel at the process of statutory construction which derived the decision and these regimes from the language of the fourteenth amendment which prohibited the States depriving "any person of life, liberty or property without due process of law or denying to any person the equal protection of the laws." The decision of course has not quelled the controversy.

84 In 1998 in *Osman v The United Kingdom* the European Court of Human Rights held that Article 6 of the Convention created a substantive right to sue the police for negligent policing. Article 6 provides that in the determination of his civil rights and obligations, everyone is entitled to a hearing by a tribunal. It says nothing about the contents of those rights and obligations. My last example is the decision at first instance in *Pye (Oxford) Ltd v The United Kingdom* last year. Article 1 provided that no one is to be deprived of property except in the public interest in circumstances provided by law. It had been thought that it was directed to acquisitions by the Government, but the Court held that it was fringed by a general limitation statute which extinguished the title of a documentary owner after twelve years adverse possession.

85 Human rights are the flavour of the month for some, but the public should realise they are a sugar coated pill. An accurate title for such an Act would be The Parliament (Transfer of Powers to the Courts) and Lawyers (Augmentation of Incomes) Act. Politicians and others who advocate a Human Rights Act do so either because they do not understand what would happen or because they understand only too well. The latter hope to increase their power and achieve legal and social change through the Courts that they cannot achieve through Parliament. This is government by litigation and when change occurs in this way no one is accountable, not the Judges and not the politicians.

86 Judges take an oath to apply the law without fear or favour, affection or ill will. At my swearing in I said that the oath probably came from the Law of Moses. Deuteronomy states: "Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both great and small alike. Do not be

afraid of any man."

87 This of course is not part of the natural order but reflects the higher wisdom of Christ's golden rule that we should do unto others what we would want them to do to us. This he said summed up the Law and the Prophets.

88 I am pleased that three of our four sons, two of our daughters in law and two of our four grandsons are here. Di brought up our sons single handed at times and did a great job. Each of them is pursuing his chosen career and only one, you'll be pleased to know, is practising law. We are proud of each of them and of their wives and our grandsons. Each is a fine human being. Di, well what can I say. You have been and are a fantastic wife, mother, grandmother, and I understand mother in law. You have stuck with me through thick and thin, and there have been too many thins. Di suggested I use my long leave to write law books, and at times she must have regretted doing so. Darling, thank you for everything.

89 As I stand on the verge of seventy two I continue to look forwards and upwards, and when age finally wearies me and the years finally condemn I will still look forwards and upwards. In the words of the old hymn, I nightly pitch my moving tent a day's march nearer home. Thank you for coming and for your presence.

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# The Law of Unfair Contracts in New South Wales

**The Law of Unfair Contracts in New South Wales**

24 November 2003

I would like to thank Jeffrey Phillips SC and Michael Tooma for inviting me to launch their book and thus continue my association with the Commission's jurisdiction over unfair contracts.

Their book has arrived at an opportune but critical time. In *Mitchforce v Industrial Relations Commission* the Court of Appeal gave judgment on 13 June this year differing, by majority, from the Full Bench of the Commission in holding that a long-term private lease of a hotel was not a contract whereby work was performed in an industry. The government also appears to be considering legislative amendments which would reinstate the jurisdiction of the Court of Appeal to review for jurisdictional error and exclude commercial contracts from the ambit of s.106.

The authors have had to deal, almost at the last minute, with the judgments of the Court of Appeal in *Mitchforce* and have had to do a lot of re-writing. Other well known authors have had a similar fate. Harvey MacGregor had a new edition of Mayne on Damages at the proof stage in January 1961 when the Privy Council gave judgment in *The Wagon Mound* [1961] AC 388, in an appeal from NSW, which changed much of the law of damages overnight and major revisions of his text were necessary.

The authors examine the historical antecedents of the Commission's jurisdiction in the common law, in equity and in legislation dealing with money lending and hire purchase agreements. Thus there were already some remedies for contracts that were unfair, harsh and unconscionable, but that tautological trinity, to use the words of Sheldon J, has rightly taken on new life in this legislation. An important reason for the vitality of the jurisdiction was and continues to be the culture of the Commission and its predecessors. Because of its award making functions the Commission is accustomed to overriding contracts and imposing fair minimum terms on parties to contracts of employment. One could say that it is varying contracts of employment almost daily. This is in marked contrast with the ordinary courts whose normal function is to enforce existing contracts in accordance with their terms.

It is not surprising then that the powers given by this legislation to the Commission have been vigorously exercised. On the whole the superior courts have supported this jurisdiction and most jurisdictional challenges have failed. Indeed in *Stevenson v Barham* (1977) 136 CLR 190 the Court of Appeal and High Court took a wider view of the jurisdiction than the Commission had done and mandamus issued to compel the Commission to exercise its true jurisdiction.

One notable exception to this pattern was the decision in *Production Spraypainting and Panelbeating Pty Ltd v Newnham* (1991) 27 NSWLR 644 where the Court of Appeal held that the outright sale of a business was not a contract whereby work was performed in an industry. The High Court declined to grant special leave. *Mitchforce* may or may not prove to be another notable exception. On the 22nd of August the Full Bench reserved its decision on an application by the hotel owner to re-open its earlier decision. In due course the jurisdictional issues may reach the High Court.

The authors favour a wide view of the Commission's jurisdiction, and robustly criticise all the judgments in *Mitchforce* including, would you believe, my own. They also criticise the judgments in *Production Spraypainting*. They have comprehensively and systematically collected and reviewed the Commission's jurisprudence under s.106 and its predecessors. The book contains separate chapters on such important topics as incentive schemes, unfair terminations, franchise agreements, partnerships and relief.

It is surprising that after nearly 40 years of reported decisions on this legislation recently reported cases have shown that much uncertainty still remains. The authors have reviewed the recent case law in the Commission dealing with the application of the section to commercial agreements, its territorial reach, its application to employment covered by Federal workplace agreements, the relevance of post contractual unfairness due to changes of circumstances or unfair conduct and the relief available.

The book brings together and organises a large body of caselaw in the Commission and the superior

courts. As a result it will, I am sure, prove invaluable to the judicial members of the Commission, other judges and the profession. The authors are to be congratulated for their efforts on our behalf.

I would like to make two final comments. Parliament has dealt with unfair contracts in different ways in two statutes. Section 106, in a statute dealing with industrial relations, can be seen as part of the statutory safety net for the protection of employees and others who work in an industry in New South Wales. For this reason I believe that the philosophy behind the relief granted by Hungerford J in *Mitchforce* was wrong. It seems to me that it is no part of the function of s.106 to protect entrepreneurs as such or to underwrite their business contracts.

In *Mitchforce* I said in paragraph 196 of my judgment that when jurisdiction was attracted in that case "the appropriate relief … was to treat the Starkeys from that time onwards as managers employed at a salary and to write off the arrears of rent, rather than to adjust the contract so as to restore to them the chance of profits and a capital gain with the risk of further losses … It might have been thought that relief of [the latter] kind was more appropriately granted, if at all, under the Contracts Review Act …".

I do not think that the authors have taken up this point and perhaps for good reason. Nevertheless it seems to me that a working entrepreneur who has been unsuccessful should not get relief under s.106 as an entrepreneur but only as a quasi employee.

In the truck and work cases the quasi employer attempted to convert an employee into an entrepreneur and the relief reversed the process and treated him as an employee. The contractual arrangements that were avoided transferred business risks to someone in the position of an employee who realistically and fairly should not have been asked to assume those risks. The Commission's orders transferred those business risks back to the real entrepreneur leaving the person who did the work with fair remuneration as if he had been an employee.

If this principle is observed the section can continue to fulfil its proper role as part of the statutory safety net in this State for persons who perform work in an industry.

My final point is based on the extraordinary popularity that this jurisdiction has enjoyed ever since that first decision in *Agius v Arrow Freightways* in 1965. The section was immediately perceived as providing a much needed remedy for injustice affecting persons who worked in an industry without the protection of an award. The overwhelming impression from reading the facts in worker and quasi-worker cases is that the defendants had indeed acted unfairly or even harshly and that right thinking members of the community would agree with this description of their conduct and with the relief granted by the Commission.

As Mr Justice Haylen said at his private welcome by the Bar Association the contracts of employment, and I would add of quasi employment, that workers make are the most important contracts they will make in their lives. In my judgment the practical results of the exercise of this jurisdiction in true worker and quasi-worker cases have been overwhelmingly beneficial and many injustices have been remedied that otherwise would have gone without remedy.

It is now my pleasure to formally launch Phillips and Tooma on "The Law of Unfair Contracts in New South Wales".

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# A Closer Look at Henderson v Henderson

*Res Judicata* is the general description in English law which covers the defences [1] of merger in judgment, cause of action estoppel and issue estoppel which protect the public and private interests in the finality of litigation. The so-called extended doctrine of *res judicata* applies where these defences are strictly not available, but the further proceedings would undermine the finality of an earlier judgment and are therefore an abuse of process.

In recent decades the decision of Wigram V.-C. in *Henderson v Henderson* [2] has been seen as the source of this extended doctrine. The thesis of this paper is that Henderson has been much misunderstood, notably by the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd (Yat Tung)*, [3] and as a result the extended doctrine became over extended. A further thesis is that this development was unnecessary in many cases because the ground was already covered by the defences of cause of action estoppel and issue estoppel, or was undesirable because it shut out potentially meritorious claims. The decision of the House of Lords in *Johnson v Gore Wood & Co (Johnson)* [4] has provided the occasion for a closer examination of these questions.

*Henderson* is a remarkable case. No other 19th century English decision has been cited with anything like the same frequency in recent years. As at February 2002 LEXIS recorded citations in 290 UK cases, 139 Australian cases, 323 Canadian cases and 48 US cases. However it was largely ignored during the 19th century and before 1925 had been cited only four times, once since 1889. [5] Only the last was a *res judicata* case.

The case was rescued from obscurity, and perhaps oblivion, by Higgins J. in his dissenting judgment in *Hoystead v Commissioner of Taxation* [6] before the first edition of Spencer Bower's *Res Judicata* in 1924. His judgment also launched the expression "issue estoppel" onto an unsuspecting common law world. *Hoystead* went to the Privy Council which found an issue estoppel and allowed the appeal. [7] Its citation of *Henderson* brought the case to notice, and it was cited again in *New Brunswick Rly Co v British & French Trust Corporation* [8] but a significant development occurred when it as cited in *Greenhalgh v Mallard* [9] to support the summary dismissal of a second action as an abuse of process. This was unnecessary as the action, for conspiracy to injure by unlawful means, was barred by a cause of action estoppel based on the dismissal of an action for conspiracy to achieve an unlawful purpose. *Henderson* has been cited with increasing frequency ever since. Thus the case came to prominence a hundred years after it was decided and has become increasingly important, which is most unusual.

Lord Halsbury said that "every judgment must be read as applicable to the particular facts proved ... since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case", [10] and Lord Diplock said the same thing. [11] The judgment of Wigram V.-C. in *Henderson* is a paradigm case for the application of this principle.

*Henderson* arose from a partnership between brothers who carried on business in Bristol where Bethel lived and Newfoundland where Jordan lived. Their late father had given £15,000 to Bethel in trust for Jordan. After Jordan's death his widow and adult children brought proceedings in Newfoundland for the taking of accounts of the partnership and of the estate of the father possessed by Bethel on account of Jordan. Bethel pleaded that Jordan was indebted to him on the balance of the partnership account, that the money received from their father had been invested in the business, and that Jordan owed him money on a private account. He failed to appear at the trial and a decree was made ex parte for the taking of the accounts. He again failed to appear and the Master reported that the £15,000 received from the father plus interest was due to Jordan's estate, but he could not take the partnership accounts because Bethel had not produced the books. The plaintiffs took a final decree on further consideration for the amount found by the Master. When they sued Bethel on this decree at law he took proceedings in Chancery to enforce the claims he pleaded but failed to prove in Newfoundland. Wigram V.-C. upheld a demurrer to Bethel's bill on the ground of res judicata. He said: [12]

"... when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward ... The plea of *res judicata* applies, except in special cases ... to every point which properly belonged to the subject of litigation, and which the parties, exercising

reasonable diligence, might have brought forward at the time". (emphasis supplied)

He added: [13]

"... the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was the very substance of the case there, and *prima facie*, therefore, the whole is settled".

This reasoning does not surprise an equity lawyer. As the Vice-Chancellor said: [14]

"The decree was to compute what was due to the plaintiffs for principal and interest; that is, upon all the accounts in question in the pleadings, including the partnership and private accounts". (emphasis supplied)

The amount for which judgment was given pursuant to the Master's report was intended to reflect the netting off of all the pleaded claims between the former partners. Any claim within the pleadings that was not brought forward for adjudication was necessarily barred by the decree. The statements of the Vice-Chancellor quoted, particularly the first, have sometimes been characterised as dicta, but they were part of the ratio because they explain why Bethel's bill was barred by *res judicata*. However, as the Vice-Chancellor made clear, his statements of principle were not directed to claims outside the pleadings in the original action, a fact that has been overlooked in recent years.

Wigram V.-C. referred to the bill of review procedure and said: [15]

"Those who have had occasion to investigate the subject of bills of review in this Court will not discover anything new in the proposition I have stated, so far as it may apply to proceedings in this country. And in an application to a court of equity in this country, for its aid against the effect of a proceeding by a court of equity in one of the Colonies, I conceive it to be the duty of this Court to apply the same reasoning".

Until the reign of Charles II there was no appeal from the decisions of the Lord Chancellor and the bill of review procedure provided the only means for correcting errors through a re-hearing before the same or another judge. [16] It remained available until the Judicature Act but was then subsumed in the appellate procedures of the Court of Appeal, [17] although original proceedings can still be brought to set aside a judgment for fraud.
The Vice-Chancellor's point was that if Bethel's bill disclosed no case for going behind a domestic decree on a bill of review there could be no case for going behind a foreign decree.

The decision in *Henderson* was based on cause of action estoppels [18] because the Newfoundland Court found that Jordan's estate was not indebted to Bethel. This was recognised in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [19] by Lord Reid, Lord Upjohn and Lord Wilberforce; and in *Arnold v National Westminster Bank* [20] by Lord Keith.

Although Wigram V.-C. included an exception for "special circumstances", the House of Lords held in Arnold that the bar created by a cause of action estoppel was absolute. [21]

Henderson was followed in *Public Trustee v Kenward*. [22] The executor of the wife's estate obtained an order for an account to be taken of the indebtedness of the husband to the estate, including any sum to be allowed by way of set-off. The spouses had carried on business as partners on land owned by the wife, and the order required the accounts of the partnership to be taken. The Master found a net balance due to the estate, and after his certificate was confirmed the executor sued on the decree. The husband then claimed that the land had been a partnership asset. Buckley J. held that this claim was barred by *res judicata* because [23] it "properly belonged to the subject matter of the account" and "the object of the account ... was to arrive at finality between the defendant and the estate".

Unfortunately all this was overlooked in *Yat Tung* [24] although *Public Trustee v Kenward* had been cited, and the result was undoubtedly correct. In earlier litigation commenced by the appellant the respondent counter-claimed for the balance due under its mortgage and recovered judgment for practically the full amount. This counter-claim and the judgment based on it assumed the regularity of a sale by the bank under its mortgage.

The appellant commenced fresh proceedings against the bank and the purchaser attacking the validity of the sale and claiming "damages" from the bank. The Privy Council purported to apply *Henderson*

and held that the new proceedings had been properly dismissed as an abuse of process because they were an attempt to raise matters which Lord Kilbrandon said [25] "could and therefore should have been litigated in earlier proceedings" (the Kilbrandon principle). The reasoning of the Privy Council was seriously flawed.

The new proceedings in *Yat Tung* were barred by a cause of action estoppel. Equity required a mortgagee to account but as a general rule, only once, [26] and the mortgagor and all puisne mortgagees were necessary parties to the proceedings. If a puisne mortgagee sued the rule was redeem up and foreclose down. Prior mortgages had to be redeemed, and later mortgages and the mortgagor had to be foreclosed. The result was either redemption of all mortgages, or foreclosure in favour of one mortgagee or another. Accounts taken in such proceedings bound all parties.

After a power of sale was held to be effective a mortgage could be paid off without redemption, but the mortgagee was still liable to an account. The proper exercise of the power barred the equity of redemption, [27] and the mortgagee's duty was therefore equitable. [28] The mortgagee can be charged on taking the account with "wilful default if he does not receive what might have been received with due diligence". [29] However the propriety of the sale and the adequacy of the price can only be investigated on taking the account if wilful default was charged in the pleadings and proved at the trial. [30]

There should be still only one account. In the words of Hutley J.A. in the New South Wales Court of Appeal: [31]

"... a party cannot ... have little bits of accounts. There is one account and one account only and the issue is what is owed and what is not owed".

Wigram V.-C. would have agreed. This analysis demonstrates why the later proceedings in *Yat Tung* were barred by a cause of action estoppel. The bank's counter-claim credited the mortgagor with the proceeds of the sale, and necessarily sought an account. This was taken summarily at the trial, and in accordance with Henderson the judgment barred any further claim by the mortgagor.

In *Yat Tung* Lord Kilbrandon said [32] that there was no true *res judicata* "since there had not been ... any formal repudiation [in the earlier case] of the pleas raised by the appellant in [the new case]" but that was the position in *Henderson* although in that case the claims had been pleaded. He added as a further reason [33] that the purchaser had not been a party to the earlier proceedings, but he was a privy of the bank and entitled to the benefit of the cause of action estoppel.

The error in *Yat Tung* as to the true basis of *Henderson* has continued to mislead. In *Yorkshire Bank p.l.c. v Hall* [34] the bank recovered money judgments against mortgagors which involved taking an account, but the mortgagors in a separate action claimed damages from the bank for its negligence and misfeasance in dealing with some securities. The Court of Appeal held that this action had been rightly struck out on the merits but was not an abuse of process. Robert Walker L.J. said [35] of *Henderson*:

"It is limited to cases in which a party's failure to deploy his full case at an earlier stage amounts to an abuse of process".

Henderson decided no such thing. The Court failed to recognise that the mortgagors' claims had to be brought forward for adjudication when the account was taken, and since this had not happened they were barred by a cause of action estoppel.

The true basis of the decision in *Henderson* was again recognised by the House of Lords in *Johnson* where Lord Bingham said: [36]

"It may very well be ... that what is now taken to be the rule in Henderson has diverged from the ruling which Wigram V.-C. made which was addressed to *res judicata*".

Lord Millett went further: [37]

"Sir James Wigram V.-C. did not consider that he was laying down a new principle but rather that he was explaining the true extent of the existing plea of res judicata ... While the exact relationship between the principle expounded ... and the defences of res judicata and cause of action and issue estoppel may be obscure I am inclined to regard it as primarily an ancillary and salutary principle

necessary to protect those defences and prevent them from being deliberately or inadvertently circumvented".

A cause of action estoppel prevents parties re-litigating the cause of action. It not only bars re-litigation of issues that were litigated but, as Wigram V.-C. held, it also bars the litigation of issues that were not litigated. That is why his well known statement [38] was part of the ratio. The *Henderson* principle is therefore fundamental to cause of action estoppel rather than ancillary. It defines the effect of such an estoppel.

The principle was extended to issue estoppels in *Hoystead v Commissioner of Taxation* [39] but *Arnold* [40] decided that these estoppels were subject to the special circumstances exception mentioned in *Henderson*. An issue estoppel prevents an issue litigated for one cause of action being re-litigated for another, and unless displaced by the exception, it bars evidence and arguments whether they were raised in the earlier proceedings or not. Again the *Henderson* principle, although qualified, is fundamental rather than ancillary.

This leaves the extended doctrine of res judicata. In Johnson the House of Lords finally rejected the wide and relatively rigid Kilbrandon principle. [41] Lord Bingham said: [42]

"It is ... wrong to hold that because a matter could have been raised in earlier proceedings it should have been ... That is to adopt too dogmatic an approach to what should ... be a broad, merits-based judgment ... One cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not".

The new principle was applied in *Gairy v A.-G. of Grenada* [43] where Lord Bingham, after referring to *Henderson*, said:

"... these are rules of justice, intended to protect a party (... not necessarily a defendant) against oppressive and vexatious litigation".

These developments have returned the extended doctrine to its proper basis, as a category of abuse of process, and are to be welcomed.

In almost all the cases in which the extended doctrine has been applied, from *Reichel v Magrath* [44] onwards, there was a cause of action estoppel or issue estoppel which justified the summary termination of the proceedings. [45] In almost all these cases the abuser had lost the earlier proceedings on the merits.

*MCC Proceeds Inc. v Lehman Bros. International (Europe)* [46] was such a case. In the first action against the parent of the defendant in the second action, the latter's title had been in issue, although it was not a party, and the plaintiff lost on the merits. [47] The parent had been forced to rely on its subsidiary's title because it acquired the relevant shares from the subsidiary with notice of the plaintiff 's equity. [48] The second action against the subsidiary sought to relitigate that issue.

Mummery L.J., who gave the principal judgment, held that the second action was abusive, [49] but this finding was unnecessary because the action was barred by an issue estoppel. There was admitted privity between the plaintiffs [50] and privity between the defendants could have been found. [51]

A recent decision of the New South Wales Court of Appeal [52] illustrates the importance of an earlier failure on the merits when considering the question of abuse in later proceedings. Purchasers of a business sued the vendors for breaches of warranty and misrepresentation in accounts annexed to the contract. [53] The purchasers recovered modest damages in contract but failed in misrepresentation because the Judge found that they had not believed the accounts but relied on the warranties. The purchasers then commenced proceedings for negligent misrepresentation against the accountants in an attempt to relitigate the issue of reliance. The Court held that the case was covered by *Reichel v Magrath* [54] and summarily dismissed the proceedings.

In *Divine Bortey v Brent L.B.C.* [55] the Court of Appeal rightly held that the failure of proceedings for unfair dismissal barred proceedings for breach of the Race Relations Act based on the same facts. Swinton Thomas L.J. said: [56] "in the light of ... the findings of [the first] tribunal, there was no realistic prospect at all that the applicant would succeed in a claim based on the *Race Relations Act*", and Potter L.J. said [57] that "the subject of litigation [a reference to the familiar passage in *Henderson*] was the reason or reasons for [the] dismissal".

Success in earlier proceedings is highly relevant when considering whether further proceedings are an abuse. Thus in *Bradford & Bingley Building Society v Seddon* [58] the Court of Appeal held that it was not abusive for a plaintiff to bring a second action against other parties when he had succeeded in the first but could not obtain satisfaction. In *Johnson* [59] the Court of Appeal dismissed a second action by a different plaintiff against the same defendant following a settlement for £1,800,000 in the first, treating this success as irrelevant or of little weight but their decision was reversed.

*Gairy v A.-G. of Grenada* [60] is another illustration of this principle. The appellant whose property had been expropriated by the former Revolutionary Government, obtained a judgment against the Crown for $3,649,414 which was not enforceable. When after some years most of the judgment debt was still unpaid, he sought coercive relief under the Constitution. The Court of Appeal of Grenada applied the extended doctrine and refused this relief because it could have been claimed in the original proceedings. The Privy Council held that there was no abuse because [61] "circumstances have so changed as to make it both reasonable and just ... to pursue the claim ... in later proceedings". The appellant had succeeded in the earlier proceedings and "it was plain that a more effective remedy was required".[62]

Where the plaintiff failed in the first action the reason for that failure is important when considering whether a second action is abusive. There is a significant difference for this purpose between a dismissal on the merits, and a dismissal on some procedural or technical ground, or because the plaintiff misconceived his remedy. [63] This principle was applied in *Barakot Ltd. v Epiette Ltd*. [64] where the Court of Appeal held that a second action to recover £1.24 million for money lent was not an abuse where the first only failed because the defendant had not been incorporated at the relevant time.

These principles were overlooked in *Talbot v Berkshire C.C*. [65] The defendant in the earlier proceedings, who had obtained judgment in the interests of his insurer for one third contribution from the Council, brought proceedings to recover damages for his own injuries. This was a different cause of action outside the pleadings in the original action, and arguably supported by an issue estoppel [66] which entitled the plaintiff to recover one third of his damages, but the action was summarily dismissed. Stuart-Smith L.J. considered that the rule in *Henderson* applied because the new claim could have been litigated in the earlier proceedings, and did not consider whether it was an abuse of process.[67] Mann L.J.[68] held that the plaintiff was barred by a cause of action estoppel " in the wide sense identified by Wigram V.-C." and also applied the Kilbrandon principle. The decision had been doubted [69] and has now been impliedly overruled by Johnson.

In *Sanctuary Housing Association v Baker (No 2)* [70] the Court of Appeal purported to apply *Henderson* when dismissing a second action for possession following the failure of the first on technical grounds. In the first action the Association treated an assignee of the tenancy as a trespasser, relying on fraud to avoid the assignment. Fraud was established but the action failed because the Association was not a party to the assignment.

In the second action the Association treated the assignee as a tenant and relied on a breach of the covenant against assignment. Ward L.J. said [71] that "the proceedings now brought were sufficiently obvious to have been raised earlier", and the claim was "well covered by that ancient rule in *Henderson*". This involved a misreading of Henderson because the second claim was not within the pleadings in the first action and the technical reason for the earlier dismissal should have prevented a finding of abuse. I suggest this case has also been impliedly overruled.

The decision of the U.S. Supreme Court in *Southern Pacific Company v Bogert* [72] provides an interesting contrast. Minority shareholders, excluded by a corporate reorganisation from any interest in a new company, failed to obtain redress in various proceedings decided between 1891 and 1907 and did not sue on their true remedy until 1913. They were then successful in the District Court and the Second Circuit [73] and again in the Supreme Court with a lone dissent on this issue. Brandeis J., delivering the judgment of the Court, said: [74]

"Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches ... Southern Pacific contends that adverse decisions in the earlier litigation are a bar ... as an estoppel ... But in none of these suits was the question here in issue decided ... There was no reason why the minority, who failed in the attempt to recover on one theory because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis".

Plaintiffs might not be given so much leeway today, even in the United States, but the case has not been overruled. [75]

In *Bradford & Bingley Society v Seddon* [76] Auld L.J. said it was important to distinguish between *res judicata* and abuse of process, "a distinction delayed by the blurring of the two in the Courts' subsequent application of " *Henderson*. The decision of the House of Lords in *Johnson* has re-emphasized the importance of this distinction.

Strike-out applications based solely on cause of action or issue estoppels can usually be determined summarily on minimal evidence. On the other hand the abuse of process issue which, in the words of Lord Bingham in *Johnson*, [77] calls for "a broad merits-based approach" requires a discretionary judgment and this will tend to generate extensive evidence and lengthy argument.

Reasonable diligence in litigation is required for many purposes and there is no reason why courts should not treat the principles in *Henderson* as one relevant factor in the "broad merits based approach" that is now required.

Mr Justice K R Handley,
A Judge of the Court of Appeal of New South Wales.

This article is based on a lecture given to the Chancery Bar Association and the Institute of Advanced Legal Studies on 6 December 2001 when the Author was the Inns of Court Fellow.

1 A cause of action or issue estoppel can also protect plaintiffs from defences rejected in earlier proceedings, or inconsistent with earlier judgments.
2 (1843) 3 Hare 100.
3 [1975] A.C. 581.
4 [2001] 2 W.L.R. 72.
5 *Mutrie v Biney* (1887) 35 Ch. D. 614 at p. 620; *In re Henderson* (1887) 35 Ch. D. 704 at p. 716; *Warman v Warman* (1889) 43 Ch. D. 296 at pp. 306-7; and *Bake v French* [1907] 1 Ch. 428.
6 (1921) 29 C.L.R. 537 at p.561.
7 [1926] A.C. 155.
8 [1939] A.C. 1 at p. 20.
9 [1947] 2 All E.R. 255 C.A.
10 *Quinn v Leathem* [1901] A.C. 495 at p.506.
11 *Roberts Petroleum Ltd v Bernard Kelly Ltd* [1983] 2 A.C. 192 at p. 201.
12 *Ibid*., at p. 115.
13 *Ibid*., at p. 116.
14 *Ibid*., at p. 118.
15 *Ibid*., at p. 115.
16 *Charles Bright & Co. Ltd. v Sellar* [1904] 1 K.B. 6 C.A. at p. 11.
17 *In re St. Nazaire Company* (1879) 12 Ch. D. 88 C.A.; *In re Barrell Enterprises Ltd.* [1973] 1 W.L.R. 19 C.A.
18 *Thoday v Thoday* [1964] P. 181 C.A. at pp. 197-8.
19 [1967] 1 A.C. 853 at pp. 916, 946, 966.
20 [1991] 2 A.C. 93 at p. 107.
21 *Ibid*., at p. 104.
22 [1967] 1 W.L.R. 1062.
23 *Ibid*., at p. 1067.
24 [1975] A.C. 581.
25 *Ibid*., at p. 590.
26 An account could be reopened for fraud, and a supplementary account might be required.
27 *Coroneo v Australian Provincial Assurance Association Ltd*. (1935) 35 S.R. (N.S.W.) 391 at p. 394 per Jordan C.J. who cited the relevant authorities.
28 *Downsview Ltd v First City Corporation Ltd* [1993] A.C. 295.
29 *Mayer v Murray* (1878) 8 Ch. D. 424 at p. 426.
30 *Mayer v Murray ibid.,* at p. 429 and *Tomlin v Luce* (1889) 43 Ch.D. 1 C.A.
31 *Adams v Bank of New South Wales* [1984] 1 N.S.W.L.R. 285 at p. 296.
32 *Ibid*., at p. 590.
33 *Ibid*., at p. 590.
34 [1999] 1 W.L.R. 1713 C.A.
35 *Ibid*., at p. 1730.
36 [2001] 2 W.L.R. 72 at pp. 89-90.
37 *Ibid*., at p. 117-8.
38 Supra n. 12.
39 [1926] A.C. 155.
40 [1991] 2 A.C. 93.

41 It had been rejected as too wide in *Port of Melbourne Authority v Anshun Pty. Ltd*. (1981) 147 C.L.R. 589 at pp. 601-2 (not cited in *Johnson*), where the High Court adopted a merits-based approach, but said it was also necessary to avoid inconsistent judgments.
42 *Ibid*., at p. 90.
43 [2001] 3 W.L.R. 779 at p. 792.
44 (1889) 14 App. Cas. 665.
45 Spencer Bower, Turner and Handley Res Judicata (3rd ed.) at pp. 252-4.
46 [1998] 4 All E.R. 675 C.A.
47 *Ibid*., at p. 696.
48 *Ibid*., at p. 695.
49 This finding was covered by *Reichel v Magrath* (1889) 14 App. Cas. 665, but it was not cited.
50 Supra n. 46, at p. 679.
51 Ibid., at pp. 693, 695, 696. A finding of privity because of community of interest would have been supported by *House of Spring Gardens v Waite* [1991] 1 Q.B. 241 C.A at p. 252-4, but it was not cited.
52 *Rippon v Chilcotin Pty. Ltd. & Ors*. [2001] N.S.W.C.A. 142, not yet reported, noted (2001) 75 A.L.J. 597.
53 Claims were pleaded in fraud, negligent misrepresentation and breach of s. 52 of the *Trade Practices Act* 1974 (*C'wlth*) which makes actionable misleading and deceptive conduct in trade and commerce. Only the latter was pressed.
54 (1889) 14 App. Cas. 665.
55 [1998] I.C.R. 886.
56 *Ibid*., at p. 897.
57 *Ibid*., at p. 898.
58 [1999] 1 W.L.R. 1482 at p. 1498.
59 [1999] P.N.L.R. 426.
60 [2001] 3 W.L.R. 779.
61 *Ibid*., at p. 792.
62 *Ibid*., at p. 792.
63 See *Palmer v Temple* (1839) 9 Ad. & El. 508 at p. 521; *Hall v Levy* (1875) L.R. 10 C.P. 154*; Tak Ming Co Ltd. v Yee Sang Metal Supplies Co.* [1973] 1 W.L.R. 300 P.C.; *Brisbane City Council v Attorney-General for Queensland* [1979] A.C. 411; *Lordsvale Finance p.l.c. v Bank of Zambia* [1996] Q.B. 752.
64 [1998] 1 B.C.L.C. 283.
65 [1994] Q.B. 290 C.A. The plaintiff also had real difficulties on the limitation issue but the case was not decided on that basis.
66 See *Wall v Radford* [1991] 2 All E.R. 741 at pp. 743, 752.
67 *Ibid*., at pp. 296-7.
68 *Ibid*., at pp. 300-1.
69 Spencer Bower Turner and Handley "Res Judicata" (3rd ed) at pp. 258, 265 and *Ulster Bank Ltd. v Fisher* [1999] P.N.L.R. 794 at pp. 806, 809 (N.I. Ch. D.)
70 (1998) 31 H.L.R. 746.
71 *Ibid*., at p. 753.
72 250 U.S. 483 (1919).
73 *Bogert v Southern Pacific Co*. 244 Fed. 61 (1917).
74 *Ibid*., at pp. 490-1.
75 It was properly distinguished without being doubted in *United States v Oregon Lumber Co.* 260 U.S. (1922) and in *Barnette v Wells Fargo Nevada National Bank* 270 U.S. 438 (1926).
76 [1999] 1 W.L.R. 1482 C.A. at p. 1490.
77 Supra n. 36, at p. 90.

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# When 'maybe' means 'no'

**K R Handley**

Immediately before the referendum on the Republic, which was held on 6 November 1999, I had a close look at the voting provisions in s 128 of the Commonwealth Constitution to see if there was any point that could be taken on behalf of Australians for Constitutional Monarchy in the event of a cliff hanger result. As they say the rest is history, but I have been asked by the Society to share with you what I discovered. I should first mention that although the absolute majority for the no case was 1,137,763, 602,272 electors did not vote at all and another 101,189 recorded informal votes.

The relevant part of s 128 is short and, in my view, reasonably clear. It reads as follows:

> "And if in the majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's Assent".

It is clear then that the relevant majorities approving a proposed law, if the referendum is to be carried, must be "of the electors voting". Voting in a referendum is compulsory, but clearly those electors who ignore their duty to vote are excluded from the relevant calculations. But what of those electors who did obtain ballot papers and placed them in the ballot boxes whose votes were informal for some reason?

It seemed to be that an informal vote is, as the expression itself indicates, nevertheless a vote. The fact that it is informal means that it cannot be recorded as either a vote of approval or as a vote of disapproval. Nevertheless it seems on the language of this part of s 128 that informal votes had to be counted in order to determine whether "a majority of the electors voting approved the law".

Quick and Garren's Annotated Constitution of the Australian Commonwealth published in 1901 is not particularly helpful on this point. The authors simply state at p 992 that "more than half the electors voting must vote yes". The authors also referred to the cognate provisions in the Constitution of Switzerland, which required the approval of the majority of the electors to amend that Constitution. This is a more demanding requirement than that found in s 128 of our Constitution as can be demonstrated by a simple example.

Assuming that in Switzerland and Australia there were 12 electors, 6 of whom voted in favour of the referendum, 4 voted against it, and 2 failed to vote. The referendum would be lost in Switzerland because the 6 votes in favour did not constitute a majority of the electors, but the referendum would be carried in Australia 6 votes to 4 on the votes actually cast.

Thus under the Swiss Constitution, at least in its form in 1901, electors who failed to vote, or who voted informal, were effectively voting no. The founding fathers were aware of the referendum provisions in the Swiss Constitution and they clearly rejected its requirement for approval by a majority of the election. Under s 128 electors who fail to vote are ignored in the tally. On the other hand it seems to me from the text of the section that informal votes, the "maybe" in the title of this talk, cannot be ignored and are effectively "no" votes.

A search of the legal dictionaries brought to light the decision of the Court of Session in Scotland in the case of *Latham v Glasgow Corporation* [1921] SC 694. The case arose under the local option provisions in the *Temperance (Scotland) Act* 1913. Section 2(3) of that statute provided that a no-licence resolution, or a limiting resolution, put to the electors in a local government district should be deemed to be carried if certain percentages of "the votes recorded" were in favour of the resolution. The Act provided in effect for a mini referendum to determine whether there should be no licensed hotels in a local government district, or no more than a particular number. The Lord President, the equivalent of our Chief Justice, said at 712-3:

> "What is the meaning of the expression 'votes recorded'? According to one contention 'votes recorded' are those ballot-papers which, when submitted to the Returning Officer at the count, are passed by him as good and effective votes. If this contention is correct, spoilt ballot-papers, which the Returning Officer rejects at the count as either unmarked, or as marked ineffectually, are excluded in the computation of the statutory proportions. The other view is that by 'votes recorded' is meant all votes in the form of a ballot paper put into the ballot-box by a voter in the exercise of his right or duty to vote. If this view is the right one, it matters nothing whether on examination the vote so recorded turns out to be 'spoilt', because the ballot-paper is unintelligible to the Returning Officer or – not being marked at all – is purely neutral and ineffective. Between these two views we have to decide … I think a voter records his vote when he puts his ballot-paper into the ballot-box; and I do not think it is material that, owing to carelessness or ignorance, or inexperience he has failed so to mark his ballot-paper as to make the vote he thus 'records' an effective exposition of his opinions. Moreover, having regard to the requirement of certain proportions and majorities of votes contained in sub section (3) of section 2, I have difficulty in construing that sub section on any other basis than that those proportions or majorities relate to the total number of persons who come and exercise their privileges at the poll, whether those privileges have been exercised effectively or ineffectively.
>
> The view which the Lord Ordinary (the trial judge) took was that 'votes recorded' meant ballot-papers passed by the Returning Officer at the count. For the reasons stated, it seems to me that this view is unsound".

A computer search through case law databases for any later decision in which *Latham v Glasgow Corporation* has been considered proved fruitless.

We are therefore left with the text of s 128 and this Scottish decision. Different minds may reach different conclusions on the question but I find it hard to get away from the description of an informal vote as a vote. Section 45 of the *Referendum (Machinery Provisions) Act 1984* makes voting at a referendum compulsory. I ask you this rhetorical question: "could a voter who voted informal be prosecuted for failing to vote?".

I raised the question with Professor Flint prior to the referendum and at that time in all events he seemed to think the point a good one. He raised the matter in correspondence with the Electoral Commissioner who would not accept the point. Needless to say, we did not take the matter any further and for the time being there the matter rests.

The point could be critical in a future referendum if there were cliff hanger results in the nation or in particular States. If the question were to come before the High Court some of the Justices might wish to avoid a decision which would make it harder to get a referendum passed. Some of them may be tempted to read in, or imply, the word "validly" before voting. However words should not be read into a Constitution where the text is clear, and the provision in question is workable as it stands.

In my opinion there is no justification for reading into s 128 any requirement that the votes must be valid.